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INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

VOLUME ONE

INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

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IN TWO VOLUMES

VOLUME ONE

BOSTON
LITTLE, BROWN, AND COMPANY
1922

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Norwood Press

Set up and electrotyped by J. S. Cushing Co.,
Norwood, Mass., U.S.A.

TO

MY FRIEND AND COLLEAGUE

JOHN HENRY WIGMORE

PREFACE

SOME years ago Professor John H. Wigmore, Dean of the Law School of Northwestern University, suggested to the author the preparation of a treatise reflecting what might be called the American conception of international law. That work was then begun. Out of it have grown the present volumes. They embody the results of a study of international law chiefly as it has been interpreted and applied by the United States. They express an attempt primarily to portray what the United States, through the agencies of its executive, legislative and judicial departments, has deemed to be the law of nations.

It is not suggested that in legal contemplation there exists an American international law as distinct from that which necessarily prevails throughout the society of civilized States. It is believed, however, that the views of the Department of State (embracing by implication those of the President), of the Congress, and of the Courts of the United States, together with those of certain other governmental agencies, give expression to an authentic American understanding of what the principles of international law really are. Such an understanding is entitled to thorough examination and critical analysis; for it constitutes the only scientific basis for the formulation of principles in reliance upon which the United States, whether at the Hague or elsewhere, may participate intelligently and worthily in the common effort to render the law of nations closely responsive to the just and changing demands of civilization. Clearness of thought concerning rules which any State may soundly press for adoption in a codification designed for general approval imposes, as a condition precedent, an exact enunciation of what are conceived to be the existing requirements of international law.

The scope of the present work necessarily calls for the treatment of numerous matters which, however closely associated with the international obligations of the United States, refer primarily to the domestic activities of an independent State in pursuance of its fundamental law. Thus, in relation to topics bearing,

for example, upon the making of treaties, extradition, nationality, passports, neutrality laws and a variety of other subjects, it will be seen that the chief problem for consideration is how the United States, in the light of its existing institutions, undertakes to fulfill its obligations to the outside world, rather than how the principles of international law, as tested by the practice of States, ordain that it shall act. Again, other matters are discussed which concern primarily the conduct of foreign States, and relate but indirectly to the United States. This will be observed in the treatment of certain problems either resulting from The World War, or for which recent treaties of peace have made provision.

The pages which follow do not purport to be descriptive of American diplomacy. Nor do they point to paths of national policy save with respect to those necessarily leading through the domain of legal principle, and obscured by confusion of thought and insufficient markings. No attempt has been made to construct a digest of American State papers or judicial decisions. There has been no reluctance in adverting to the nature of unconvincing reasoning or of strained applications of principle whenever they seem to have been apparent, and regardless of their origin. Moreover, there has been constant endeavor to emphasize the unreasonableness of any rule which, however widely accepted, and although acquiesced in by American statesmen, has appeared through its operation to violate the requirements of international justice. Under such circumstances the author has not hesitated to suggest the nature of the modification which those requirements seemed to demand. He has not refrained from the attempt to point out, in the light of reason and practice, the next step which his own country might well advocate.

There is abundant documentary evidence of international law as interpreted and applied by the United States. American diplomatic correspondence, the decisions of the Supreme Court of the United States and of lesser American tribunals, Federal and State, Acts of Congress, together with publications of the War and Navy Departments and other agencies of the Government, bear impressive testimony. The treaties to which the United States is a party reflect also principles in which it has acquiesced. On such material the present volumes are chiefly based. Reliance has, however, oftentimes been placed upon other data, and upon much of foreign origin. Emphasis has at times been attached to the views of commentators on American

practice. The utterances of Professor John Bassett Moore have been quoted with frequency because of their unique and authoritative value. The Digest of International Law, prepared and enriched by him in 1906, has been constantly relied upon; and for the convenience of the reader reference is made thereto with respect to documents there quoted, regardless of their publication elsewhere. The publications of the Naval War College and the documents supplementary to the American Journal of International Law, as well as the contents of that periodical, have been put to full use, and also certain publications of the Carnegie Endowment for International Peace. A few sections of this work comprise an enlargement and revision of papers by the author originally printed in the American Journal of International Law.

One purpose of these prefatory words is to express the gratitude of the author to those who have furthered his efforts. Their number has been legion and their assistance beyond appraisal. A course under Professor Joseph H. Beale in the Harvard Law School in 1898, in public and private international law, was a source of aid which has not ceased to be of value. To the Library of Congress and its Librarian, Dr. Herbert Putnam, the author has long been indebted for unusual courtesies and assistance. He acknowledges his special indebtedness to the Chief Assistant Librarian, Mr. Appleton P. C. Griffin, whose zeal and interest in procuring documents not easily accessible have been warmly appreciated. Various divisions of the Department of State have from time to time rendered aid. Courtesies on the part of its Bureau of Rolls and Library have been constant. Mr. Richard W. Flournoy, Jr., of the same Department has been good enough to make a careful examination of the sections relating to nationality and passports, and to offer important suggestions which it has been deemed a privilege to incorporate in the text. The Library of the Carnegie Endowment for International Peace at Washington has furnished much-needed assistance.

In certain instances the author has acknowledged his indebtedness to the kindness of others in foot-notes pertaining to material which they have furnished. He mentions also the following as among those to whom his thanks are especially due:

Professor Edwin M. Borchard, of Yale University; Hon. Wilbur J. Carr, Director of the Consular Service of the Department of State; Frederic B. Crossley, Esq., Secretary of Northwestern University Law School; Major General (then Brigadier

General) Enoch M. Crowder, U. S. A.; Dr. Frances Gardiner Davenport, of the Carnegie Institution of Washington; Dr. William C. Dennis, of Washington, D. C.; George A. Finch, Esq., of the American Journal of International Law; Dr. Stanley K. Hornbeck, of Washington, D. C.; Professor Albert Kocourek, of Northwestern University Law School; Dr. Henry Barrett Learned, of Washington, D. C.; Dr. C. E. McGuire, of the Inter-American High Commission; Professor John Bassett Moore, of Columbia University; Dr. Leo S. Rowe, Director-General of the Pan-American Union; Dr. James Brown Scott, Secretary of the Carnegie Endowment for International Peace; Professor Munroe Smith, of Columbia University; Rear Admiral Charles H. Stockton, U. S. N., retired; Commander Raymond Stone, U. S. N., retired; Dr. Charles C. Tansill, of Washington, D. C.; William R. Vallance, Esq., Assistant Solicitor of the Department of State; Professor Eugene Wambaugh, of Harvard University; Louis B. Wehle, Esq., formerly General Counsel of the War Finance Corporation; Professor George Grafton Wilson, of Harvard University; Lester H. Woolsey, Esq., formerly Solicitor of the Department of State. It is a pleasure to record the fact that numerous and highly valued suggestions of Mr. Lewis H. Bailey of Messrs. Little, Brown & Company, the publishers, have been gratefully accepted.

For encouragement from Professor John H. Wigmore, the dedication of this work betokens the gratitude of the author. For that vigorously given by his law partners, Captain Ira Edward Westbrook, U. S. R., and Professor Charles H. Watson, of Northwestern University Law School, he makes full acknowledgment.

C. C. H.

WASHINGTON, D.C.
March, 1921.

CONTENTS

VOLUME ONE

PAGES

PREFACE vii

TABLE OF CASES xxix

LIST OF ABBREVIATIONS xlvii

PRELIMINARY

§§ 1–5 CERTAIN ASPECTS OF INTERNATIONAL LAW . 1–13

PART I

STATES. THEIR CLASSIFICATION

TITLE A

SUBJECTS OF INTERNATIONAL LAW

1. States
   - *a.* § 6. Significance of the Term in International Law . . 15
   - *b.* § 7. Requisites of a State of International Law . . . 16
   - *c.* §§ 8–10. Excluded Associations or Entities 17–19
2. The Equality of Independent States
   - § 11. Observance of the Principle 20

TITLE B

CLASSIFICATION OF STATES OF INTERNATIONAL LAW

1. States in Relation to Their Freedom from External Control
   - *a.* § 12. In General 23
   - *b.* § 13. Independent States 23
   - *c.* Dependent States
     - (1) § 14. Preliminary 24
     - (2) §§ 15–16. Certain So-called Protectorates and Protected States 25–26
     - (3) §§ 17–18. So-called Suzerainties 26–27
     - (4) §§ 19–24. Relationships Established between the United States and Certain Neighboring States . . . 27–35
     - (5) § 25. Protection of Countries Lacking European Civilization 36
     - (6) § 26. Mandatory States under the League of Nations . 38
     - (7) § 27. Certain Minor Impairments of Independence through the Medium of the League of Nations . . 40

PAGES

(8) § 28. Turkey 41
d. § 29. Neutralized States 42
2. States in Relation to Their Structure and Composition
a. § 30. In General . . . . . .
b. Unions of States
(1) § 31. Where International Personality of Members Is Not Relinquished 45
(2) § 32. Where International Personality of Members Is Relinquished 48
(3) § 33. Countries Not Possessed of European Civilization 49
(4) § 34. The International Organization of States . . 51

PART II

NORMAL RIGHTS AND DUTIES OF STATES

TITLE A

RIGHTS OF POLITICAL INDEPENDENCE

1. § 35. The Right to Become a State of International Law . 55
2. Recognition
a. § 36. In General 56
b. § 37. Mode of Recognition 57
c. § 38. Conditional Recognition 58
d. §§ 39–40. Time of According Recognition to a New State Produced by Revolution 59
e. § 41. Recognition, by Whom Determinable . . . 63
f. § 42. Acts Falling Short of Recognition of a New State . 64
g. §§ 43–45. Recognition of New Governments . . . 66–73
h. § 46. Acts Falling Short of Recognition of New Governments 75
i. §§ 47–49. Recognition of Belligerency 77–79
j. § 50. Acts Falling Short of Recognition of Belligerency. Insurgency 81
3. § 51. The Right to Continue Existence 83
4. Rights of Independence during Existence
a. § 52. In General 84
b. §§ 53–55. In Domestic Affairs 86–87
c. Foreign Affairs
(1) § 56. In General 90
(2) § 57. The Conclusion of Special Relationships . . 91
(3) § 58. The Right to Acquire Territory 94
(4) §§ 59–64. The Admission and Expulsion of Aliens . . 94–105
5. Certain Non-Political Acts of Self-defense
a. § 65. In General 106
b. §§ 66–67. Invasion of Territory 107–110
c. § 68. Acts on the High Seas. The Case of *The Virginius* . 114

CONTENTS

		PAGES
6.	Intervention	
	a. § 69. In General	116
	b. § 70. Self-defense	119
	c. § 71. Prevention of Unlawful Intervention by Another State	119
	d. §§ 72–73. Domestic Affairs	120–121
	e. § 74. Intervention by a Body of States	122
	f. § 75. Chronic Disregard of International Obligations	123
	g. §§ 76–83. The Conduct of the United States	124–130
	h. § 84. The League of Nations and Intervention	132
7.	The Monroe Doctrine	
	a. § 85. Preliminary	133
	b. § 86. Prior Events	134
	c. § 87. President Monroe's Message	136
	d. § 88. The Non-colonization Principle	139
	e. § 89. The Non-intervention Principle	140
	f. §§ 90–92. Scope of Opposition to Foreign Territorial Aggrandizement	140–147
	g. § 93. Opposition to Interference with Political Independence	151
	h. §§ 94–95. Modes of Applying the Monroe Doctrine	152–155
	i. § 96. The Relation of the Monroe Doctrine to International Law	156
	j. § 97. The Relation of the Monroe Doctrine to the League of Nations	159

TITLE B

GENERAL RIGHTS OF PROPERTY AND CONTROL

1.	Creation, Transfer, Extinction	
	a. Creation	
	(1) § 98. In General	162
	(2) § 99. Discovery	163
	(3) §§ 100–104. Occupation	167–173
	(4) § 105. Accretion	174
	(5) § 106. Conquest	175
	b. Succession	
	(1) §§ 107–114. Cession	177–189
	(2) § 115. Relinquishment	191
	(3) § 116. Prescription	192
	(4) § 117. Revolution	196
	c. Extinction	
	(1) § 118. Operation of Nature	196
	(2) § 119. Abandonment	197
2.	Certain Effects of Change of Sovereignty	
	a. § 120. In General	199
	b. § 121. Effect on Legislative and Political Power	200
	c. § 122. Effect on Law	201
	d. §§ 123–130. Effect on Public Debts	204–224
	e. § 131. Effect on Contracts and Concessions	227
	f. §§ 132–133. Effect on Private Rights	235–238

CONTENTS

Nature and Limits of Rights — PAGES

a. Extent of the National Domain
- (1) § 134. In General 241
- (2) Various Territorial Limits
  - (a) § 135. Artificial Lines 242
  - (b) § 136. Mountains and Hills 242
  - (c) §§ 137–140. Rivers 243–250
  - (d) §§ 141–145. Marginal Seas 251–257
  - (e) §§ 146–148. Bays 258–267
  - (f) § 149. Lakes and Enclosed Seas 267
  - (g) § 150. Straits 269
- (3) § 151. Determination of Boundaries 270

b. Certain Limitations of the Right of Control over What Pertains to the Territory of a State
- (1) §§ 152–153. In General. Servitudes 272-275
- (2) § 154. Marginal Seas 277
- (3) §§ 155–158. Straits 278–281
- (4) Navigation of Rivers
  - (a) § 159. National Streams 282
  - (b) §§ 160–165. International Streams of North America 283–290
  - (c) §§ 166–167. International Streams of South America 291–292
  - (d) §§ 168–180. International Streams of Europe . 293–308
  - (e) § 181. International Streams of Africa . . . 309
  - (f) § 182. Certain General Conclusions . . . 311
- (5) §§ 183–184. Diversion of Waters 313–316
- (6) § 185. Bays 319
- (7) § 186. Lakes and Enclosed Seas 320
- (8) § 187. Access to Ports 321
- (9) §§ 188–193. Air Space over the National Domain . 324–332
- (10) §§ 194–196. Transit by Land 334–336
- (11) §§ 197–198. The Protection of Areas by Neutralization and Other Processes. International Waterways . 338–341

c. The Supremacy of the Territorial Sovereign over the National Domain
- (1) § 199. In General 346
- (2) §§ 200–202. Acts in Derogation of the Supremacy of the Territorial Sovereign 347–349
- (3) §§ 203–217. The Exercise by a State of Certain Rights as Sovereign within Its Own Domain . . . 352–384

TITLE C

RIGHTS AND DUTIES OF JURISDICTION

1. Rights of Jurisdiction
   - a. § 218. In General 386
   - b. § 219. The Establishment of a Judicial System . . . 388
   - c. The Exercise of Jurisdiction within the National Domain

PAGES

(1) § 220. On Land 392
(2) §§ 221–225. Ports and Bays. Foreign Merchant Vessels 393–401
(3) § 226. The Marginal Sea. Foreign Merchant Vessels . 404
d. The High Seas
(1) § 227. In General 405
(2) § 228. Jurisdiction Resulting from Acts of Self-Defense 406
(3) §§ 229-230. Visit and Search 407–408
(4) §§ 231–234. Piracy 410–417
(5) § 235. Revenue or Hovering Laws 417
(6) § 236. Hot Pursuit 420
(7) § 237. Impressment 421
e. §§ 238–243. Extraterritorial Crime 422–426
f. Exemptions from Territorial Jurisdiction
(1) §§ 244–245. In General 428–429
(2) § 246. Heads of Foreign States 430
(3) §§ 247–249. Foreign Military Forces 432–434
(4) §§ 250–255. Foreign Vessels of War 435–441
(5) §§ 256–257. Other Vessels in Foreign Public Service . 442–445
(6) § 258. Other Foreign Public Property 446
(7) §§ 259–265. Extraterritorial Jurisdiction . . . 448–462

2. Duties of Jurisdiction
a. §§ 266–267. Maintenance of a Judicial System. An International Standard 464–466
b. §§ 268–269. Operation of the Judicial System . . . 470–472

3. Claims
a. § 270. In General 472
b. §§ 271–272. Mode of Presentation of Private Claims . . 475–476
c. §§ 273–274. The Prosecution of Private Claims . . . 477
d. §§ 275–280. Conditions of Interposition in Behalf of a Private Claimant 479–490
e. §§ 281–285. Grounds of Interposition 491–500
f. §§ 286–288. Claims Arising from Acts Primarily Attributable to the Authorities of a State 501–510
g. §§ 289–293. Claims Arising from Tortious Acts Not Primarily Attributable to the State 511–522
h. §§ 294–299. Claims Based on War 524–536
i. §§ 300–302. The Relation of a State to Acts of Insurgents . 538–544
j. §§ 303–309. Contractual Claims against Foreign Governments 544–563

4. Extradition
a. § 310. Preliminary 566
b. §§ 311–312. Extradition without Treaty 568–569
c. Treaties of the United States
(1) § 313. Policy 569
(2) § 314. Offenses Generally 571
(3) §§ 315–318. Political Offenses 571–577
(4) §§ 319–320. Nationals 578–579
(5) § 321. Irregular Recovery of Fugitive 580

PAGES

(6) §§ 322–323. Limitations as to Trial 582–585
(7) § 324. Requisition. Mandate 586
(8) § 325. Provisional Detention 587
(9) §§ 326–327. Interpretation 588–590
(10) § 328. Scope of Treaties with Respect to Areas Covered . 591
(11) § 329. Fugitives from Justice 593
d. Some Aspects of Procedure in the United States
(1) § 330. In General 593
(2) § 331. Magistrates 594
(3) §§ 332–334. Complaint 596–598
(4) §§ 335–338. Evidence 599–603
(5) §§ 339–341. Surrender 605–608

TITLE D

NATIONALITY

1. § 342. In General 610

2. The Acquisition of American Nationality by Birth
a. Citizenship
(1) §§ 343–344. By Right of Place. *Jure Soli* . . . 612
(2) § 345. By Right of Blood. *Jure Sanguinis* . . 615
b. American Nationality as Not Derived from Citizenship
(1) § 346. By Right of Place. *Jure Soli* 617
(2) § 347. By Right of Blood. *Jure Sanguinis* . . 619
c. § 348. The Attitude of International Tribunals . . 620

3. § 349. Acquisition of Nationality by Revolution . . . 621

4. Naturalization
a. § 350. Definition. Regulation 622
b. § 351. Voluntary Individual Action 623
c. § 352. Collective Naturalization 624
d. §§ 353–360. American Naturalization 626–634
e. §§ 361–364. Conventional Arrangements of the United States 636–642
f. §§ 365–366. Nationality of Married Women . . . 643–645
g. § 367. Effect of Parents' Naturalization on Infants . . 646
h. §§ 368–369. Naturalization Partially Ineffective as to Absent Family 648
i. §§ 370–371. Impeachment of Naturalization . . . 649–651

5. Double Allegiance
a. § 372. Its Significance 653
b. §§ 373–375. The Attitude of the United States . . 654–658

6. §§ 376–387. The Right of Expatriation 659–676

7. §§ 388–393. Loss of Right to National Protection . . . 677–683

8. § 394. Seamen 684

9. § 395. Care of Indigent Nationals 685

PAGES

10. The Temporary Protection of Domiciled Aliens Declaring an Intention to Become American Citizens
    a. § 396. Thrasher's Case. Koszta's Case 686
    b. § 397. The Act of March 2, 1907 688
11. § 398. Extraterritorial Factories of American Citizens . . 689

TITLE E

AMERICAN PASSPORTS

1. § 399. In General 692
2. § 400. To Whom Issued 695
3. § 401. Grounds of Refusal 696
4. §§ 402–403. International Effect 697–698
5. § 404. Local Papers 699
6. §§ 405–406. War Regulations 700–702

PART III

DIPLOMATIC INTERCOURSE OF STATES

TITLE A

§ 407. In General . 707

TITLE B

AGENTS OF A STATE

1. § 408. The President of the United States 708
2. § 409. Communications through Non-governmental Channels 710
3. § 410. The Secretary of State as Organ of Correspondence . 713
4. §§ 411–417. Diplomatic Missions 714–723

TITLE C

BEGINNING AND END OF MISSION

§ 418. Appointments 725
§ 419. Reciprocity of Treatment 726
§§ 420–421. Credentials and Reception 727–728
§§ 422–425. Question of Personal Acceptability . . 732–737

TITLE D

THE RIGHTS AND DUTIES OF MINISTERS

1. §§ 426–427. Right to Protection 739–740
2. §§ 428–429. Right of Official Communication . . 741–743
3. §§ 430–432. Miscellaneous Privileges 743–745
4. §§ 433–442. Jurisdictional Immunities 746–759

PAGES

5. § 443. Diplomatic Asylum 760
6. §§ 444–453. The Functions of a Minister 763–774

TITLE E

OFFICIAL NEGOTIATIONS

1. § 454. The Diplomatic Channel 776
2. § 455. Language. Tone 777
3. § 456. Publication 778

TITLE F

CEREMONIAL

1. § 457. Observance of Formalities 780
2. § 458. Rules of Precedence 781
3. § 459. Ambassadorial Privileges 782

PART IV

CONSULS

TITLE A

§ 460. Classes and Titles 785

TITLE B

§ 461. Appointment of American Consular Officers . . . 788

TITLE C

EXEQUATUR

1. § 462. Nature and Effect. Conditions of Issuance . . . 790
2. § 463. Refusal or Revocation 792

TITLE D

PRIVILEGES AND IMMUNITIES

1. § 464. Under International Law and Treaty 794
2. § 465. Respect for the Consular Function 795
3. § 466. Protection of the Person of a Consul 797
4. § 467. Protection of the Consular Archives and Dwelling . 797
5. §§ 468–469. Correspondence 799–801
6. §§ 470–473. Certain Accessory Privileges 803–804
7. §§ 474–476. Amenability to Local Process 806–808
8. §§ 477–482. Privileges in Relation to Deceased Countrymen . 809–820
9. §§ 483–485. Shipping and Seamen 820–824
10. §§ 486–487. Notarial Functions 825–826
11. § 488. Miscellaneous Duties 828

CONTENTS

VOLUME TWO

PART V

AGREEMENTS BETWEEN STATES

TITLE A

PAGES

§ 489. Preliminary. Nature of Contractual Obligations . . 1

TITLE B

VALIDITY

1. § 490. Restrictions of International Law 5
2. § 491. Restrictions Imposed by a General Convention. The Covenant of the League of Nations 6
3. § 492. Capacity to Contract 7
4. § 493. Consent 8
5. § 494. Constitutional Limitations 9
6. Constitutional Limitations of the United States
   - *a.* § 495. Provisions of the Constitution 10
   - *b.* § 496. Limitations of the Agreement-making Power of the United States as a Whole 10
   - *c.* §§ 497–502. Matters Pertaining Directly to Affairs of States of the Union 12–22
   - *d.* §§ 503–504. Other Problems of Constitutionality . . 22–24
   - *e.* §§ 505–509. The Manner in Which the United States May Contract. Agreements Other Than Treaties . . . 27–33

TITLE C

NEGOTIATION AND CONCLUSION

1. § 510. Persons Capable of Concluding Agreements . . . 35
2. § 511. Full Powers 36
3. Formalities
   - *a.* § 512. Language 38
   - *b.* § 513. The Alternat 39
   - *c.* § 514. Protocols 39
   - *d.* § 515. Signature. Seal 40
4. Ratification
   - *a.* § 516. Legal Right to Withhold It 41
   - *b.* §§ 517–518. Ratification by the United States . . . 43–44
   - *c.* § 519. Amendments and Reservations 45
   - *d.* § 520. Exchange of Ratifications 47
   - *e.* § 521. Proclamation 48

CONTENTS

TITLE D

OPERATION AND ENFORCEMENT OF TREATIES

		PAGES
1.	§ 522. Date of Taking Effect	49
2.	Some Aspects of Performance	
	a. § 523. In General	50
	b. §§ 524–525. Legislation Necessary to Performance	51–52
	c. §§ 526–529. Judicial Action	54–59

TITLE E

THE INTERPRETATION OF TREATIES

1.	§ 530. The Nature of the Problem	61
2.	§ 531. Sources of Interpretation	63
3.	§§ 532–533. Certain Cases	64–66
4.	§ 534. Declarations of Negotiators	68
5.	§ 535. So-called Rules of Construction	69
6.	§§ 536–537. The Most-Favored-Nation Clause	73–77

TITLE F

TERMINATION OF TREATIES

1.	§ 538. Preliminary	79
2.	§ 539. Notice Pursuant to Agreement	79
3.	§ 540. Later Agreement Superseding Earlier One	80
4.	§§ 541–545. Changed Conditions	81–86
5.	§ 546. Abrogation by One Party	88
6.	§§ 547–551. Effect of War	91–96

PART VI

DIFFERENCES BETWEEN STATES. MODES OF REDRESS OTHER THAN WAR

TITLE A

AMICABLE MODES

1.	Non-Judicial Means	
	a. § 552. Negotiation	99
	b. §§ 553–556. Good Offices and Mediation	100–103
	c. §§ 557–558. International Commissions of Inquiry	105–108
2.	Judicial Means	
	a. Arbitration	
	(1) § 559. Definition	111
	(2) §§ 560–561. Justiciable Differences	113–114

PAGES

(3) §§ 562-567. Recourse to Arbitration by the United States 115–125
(4) §§ 568–571. The Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes . 129–138
(5) § 572. The Court of "Judicial Arbitration" Proposed by the Second Hague Peace Conference 138
(6) §§ 573–576. The Permanent Court of International Justice Designed by Advisory Committee of Jurists, 1920 141–150
(7) §§ 577–578. Powers and Functions of Arbitral Tribunals 152–154
(8) § 579. Payment and Distribution of Awards . . 155
(9) § 580. Barring of Unpresented Claims . . . 156
(10) §§ 581–583. Finality of Awards 157–160

b. § 584. Joint Commissions 161
c. § 585. The Covenant of the League of Nations . . . 163

TITLE B

NON-AMICABLE MODES SHORT OF WAR

1. § 586. In General 166
2. § 587. Withdrawal of Diplomatic Relations 167
3. § 588. Retorsion. Retaliation 169
4. §§ 589–591. Reprisals 172–177
5. § 592. Pacific Blockade 179
6. §§ 593–594. Embargo 182–184
7. § 595. Non-Intercourse 185

PART VII

DIFFERENCES BETWEEN STATES. WAR

TITLE A

§ 596. Preliminary 187

TITLE B

§ 597. The State of War 189

TITLE C

KINDS

1. § 598. General in Contrast to Limited War 191
2. § 599. Limited War. 192
3. § 600. Insurrection. Civil War. Rebellion 193
4. § 601. Private War 194

CONTENTS

TITLE D

PAGES

THE COMMENCEMENT OF WAR

1. § 602. Processes of Initiation 195
2. § 603. Extent of Warning. The Hague Convention of 1907 . 198
3. § 604. Civil War 200

TITLE E

EFFECT OF WAR ON NORMAL RELATIONS BETWEEN OPPOSING BELLIGERENTS

1. § 605. On Diplomatic and Political Relations 202
2. On Intercourse between Territories of Opposing Belligerents
   - *a.* §§ 606–607. General Suspension of Communication . . 202–206
   - *b.* §§ 608–610. Contracts 209–214
   - *c.* §§ 611–613. Judicial Remedies. The Statute of Limitations 216–221
   - *d.* § 614. Cessation of Interest 222
   - *e.* § 615. Interference with Means of Communication . . 224
3. §§ 616–617. Control over the Persons of Resident Alien Enemies 226–230
4. Control of Enemy Property within the National Domain
   - *a.* §§ 618–619. In General 232–234
   - *b.* §§ 620–623. Confiscation 235–241
5. § 624. Prohibition of Exports 242
6. Neutral Persons and Property within Belligerent Territory
   - *a.* Persons
     - (1) §§ 625–627. Exaction of Military Service . . . 244–253
     - (2) § 628. Military Tax. Other Services 256
     - (3) § 629. Place of Residence and Occupation . . . 257
   - *b.* Property
     - (1) § 630. Taxation 258
     - (2) § 631. Forced Loans 259
     - (3) § 632. Requisition of Property 260
     - (4) §§ 633–637. Neutral Property Temporarily Within the State. The Right of Angary 261–271

TITLE F

PACIFIC INTERCOURSE OF BELLIGERENTS

1. § 638. In General 272
2. Military and Naval Communications and Agreements
   - *a.* § 639. Flags of Truce 273
   - *b.* §§ 640–642. Passports. Safe-conducts. Safeguards . . 276–278
   - *c.* § 643. Capitulations 278
   - *d.* § 644. Cartels 280
   - *e.* § 645. Suspensions of Arms 281
   - *f.* §§ 646–647. Truces or Armistices 282–286

CONTENTS

TITLE G

LAND WARFARE

PAGES

1. Belligerent Forces
   - *a.* § 648. Belligerent Qualifications Generally 290
   - *b.* § 649. Regulations Annexed to The Hague Conventions. *Levée en Masse* 290
   - *c.* § 650. Persons Incapable of Military Discipline . . 293
   - *d.* § 651. Aliens 295
   - *e.* § 652. Guerrilla Bands. Armed Prowlers 296
   - *f.* §§ 653–654. Divisions of Belligerent Forces . . . 298
2. Belligerent Measures and Instrumentalities
   - *a.* § 655. Permissible Violence Generally. Military Necessity 299
   - *b.* § 656. Sieges and Bombardments 302
   - *c.* § 657. Seizure, Destruction and Devastation of Enemy Property 306
   - *d.* § 658. Measures of Concentration 309
   - *e.* § 659. Deceit 311
   - *f.* §§ 660–663. Certain Implements of Destruction . . 313–319
   - *g.* § 664. Prohibition of Certain Measures Respecting the Treatment of an Enemy Person. Denial of Quarter . 323
   - *h.* § 665. Inciting Enemy Troops to Desertion, Treason and Insurrection 325
   - *i.* § 666. Services Not to Be Exacted from an Enemy Person 326
   - *j.* § 667. Retaliation 327
3. Prisoners of War
   - *a.* §§ 668–672. Treatment 330–340
   - *b.* §§ 673–674. Termination of Captivity 341–342
   - *c.* §§ 675–679. Grounds on Which Individuals Are Treated as Prisoners of War 344–350
4. The Sick and Wounded
   - *a.* § 680. The Geneva Convention of 1864 350
   - *b.* §§ 681–687. The Geneva Convention of 1906 . . . 352–360
5. Belligerent Occupation
   - *a.* § 688–689. Nature and Effect 361–365
   - *b.* The Administration of Occupied Territory
     - (1) § 690. Legislative and Judicial Functions . . . 366
     - (2) §§ 691–696. Fiscal and Other Measures Respecting Property 368–378
     - (3) §§ 697–700. Measures Relating to the Persons of the Inhabitants 379–384
     - (4) § 701. Miscellaneous Measures. Neutral Consuls . 385
     - (5) § 702. Martial Law 386

TITLE H

MARITIME WAR

1. Belligerent Forces
   - *a.* § 703. Private Non-commissioned Vessels 389
   - *b.* § 704. Privateers 390

PAGES

c. § 705. Vessels of War 395
d. §§ 706–708. Conversion of Volunteer, Auxiliary or Subsidized Vessels 396–401
e. § 709. Private Vessels Defensively Armed 402

Belligerent Measures and Instrumentalities
a. § 710. The Special Objects of Maritime War. General Limitations Respecting Their Accomplishment . . 406
b. §§ 711–712. Bombardment of Undefended Places. The Hague Convention of 1907 408–409
c. §§ 713–719. Submarine Automatic Contact Mines . 413–423
d. §§ 720–721. War Zones and Areas of Hostilities . 423–428
e. § 722. Torpedoes 428
f. § 723. The Cutting of Submarine Telegraphic Cables 430
g. Visit and Search
(1) § 724. Nature and Purpose 433
(2) §§ 725–730. Mode of Exercise 435–446
(3) §§ 731–732. Resistance or Evasion of Visit and Search. The Consequences Thereof 451–454
(4) §§ 733–735. Exemptions from Visit and Search . . 456–459

3. Attack
a. § 736. Preliminary 459
b. Effect of Nature, Use or Conduct of Enemy Vessel Encountered
(1) §§ 737–740. Unarmed Vessels 460–464
(2) §§ 741–743. Armed Vessels 465–468
(3) § 744. Attempts to Escape Capture. Ruses . . 472
(4) § 745. Certain Conclusions 475
c. Mode of Conduct with Reference to Nature of Attacking Vessel
(1) § 746. Surface Craft 476
(2) §§ 747–749. Submarine Craft. The Controversy with Germany 477–485
d. §§ 750–751. Attacks on Neutral Vessels 488–489

4. Capture
a. § 752. Acts Falling Short of Capture 491
b. § 753. What Constitutes Capture 492
c. § 754. Probable Cause 493
d. §§ 755–758. Effect of Capture 494–503
e. § 759. Recapture. Salvage 505
f. § 760. Ransoms. Safe-conducts 509

5. Exemptions from Capture
a. § 761. In General 510
b. § 762. Enemy Property on Neutral Ships 511
c. §§ 763–765. Enemy Vessels in or Sailing for Port at Outbreak of War. Days of Grace 515–520
d. §§ 766–770. Vessels Exempt by Occupation or Service . 524–528
e. §§ 771–772. Proposed General Immunity of Enemy Private Property 529–532

CONTENTS

PAGES

6. Prisoners of War
   a. §§ 773–774. Persons Who May Be Regarded as Prisoners of War 535–537
   b. § 775. Treatment 538
7. Sick, Wounded and Shipwrecked Persons
   a. § 776. The Situation Prior to The Hague Convention of 1907 539
   b. §§ 777–781. The Hague Convention of 1907 . . . 540–545
   c. § 782. Results of the World War 546
8. National Character in Relation to Property at Sea
   a. § 783. General Liability of Enemy's Property to Seizure . 547
   b. §§ 784–788. Ships 548–555
   c. §§ 789–793. Enemy Character of Cargoes 557–566
   d. §§ 794–796. Corporations 567–569

TITLE I

CONTRABAND

1. §§ 797–798. Preliminary 572–575
2. § 799. Early Treaties of the United States 577
3. Controversies Respecting Certain Articles
   a. §§ 800–805. Foodstuffs 580–594
   b. §§ 806. Certain Other Articles. Fuel 597
4. Destination
   a. § 807. Necessity of Hostile Character 601
   b. §§ 808–813. The Doctrine of Continuous Voyage . . 602–626
5. Penalty
   a. § 814. Nature of the Traffic 629
   b. § 815. Penalty for Carriage 630
   c. § 816. Treatment of the Cargo 634
6. Indirect Unneutral Service. The Carriage of Enemy Persons and Despatches
   a. § 817. In General 635
   b. §§ 818–820. Persons Subject to Interception . . . 636–642
   c. § 821. Enemy Despatches 643
   d. §§ 822–823. Penalty for Carriage of Persons and Despatches 644–645

TITLE J

BLOCKADE

1. §§ 824–825. Preliminary 647–650
2. Certain Conditions of Validity
   a. § 826. Authority to Institute. Acts of Unrecognized Insurgents 651
   b. § 827. Effectiveness 655
   c. §§ 828–832. Extent and Limitations 657–666

PAGES

3. Breach of Blockade
   a. §§ 833–834. Announcement to Neutral States. Notification of Neutral Vessels 669–672
   b. §§ 835–836. Acts Constituting a Breach and Dealt with as Such. Place of Capture 675–678
   c. § 837. Capture and Penalty. Deposit of Offense . . 680
4. Ameliorations
   a. § 838. Vessels in Distress 682
   b. § 839. Neutral Ships in Blockaded Ports. Days of Grace . 683
   c. § 840. Ships of War. Diplomatic Agents 685
   d. § 841. Special Concessions 687
5. § 842. Termination 688
6. § 843. Obstruction of Navigable Channels 690

TITLE K

NEUTRALITY

1. The Duties of a Neutral State
   a. §§ 844–847. The Nature of the Obligation . . . 692–697
   b. § 848. Governmental Abstention from Participation. Miscellaneous Activities 698
   c. Duties of Prevention
      (1) § 849. In General 702
      (2) §§ 850–852. Acts of a Belligerent in Defiance of the Rights of the Territorial Sovereign as Such . . 703–708
      (3) §§ 853–856. Other Uses of Neutral Territory Associated with the Prosecution of War and Not Necessarily Attributable to a Belligerent Government . . 710–721
      (4) §§ 857–865. Asylum in Maritime War . . . 723–744
      (5) § 866. Asylum to Belligerent Land Forces . . . 745
   d. Belligerent Acquisition from Neutral Territory of Aid Which the Territorial Sovereign is Not Obliged to Check
      (1) §§ 867–868. The Exportation of Munitions of War . 748–754
      (2) § 869. Loans to Belligerents 755
      (3) § 870. The Departure of Unorganized Individuals Contemplating and Entering Belligerent Service . 757
      (4) §§ 871–872. Belligerent Services by Neutral Nationals on the High Seas 759–761
      (5) § 873. The Fitting Out, Transfer and Departure of Vessels Not Adapted or Intended Primarily for Hostile Operations 762
      (6) § 874. Expressions of Opinion by Private Persons . 764
      (7) § 875. Qualified Neutrality 765
   e. Enforcement of Neutral Duties. Some Aspects of American Procedure
      (1) § 876. Neutrality Proclamations 767
      (2) § 877. Legislative Action 768
      (3) § 878. Executive Action 770

PAGES

(4) § 879. Judicial Action 773
(5) § 880. Extraterritorial Pursuit 775
(6) § 881. Duties Resulting from Extraterritorial Jurisdiction 776
f. The Requisite Measure of Exertion
(1) § 882. The Rules of the Treaty of Washington. "Due Diligence" 778
(2) § 883. The Hague Convention of 1907 780
g. §§ 884–885. The Question of Belligerency 781–784
h. § 886. Effect of Armistice 785
2. Inviolability of Neutral Territory
a. § 887. The Duty of the Belligerent 786
b. § 888. The Duty of the Neutral 792
3. § 889. The Law of Neutrality in Relation to World Organization 793

TITLE L

AMERICAN PRIZE COURTS AND PROCEDURE

1. § 890. Courts 796
2. Jurisdiction
a. § 891. To Adjudicate 798
b. § 892. To Award Damages 800
3. Jurisprudence
a. § 893. In General 802
b. §§ 894–895. Grounds of Foreign Complaint. The Discussion between the United States and Great Britain during the World War 804–810
c. § 896. Need of an International Tribunal 811
4. Some Aspects of American Procedure
a. § 897. In General 812
b. § 898. Examination *in Preparatorio* 813
c. § 899. Order for Further Proof 814
d. § 900. Discussion with Great Britain during The World War 815
e. § 901. Concerning Rules of Evidence 817
5. §§ 902–903. Condemnation 818

TITLE M

TECHNICAL ASPECTS OF THE TERMINATION OF WAR

1. Modes of Termination
a. § 904. Cessation of Hostilities 820
b. § 905. Formal Declaration by One Party 821
c. § 906. Public Proclamation in Relation to a Civil War . 823
d. § 907. Subjugation 823
e. § 908. Agreement 824

CONTENTS

		PAGES
2.	Procedure Peculiar to the Negotiation of a Treaty of Peace	
	a. § 909. The Public Exchange of Views of Responsible Statesmen	827
	b. § 910. Preliminary Negotiations	828
	c. §§ 911–912. Agreements Preliminary to Peace	831–833
	d. §§ 913–920. The Conclusion of a Definitive Treaty	835–852
3.	§ 921. Certain Effects of the Termination of War	853
4.	§ 922. The Doctrine of *Postliminium*	856
INDEX		859

TABLE OF CASES

[References are to pages]

Abbiatti Case, I, 480
Abell *v.* Penn. Mut. Life Ins. Co., II, 211
Accessory Transit Co. Case, I, 488
Acquatella Case, I, 539
Ada, The, I, 509
Adams *v.* Akerlund, I, 354, II, 67
Adela, The, II, 679, 787
Adger *v.* Alston, II, 201, 823
Admiral, The, II, 650, 672, 678, 798
Adriatic, The, I, 443, 766
Adula, The, II, 615, 670, 672, 676, 690, 815
Adutt, In re, I, 586, 587
Adventure, The, II, 496, 508, 818
Advocate General of Bengal *v.* Ranee Surnomoye Dossee, I, 199
Æolus, The, I, 400
Africa, The, II, 603
Agency of Canadian Car & F. Co. *v.* American Can Co., I, 730
Aggi, The, II, 453
Aguirre *v.* United States, II, 62
Ah Lung, In re, II, 59
Ah Yup, In re, I, 628
Aigburth, The, II, 563
Ainsa *v.* New Mexico and Arizona Railroad Co., I, 228, 236, 240
Akhay Kumar Mozumbar, In re, I, 628
Aktien Gesellschaft, etc. *v.* Levinstein, Ltd., II, 218
Alaskan Boundary Case, I, 193, 195, 242, 253, 258, 262, 271, II, 65, 118, 162
Albany *v.* Derby, I, 618
Albergen, The, I, 821
Albo, The, II, 557
Alciator *v.* Smith, II, 217
Alcinous *v.* Nigrou, II, 217
Alexander, The (8 Cranch, 169), II, 492
(Hurst and Bray, II, 86), II, 525
Alexander *v.* Roulet, I, 200
Alexander's Cotton, Mrs., I, 528, II, 375, 561
Alsberry *v.* Hawkins, I, 662
Alsop Case, I, 485, 486, II, 30, 156
Altman & Co. *v.* United States, II, 28
Alvarez y Sanchez *v.* United States (216 U. S. 167), I, 236
(42 Ct. Cl. 458), I, 236
Alverto, In re, I, 628
Alwina, The, II, 634
Ambrose Light, The, I, 415
Amédie, The, I, 408
Amelia, The (1 Cranch, 1), II, 191, 192, 507
(4 Phila. 417), 527
American Banana Co. *v.* United Fruit Co., I, 386, 387, 393, 423, 424, 452
American Exchange Bank *v.* Palmer, II, 235
American Insurance Co. *v.* Canter, I, 176, 202, 624
American Railroad of Porto Rico *v.* Didricksen, I, 618
Amiable Isabella, The, II, 390, 493
Amiable Nancy, The, II, 800, 801
Amistad, The, I, 412, II, 70
Amistad de Rues, La, II, 737, 774, 775
Amy Warrick, The, II, 805
Anderson and Thompson Case, I, 623
Anderson, In Re Estate I, 367
Anderson, Ex parte, I, 396
Angelus *v.* Sullivan, II, 254
Anglo-American, The, II, 566
Anna, The, I, 174
Anna Catharina, The, II, 564
Anna Maria, The, II, 801
Anne, The, I, 794, 818, II, 787, 814
Antelope, The, I, 20, 407, 408
Anthon *v.* Fisher, II, 509
Antonia Johanna, The, II, 514, 563
Antrey Case, I, 529, 530

Apollon, The, I, 116, 387, 419, 425, II, 801
Appam, The (*see* also STEAMSHIP APPAM, The) II, 733, 734, 735, 736, 737, 775
Arabia, The, II, 587
Arce *v.* State, I, 434
Argo, The, II, 517, 518
Ariadne, The, II, 548
Arkansas *v.* Mississippi, I, 246, 247
v. Tennessee, I, 246, 247
Aroa Mines Case, I, 473, 539, II, 64, 65, 66, 71
Arrogante Barcelones, The, II, 774
Artan, Re, I, 573
Astiazaran *v.* Santa Rita Land and Mining Co., I, 236, 240
Astrea, The, II, 508
Atalanta, The (3 Wheat), II, 456
(6 Ch. Rob.), II, 646
Athanasios, The, I, 443
Atlantic, The, II, 631
Atlantic and Hope Insurance Companies *v.* Ecuador, II, 86
Attualita, The, I, 443, 444
Aubrey Case, I, 624
Australasia and China Telegraph Co, Ltd., *v.* United States, I, 231
Austro-Hungarian Consul *v.* Westphal, I, 816, 817, II, 77
Ayer & Lord Tie Co. *v.* Kentucky, I, 362

Baasch and Römer Case, I, 485, 490
Bacigalupi Case, I, 529
Bader, In re, I, 100
Bagaley, William, The, II, 211, 212, 547, 548, 549, 563, 566
Baglieri's Estate, In re, I, 815
Bagnola's Estate, In re, I, 817
Bahuaud *v.* Bize, I, 354
Baigorry, The, II, 452, 556, 679
Baiz, In re, I, 717, 794
Baker *v.* Portland, II, 78
Baldwin Case, I, 506, 510
Baldy *v.* Hunter, I, 79
Balfour, Guthrie & Co. *v.* Portland and Asiatic S.S. Co., II, 584
Ballistini Case, I, 497, 508, 562
Baltic, The, II, 634
Baltica, The, II, 552, 557
Balto, The, II, 625
Bangor, The, II, 788
Banning *v.* Penrose, I, 672
Barclay Case, I, 483
Barker *v.* Harvey, I, 228, 236, 240
Barlow Case, I, 558
Barrett and Walker Case, I, 539
Bartram *v.* Robertson, II, 74
Barzizas *v.* Hopkins, I, 616
Bas *v.* Tingy, II, 191, 192, 193
Batesville Institute *v.* Kauffman, II, 201, 823
Bautista, In re, I, 628
Beales, Nobles and Garrison Case, I, 558
Beck, Ex parte, II, 255
Beckman & Co. Case, II, 259
Behrendt, In re, I, 599, 600
Behrensmeyer *v.* Kreitz, I, 626
Belcher Case, I, 678
Belgenland, The, I, 398, 822
Bell *v.* Kennedy, II, 560
v. Reid, II, 557
Bellefontaine Improvement Co. *v.* Niedringhaus, I, 246
Bello Corrunes, The, I, 818, II, 775
Bembelista Case, I, 527
Benito Estenger, The II, 551, 561
Benny *v.* O'Brien, I, 614
Bensley Case (Second), I, 510
Bensley Case (Third), I, 510
Benson *v.* McMahon, I, 586, 587, 590, 595, 600, 604
Bercier Case, I, 527
Bering Sea Arbitration. *See* FUR SEAL ARBITRATION.
Berlin, The, II, 525
Bermuda, The, II, 604, 605, 609, 610, 611, 614, 631, 632, 634, 679, 680
Bernat, Ex parte, I, 96
Bernon, The, II, 559
Bessho *v.* United States, I, 628
Betsey, The, II, 62, 63, 811
Betty Cathcart, The, II, 774
Bhagat Singh Thind, In re, I, 628
Bingham *v.* Bradley, I, 602, 605
Bird, The, II, 632
Birge-Forbes Co. *v.* Heye, II, 220
Bister Case, I, 620
Blackstone *v.* Miller, I, 362, 366
Blankard *v.* Galdy, I, 202
Blazekovic, Ex parte, II, 254, 255
Blodgett Case, I, 528, 529
Blumenkron Case, I, 527
Blumhardt Case, I, 509
Blythe *v.* Hinckley, I, 358

TABLE OF CASES

[References are to pages]

Bobrik, The, II, 531
Boedus Lust, The, II, 185, 196
Boffolo Case, I, 101, 102, 103
Bolívar Railway Co. Case, I, 545
Bolmer *v.* Edsall, I, 255
Bond Cases, I, 473
Bond *v.* Owen, II, 205
Bong *v.* Campbell Art Co., I, 371
Bosque *v.* United States, I, 625
Botiller *v.* Dominguez, I, 227
Boulton, Bliss & Dallett Case, I, 473, 558
Boulton *v.* Dobree, II, 217
Bound Brook, The, I, 398
Boussmaker, Re, II, 220
Boyd *v.* Thayer, I, 622, 624, 628
Boynton *v.* Blaine, II, 161
Brandon *v.* United States, I, 528, II, 600
Breen, In re, I, 599
Brig Alerta, The II, 774, 775
Concord, The I, 399
Freemason *v.* United States, I, 509
Napier, The I, 509
Briggs *v.* United States, II, 209, 375
Brignone Case, I, 621
Brissot Case, I, 621
British Guiana-Venezuelan Boundary Arbitration, I, 165, 166, 192, 271
British South Africa Co. *v.* Companhia de Moçambique, I, 425
Bronner Case, I, 508
Brown *v.* Duchesne, I, 395
v. Gardner, II, 209
v. Hiatts, II, 201, 220, 223, 823
v. United States, II, 233, 237, 390
Browne *v.* Dexter, I, 616
Bryant *v.* United States, I, 584, 604
Buck *v.* Beach, I, 363, 364
Buena Ventura, The, II, 517, 801
Buentello Case, I, 529, 531
Bugajewitz *v.* Adams, I, 100
Bullen *v.* Wisconsin, I, 366
Burke *v.* Wells, I, 363
Burn Case, I, 502, 509
Buron *v.* Denman, II, 802
Burthe *v.* Denis, I, 479
Burton *v.* Burton
(26 How. Pr.), I, 648
(1 Keyes), I, 645
Bush *v.* United States II, 50
Buttenuth *v.* St. Louis Bridge Co., I, 246, 247
Buzzi Case, I, 651
Byfield, The, II, 688

Calchas, The, II, 446, 450
Calderwood Case, I, 645
Caldwell *v.* Barclay, I, 807
v. Van Vlissengen, I, 395
Calvin's Case I, 202, 612
Cameron, In re, I, 634
Cameron Septic Tank Co. *v.* Knoxville, II, 64
Campbell *v.* Gordon, I, 649
v. Hall, I, 202, 388
v. Mullett, I, 484
Camy Case, I, 483
Canevaro Case, I, 480, 484, 485, 620
Canton, The, II, 270
Capitation Tax Case, II, 66
Cargo of Ship Emulous, II, 237
Cariño *v.* Insular Government, I, 200
Carioto, In re, I, 819
Carlisle *v.* United States, I, 388
Carlo Poma, The, I, 443, 447
Carlos F. Roses, The, II, 564, 565
Carneal *v.* Banks, I, 354, II, 93
Carolina, The, II, 635
Caroline, The, II, 638, 646
Carpigiani *v.* Hall, I, 814
Carrington *v.* Merchants' Ins. Co., II, 613, 631, 634
Carson *v.* Dunham, II, 209
Carthage, The, II, 438, 617, 801
Cary *v.* South Dakota, II, 19
Casablanca Case, I, 432, II, 296
Casdagli *v.* Casdagli, I, 428
Casper, In re, I, 819
Castel Case, I, 526
Castelains Case, I, 530
Castioni, Re, I, 573, 574
Castro *v.* De Uriarte
(12 Fed.), I, 598
(16 Fed.), I, 596, II, 53
Catlett *v.* Pacific Ins. Co., I, 827
Cernyar's Estate, In re, I, 819
Cerri *v.* Akron-People's Tel. Co., I, 803
Cerruti Case, I, 486
Cessna *v.* United States, I, 239
Chae Chan Ping *v.* United States, II, 59
Chambers *v.* Steamship Kestor, I, 395
Chamizal Case, I, 246, 247, 248, II, 72, 119, 120

[References are to pages]

Chappell *v.* Jardine, I, 203, II, 21
Charkieh, The
(L. R. 8 Q. B.), I, 443
(L. R. [1873] 4 Adm. & Ecc.), I, 27
Charles *v.* Monson and Brimfield Mfg. Co., I, 617
Charlotte Christine, The, II, 676
Charlton, Ex parte, I, 579, 587, 589, 595, 601
Charlton *v.* Kelly, I, 579, 589
Charming Betsy, The, I, 13, II, 507
Chauncey *v.* Chile, I, 486
Chavez, In re, I, 202
Cheek Case, I, 390, 391, 550
Cherokee Nation *v.* Georgia, I, 19
Cherokee Tobacco, The II, 9, 59
Chesapeake, The, I, 411, 413
Chesapeake & Ohio Ry. Co. v. United States, II, 201
Cheshire, The, II, 548, 563, 676, 679
Chester *v.* The Experiment, II, 557
Chew Heong *v.* United States, II, 59
Chicago & Pacific Ry. Co. *v.* McGlinn, I, 202
Chi Lung *v.* Freeman, I, 97
Chinese Exclusion Case, I, 95, 100
Chin Yow *v.* United States, I, 100
Chirac *v.* Chirac, I, 354, 355, 626, II, 15, 55
Chourreau Case, II, 66
Church *v.* Hubbart, I, 116, 418, 828
C. H. White, The, I, 116, 254, 421
Cienfuegos, In re, I, 601
Circassian, The, II, 650, 666, 678, 679, 680, 690
Clan Grant, The II, 560, 563
Clark Case, I, 556
Clarke *v.* Morey, II, 218
Cleworth Case, I, 527
Clinton Bridge, The, II, 59
Coffee *v.* Groover, I, 236
Cohn *v.* Jones, I, 583, 584
Cole Case, I, 527
Collet *v.* Collet, I, 626
Collins, In re, I, 585
v. Johnston, I, 585
v. O'Neil, I, 583, 585
Colonia, The, II, 553
Colombia *v.* Cauca Co., II, 153
Comegys *v.* Vasse, II, 152, 157
Comitis *v.* Parkerson, I, 630
Commercen, The, II, 584, 585, 605, 631
Commercial Cable Co. *v.* Burleson, II, 287
Commonwealth *v.* Chapman, I, 201, 202
v. Deacon, I, 568
v. Lane, I, 425
v. Luckness, I, 397
v. Manchester, I, 260
v. White, I, 422
Compagnie Générale des Eaux de Caracas, I, 562
Conception, La, II, 774
Confederate Debt Cases of Barrett and Walker, I, 539
Conn *v.* Penn, II, 212, 223
Conrad, The, II, 453
Conrad *v.* Waples, II, 209, 210, 238
Conserva, The, I, 77
Constancia, La, I, 477
Constantia, The, II, 565
Constitution, The, I, 436, 539
Consul of Spain *v.* Consul of Great Britain, II, 734
Continental Tyre & Rubber Co., Ltd. *v.* Daimler Co., Ltd., II, 569
Cook, In re, I, 634
v. Sprigg, I, 231
Cooley *v.* Golden, I, 247
Cooper Case, I, 530
Cooper, In re, I, 272, 389, II, 58
Coosa, The, II, 679
Coppell *v.* Hall, I, 793
Cordaro, In re, I, 630
Cordova *v.* Grant, I, 272, II, 58
Cornelius, The, II, 679
Cornu *v.* Blackburne, II, 509
Coro and La Vela Railway & Improvement Co. Case, I, 553
Corvaia Case, I, 480, 620, 677
Cosgrove *v.* Winney, I, 583
Cosmopolite, The, II, 205
Costa Rica *v.* Nicaragua, II, 5
Costa Rica Packet, The, I, 255, 406
Cotesworth & Powell Case, I, 512
County of St. Clair *v.* Lovingston, I, 174
Cox and Elkins Case, I, 555
Crane *v.* New York, I, 357
Crapo *v.* Kelly, I, 406, 423
Crawford and McClean *v.* The "William Penn," II, 209
Creole, The, I, 400, 401
Crimdon, The, I, 444

[References are to pages]

Cross *v.* Harrison, I, 203, II, 365, 369
Crossman Case, II, 66
Culberson Case, I, 529
Curlew, The, II, 270
Cushing *v.* Laird, II, 800
Cushing, Admin'r, *v.* United States, II, 403
Czar-Nicolai II, II, 221

D'Adamo's Estate, In re, I, 812, 815, 816, 817, II, 77
Dacia, The, II, 552
Daifjie, The, II, 529
Daigle *v.* United States, II, 58
Daimler Co., Ltd. *v.* Continental Tyre and Rubber Co., Ltd., II, 569, 570
Dainese *v.* Hale, I, 458
v. United States, I, 458
Dale *v.* Merchants' Mut. Mar. Ins. Co., I, 417
v. New England Mut. Mar. Ins. Co., I, 417
Dallemagne *v.* Moisan, I, 822
Danckebaar Africaan, II, 564
Darby *v.* The Brig Ernstern, II, 555
Darnell *v.* Indiana, I, 363
Dashing Wave, The, II, 494, 679, 801
Davis, The, I, 444
Davis *v.* Concordia, I, 201, II, 50, 59
v. Hall, I, 617
Davy Case, I, 511
Dawson, In re, I, 607
Day and Garrison Case, I, 552
Deans, In re, I, 634
De Caro Case, I, 509, II, 260
De Forge Case, I, 544
De France *v.* Howard, I, 355
De Ganay *v.* Lederer, I, 363, 365
De Garmendía Case, I, 550
De Haber *v.* Queen of Portugal, I, 446
De Hammer Case, I, 621
De Lacey *v.* United States, II, 228
De la Croix *v.* Chamberlain, I, 236, 239, 240
Delagoa Bay Railway Case, I, 489, 547, 550
Delassus *v.* United States, I, 236, 237, 239
Delaware, The, I, 380
Delaware, L. & W. R. Co. *v.* Petrowsky, I, 647
De Lemos Case, II, 66
De Leon Case, I, 678
De Lima *v.* Bidwell, I, 204
Deming *v.* United States, I, 561
Dent *v.* Emmeger, I, 237
Derbec Case, I, 517, 522
Deucatte Case, I, 482
Devine Case, I, 542
De Witt Heirs Case, I, 557
Diana, The (1 Dodson), I, 408
(7 Wall.), II, 679, 683
Dickens Case, I, 512
Dillon, In re, I, 808
Dimond Case, I, 483
Dinehart, Ex parte, I, 597, 598
Direct United States Cable Co. *v.* Anglo-American Telegraph Co., I, 260
Distington Hematite Iron Co., Lim. *v.* Passehl & Co., II, 211
Divina Pastora, The, I, 77, 271
Dix Case, I, 545
Doe *v.* Acklam, I, 622
v. Braden, II, 58
Dogger Bank Case, II, 106, 107
Dolphin, The, II, 606, 614, 615
Dominguez Case, Fernando, I, 651
Donaldson *v.* State, I, 355
Donaldsonville Cases, I, 527
Donnell's Executor, I, 558
Donoughho Case, I, 497, 508, 523
Dooley *v.* United States (182 U. S.), I, 204, 205, II, 47, 50, 363, 364, 365, 369
(183 U. S.), I, 204
Dorsey *v.* Brigham, I, 633
Dos Hermanos, The (2 Wheat.), II, 453, 493, 566, 813, 814, 815
(10 Wheat.), II, 389, 390
Dow, In re, I, 628
v. Johnson, II, 849
v. United States, I, 628
Dowell *v.* Cordwell, I, 473
Downes *v.* Bidwell, I, 94, 203, 204. II, 9, 19
Downs *v.* United States, II, 75
Dresch Case, I, 529
Driggs Case, I, 507
Dryden *v.* Swinburne, I, 642
Duke of Brunswick *v.* King of Hanover, I, 446

Dunbar & Belknap Case, I, 529
Dunham *v.* Lamphere, I, 260
Dupont *v.* Pichon, I, 756
Duus, In re, I, 629
v. Brown, I, 367

Earn Line S.S. Co. *v.* Sutherland S.S. Co., I, 392
Eastern Extension, Australasia and China Telegraph Co., Ltd. *v.* United States
(231 U. S.), I, 231, 546
(251 U. S.), I, 231, 546
(48 Ct. Cl.), I, 231
Edgerton Case, I, 529, 539
Eichhorst *v.* Lindsey, I, 630
Eidman *v.* Martinez, I, 366
Eigendorff Case, I, 481
Eldredge's Case, I, 483, 556
Eleanor, The (2 Wheat.), II, 434, 435, 436
(Edwards), I, 400
Elias *v.* Ramirez, I, 599, 602, 604
Elizabeth, The, II, 549
Elk *v.* Wilkins, I, 613, 628
Ella Warley, The, II, 269
Ellis, In re, I, 628
Elphic *v.* Hoffman, II, 21
Elsebe, The, II, 458
Ely's Adm. *v.* United States, I, 200, 236, 240
Emerson *v.* Hall, I, 473
Emperor of Austria *v.* Day, I, 63, 272
Empress, The, II, 679
Enterprise, The I, 400, 401
Ernst Merck, The, II, 552
Esposito *v.* Bowden, II, 211
Essex, The, II, 604
Ester, The, I, 398
Estrella, The, II, 737, 774, 775
Experiment, The, II, 558
Expulsion Cases, I, 103
Ezeta, In re, I, 573, 574, 577, 593, 600, 604

Faber Case, I, 293
Faber *v.* United States, II, 71
Fairfax's Devisee *v.* Hunter's Lessee, I, 355, II, 15
Fama, The, II, 50
Fanny, The, II, 456
Farez, In re, I, 596, 600
Felicity, The, II, 497, 499, 501
Fergus, In re, I, 596
Ferrelle, In re, I, 597
Fidelity and Columbia Trust Company *v.* Louisville, I, 363, 366
Field *v.* Clark, II, 28
Fifield *v.* Insurance Company, I, 63, 417
Finn Case, I, 485
Fish *v.* Stoughton, I, 676
Fitch Case, I, 479
Fitzsimmons *v.* Newport Ins. Co., II, 671
Five Per Cent Discount Case, II, 75
Flannagan, Bradley, Clark & Co. Case, I, 552, 558
Fleming *v.* Page, I, 176, 203, II, 363
Florence H., The, I, 443
Florida *v.* Furman, I, 228, 240
Flutie Cases, I, 652
Fong Yue Ting *v.* United States, I, 95, 100, 101, 103, II, 59
Ford *v.* Surget, I, 417, II, 307
Forte, The, I, 442
Fortuna, The
(1 Dodson), I, 408, II, 549
(3 Wheat.), II, 564
Foster Case, I, 529
Foster & Elam *v.* Neilson, I, 63, 271, 272, 389, II, 50, 58
Four Packages of Cut Diamonds *v.* United States, II 29
Fourteen Diamond Rings *v.* United States, I, 204, II, 69
Fox, The, II, 805, 807
Foxcraft and Galloway *v.* Nagle, II, 222
Frances, The
(8 Cranch), II, 560, 564, 565, 814
(9 Cranch), II, 565
Frances and Eliza, The, II, 170
Franciska, The
(10 Moore, P.C.), II, 662, 687
(2 Spinks), II, 687
Frantz's Appeal, I, 361
Frau Houwina, The, II, 605
Frear Case, I, 558
Frederickson *v.* Louisiana, I, 366
Freeland *v.* Williams, II, 849
Freemason, The Brig. *See* BRIG FREEMASON.
Frelinghuysen *v.* Key, II, 160, 161
French Republic *v.* Inland Nav. Company, I, 446

Fretz *v.* Stover, II, 212
Frevall *v.* Bache, II, 152
Frick *v.* Lewis, I, 633
Friendschaft, The
(3 Wheat.), II, 566, 815
(4 Wheat.), II, 548, 563
Friendship, The, II, 635
Friery Case, I, 530
Fritz Schultz, Jr., Co., *v.* Raimes & Co., II, 218
Frothingham *v.* Shaw, I, 366
Fudera, Ex parte, I, 591, 603
Fur Seal Arbitration (United States *v.* Great Britain), I, 109, 116, 253, 256, 260, 261, 407, 408, 418, 419, 420, 421, II, 121, 122, 136

Galen, The, II, 459, 678
Gallego, Messa & Co. *v.* United States, I, 528
Garcia *v.* Lee, I, 271, 272, II, 58
Garrison's Case, I, 497, 508
Gates *v.* Goodloe, II, 563
Gazzola *v.* Commanding Officer, II, 254
Gee Hop, In re, I, 628, 649, 697
Gelbtrunk Case, I, 523, 539
Gelston *v.* Hoyt, I, 63, 271, II, 771
General Hamilton, The, II, 682
Geneva Arbitration, I, 79, 253, II, 120, 121, 156
Genoese Case, Virgilio del I, 553
Gentini Case, I, 192
Geofroy *v.* Riggs, I, 354, 615, II, 12, 15, 16, 60, 71
George, The, II, 801
Georgia, The, II, 550
Gerasimo, The, II, 557
Germanic, The, I, 396
Gertrude, The, II, 610, 613
Ghio, In re, I, 814, 817
Giacomo, In re, I, 590
Gibbs, R. W., Case, I, 555, 556
Gilbert *v.* David, II, 560
Giles Case, I, 527
Gilroy, Ex parte, I, 655
Giovanna, In re, I, 614
Glaser, In re, I, 599, 600
Glass *v.* The Sloop Betsey, II, 737, 774, 797, 798
Glenn *v.* United States, I, 228
Glenn's Case, I, 498
Gloire, La, II, 529
Gloria De Larrinaga, The, I, 397, 470
Glucksman *v.* Henkel, I, 590, 597
Goetze *v.* United States, II, 67
Goldstein, In re, I, 630
Gonzales *v.* Williams, I, 618
Good Return, The, I, 684
Goodrich and De Forest *v.* Gordon, II, 509, 510
Gosch Case, I, 481
Gowen and Copeland Case, I, 173
Graber, Ex parte, II, 230
Gran Para, The, II, 774, 775
Grapeshot, The, II, 364, 797
Gray Case, I, 277
Gray, Adm'r. *v.* United States, I, 508, II, 193, 808
Gray Jacket, The, II, 562, 815
Green Case, I, 509
Griffin, Ex parte, I, 670, 671, 676
Grin *v.* Shine, I, 589, 594, 597, 598, 599
Grinnan *v.* Edwards, II, 216
Griswold *v.* Waddington, II, 212
Grotius, The, II, 492, 814
Guastini Case, I, 539, 544
Guerrieri Case, I, 539
Guido, The, II, 548

Haas, In re, I, 629
Hakan, The, II, 631, 632
Halifax Commission, Award, I, 258, II, 153
Halladjian, In re, I, 628
Hallet and Bowne *v.* Jenks, I, 399
Halpern *v.* Commanding Officer, II, 550
Hamborn, The, II, 254
Hamburg-American Steam Packet Co. *v.* United States, II, 749
Hamilton, The, I, 425
Hamilton *v.* Dillin, II, 208
v. Kentucky Distilleries Company, II, 820
Handly's Lessee *v.* Anthony, I, 192, 246, 248
Hanger *v.* Abbott, II, 212, 216, 218, 220
Hanna Case, I, 539
Hannay *v.* Eve, II, 547
Harcourt *v.* Gaillard, I, 196, 200
Hardman Case, I, 528, II, 375
Hargous Case, I, 483, 485, II, 67
Harmon *v.* United States, I, 630
Harmony, The, II, 557
Hart, The, II, 556, 607, 614, 680

Hart *v.* Gumpach, I, 425
v. United States, II, 209
Hassard *v.* United States of Mexico, I, 446
Hatch *v.* Baez, II, 848
Hauenstein *v.* Lynham, I, 354, 358, II, 14, 15, 55
Haver *v.* Yaker, II, 47, 50, 58
Hawley *v.* Malden, I, 363
Hayes *v.* United States, I, 240
Haymond *v.* Camden, II, 216
Hays *v.* Pacific Mail Steamship Company, I, 362
Headman *v.* Rose, I, 645
Head Money Cases, II, 59
Heathfield *v.* Chilton, I, 750
Heim *v.* McCall, I, 357, 359
Helena, The, I, 411, II, 797
Hellman Case, I, 481
Henderson *v.* Mayor of New York, I, 97
v. Poindexter's Lessee, I, 196
Hendricks *v.* Gonzales, II, 772
Henrich, In re, I, 595
Henriquez Case (J. M.), I, 529
(J. N.), I, 539, 541
Heny Case, I, 455
Herald, The, II, 672
Herman, The, II, 557
Hermon, The, I, 555
Hermosa, The, I, 400, 401
Hernandez *v.* Aury, II, 799
Herrera *v.* United States, I, 528, II, 207, 307
Herres, In re, I, 597
Hewitt *v.* Speyer (248 Fed.), I, 393
(250 Fed.), I, 393
Hiawatha, The
(Blatchf. Prize Cases), II, 679
(2 Black), II, 672
Hijo *v.* United States, II, 59
Hipsang, The, II, 452
Hoare *v.* Allen, II, 222, 224
Hoffnung, The, II, 688
Holbrook *v.* Henderson, I, 746
Holden *v.* Joy, I, 19, II, 12
Holmberg's Estate, In re, I, 816
Holmes *v.* Jennison, II, 12, 27
Homan Case, I, 485
Homer Ramsdell Co. *v.* La Compagnie Générale Trans-Atlantique, I, 380
Hong Yen Chang, In re, I, 628, 649
Hoop, The, II, 216, 509
Hooper, Administrator *v.* United States, II, 403, 507
Hopkirk *v.* Bell, II, 220
Horn *v.* Mitchell, I, 392, 435
Howland, et al. *v.* Venezuela, II, 67
Hoyt *v.* Commissioners of Taxes, I, 362
Hudson *v.* Guestier
(4 Cranch), I, 116, 419, II, 799
(6 Cranch), I, 116, 419
Hudson's Bay Co., Case No. 37, I, 555
Hunter Case, I, 555
Hutchinson *v.* Brock, II, 220
Hutflis, Ex parte, II, 254
Hylton's Lessee *v.* Brown, II, 50

Idler Case, I, 556, 558
Illinois Central Railroad Co. *v.* Illinois, I, 268
Imina, The, II, 602, 606
Immanuel, The, II, 613
Indian Chief, The, II, 560
Indiana *v.* Kentucky, I, 192, 193
Infelise's Estate, In re, I, 818
Inglis *v.* Sailor's Snug Harbour, I, 612, 615, 621, 662
Insurance Co. *v.* Davis, II, 212, 213
Invincible, L', II, 737, 774, 799
Ionian Ships, The, I, 25
Iowa *v.* Illinois (147 U. S.), I, 246
(202 U.S.), I, 246
Isaacson *v.* Durant, I, 46
Island Belle, The, II, 552
Itata, The, I, 116, 421
Iturria Case, I, 557
Ixion, The, I, 395

James and William, The, II, 59, 78
James Hamilton Lewis, The, I, 116, 254, 421
Jane, The, II, 452
Jan Frederick, The, II, 564
J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, Beck & Co., I, 370
Jardel Case, I, 527
Jarr and Hurst Case, I, 481
Jarvis Case, I, 539
Jassy, The, I, 443
Jeannaud Case, I, 529
Jeannotat Case, I, 523
Jecker *v.* Montgomery
(13 How.), II, 797, 799, 801
(18 How.), II, 605

[References are to pages]

Jefferis *v.* East Omaha Land Company, I, 174
Jemmy, The, II, 552
Jennings *v.* Carson (4 Cranch), II, 494
(1 Pet. Adm.), II, 798
Jennings, Laughland & Co. Case, I, 485, 509
Jenny, The, II, 679
Jesus, The, II, 603
Jeune Eugenie, La, I, 4
Johannessen *v.* United States, I, 649
Johnson Case, I, 556
Johnson *v.* Browne, I, 583, 584, 589
v. Elkins, I, 355
v. Jones, II, 388
v. McIntosh, I, 164, 166
Johnson Lighterage Co., The, I, 443, 447
Jonasson, In re, I, 629
Jones, John C., Case, I, 511
Jones *v.* Le Tombe, I, 807
v. Meehan, I, 19
v. United States (1 Ct. Cl.), I, 561
(137 U. S.), I, 172, 271 272, 389, 713
Jonge Klassina, The, II, 557
Jonge Margaretha, The, II, 584
Jonge Pieter, II, 662
Josefa Segunda, The, II, 492
Josephine, The, II, 679
Jost *v.* Jost, I, 355
Judson *v.* Corcoran, I, 483
Julia, The, II, 203
Juragua Iron Co., Ltd. *v.* United States, I, 528, II, 307
J. W. Beam *v.* United States and Sioux Indians, II, 50

Kahn *v.* Garvan, II, 207
Kaiser Wilhelm II, The, II, 220
Kansas *v.* Colorado, I, 314
Kealoha *v.* Castle, I, 202, 240
Keane *v.* McDonough, I, 271
Keith *v.* Clark, I, 15
Kelley, In re (25 Fed.), I, 600,
(26 Fed.), I, 596, 597
Kelly *v.* Griffin, I, 533, 597
v. Owen, I, 645
Kennett *v.* Chambers, I, 63
Keokuk & Hamilton Bridge Co. *v.* The People (145 Ill.), I, 246
(167 Ill.), I, 246
Keokuk & Hamilton Bridge Co. *v.* Illinois, I, 246
Ker *v.* Couden, I, 174
v. Illinois, I, 582
Kern Case, I, 481
Kershaw *v.* Kelsey, II, 204, 205, 209, 210
Kidd *v.* Alabama, I, 363
Kim, The, II, 621, 622, 623, 624, 625, 634
Kingdom of Roumania *v.* Guaranty Trust Co. (244 Fed.) I, 446
(250 Fed.), I, 446
Kinter *v.* Hoch-Frequenz-Maschinen Aktien-Gesellschaft für Drahtlose Telegraphie, II, 220
Kirk *v.* Lynd, II, 238
Knight, In re, I, 628
Knight Commander, The, II 500, 587
Knott *v.* Bottany Mills, I, 396
Koenigin Luise, The, I, 398
Kohn *v.* Jacob & Josef Kohn, II, 235
Krachanake *v.* Acme Mfg. Co., II, 219
Kreuter, In re, I, 629
Krojanker, In re, I, 599
Kronprinsessan Margareta, The, II, 634
Kuhnhold *v.* Netherlands-American Steam Nav. Co., II, 220
Kumagai, In re, I, 628
Kummerow Case, ., 539, II, 66
Kunhardt & Co., Case, I, 490, 491
Kuntz *v.* Davidson County, I, 365
Kyle, Ex parte, I, 642

La Abra Silver Mining Co. *v.* United States, II, 160, 161
Lady Furness, The, I, 822
Lagueruene Case, I, 523
Lalanne and Ledour Case, I, 511
Lamachia, Ex parte, II, 254
La Mantia, Ex parte, I, 591, 600
Lamar *v.* Browne, II, 375, 802
v. Micou, II, 211
Lampitoe, In re, I, 628
Langtry, In re, I, 630
Lanham *v.* Lanham, I, 425
La Page, Ex parte, I, 603
Lapina *v.* Williams, I, 95
Larrucea, Ex parte, II, 254, 255

Lasarte Case, I, 483
La Torre, In re, I, 819
Lattimer *v.* Poteet, II, 21
Laurent Case, I, 483
Laurie Case, I, 539
Lavigne Case, I, 620
Lawrence Case, I, 583
Lazare Case, II, 152, 154
Lehto *v.* Scott, II, 255
Leichardt Case, I, 510, 511
Lem Moon Sing *v.* United States, I, 95, II, 59
Leon, In re, II, 256
Leonora, The, II, 487, 648, 665, 810
Le Roy *v.* Crowninshield, I, 387
Lespes Case, I, 557
Leucade, The, II, 497, 499
Lewis Case, I, 511
Lilla, The, II, 787, 798
Lincoln, In re, I, 599, 602
Little *v.* Barreme, II, 802
Livingston *v.* Maryland Insurance Co., II, 558
Lizardi Case, I, 644
Lobrasciano's Estate, In re, I, 814
Locke *v.* United States, II, 493
Lola, The, II, 524
London Packet, The, II, 565
Long *v.* The Tampico, I, 444, 447
Look Tin Sing, In re, I, 614
Lorenzo, The, II, 632
Louis, Le, 407, 408, 420
Louisiana, The, II, 625
Louisiana *v.* Mississippi, I, 192, 245, 246, 252, 269, 277
v. Texas, I, 380
Low Wah Suey *v.* Backus, I, 100, 645
Lucy, The, II, 631
Lucy H., The, II, 712, 769
Ludlam *v.* Ludlam, I, 617
Luigi, The, I, 443
Luis Oteiza y Cortes, In re, I, 599, 601, 604
Luke *v.* Calhoun County, I, 388
Luria *v.* United States, I, 650, 672
Lusitania, The, II, 478, 479, 485
Luther *v.* Borden, I, 63
Lützow, The, II, 563
Lynch *v.* Clarke, I, 613
Lynchehoun Case, I, 573, 574, 577
Lynden *v.* Danville, I, 618

Maal Case, I, 103, 517
McBaine *v.* Johnson, I, 246
McCall *v.* Marine Insurance Co., II, 650
Macartney *v.* Garbutt, I, 757
McCready Case, I, 684
McCready *v.* Virginia, I, 252, 358
McCreery's Lessee *v.* Somerville, I, 355
McDonald *v.* State, I, 388
Macdonnell, In re, I, 596, 600
McGovern *v.* Philadelphia & Reading Ry. Co., I, 359
McGrady Case, I, 539
McIlvaine *v.* Coxe's Lessee, I, 196, 621
McKee *v.* United States, II, 203, 205
Mackenzie *v.* Hare, I, 643
McKeown *v.* Brown, I, 366
McKinney *v.* United States, I, 604
MacLeod *v.* United States, I, 13, 544, II, 362, 363, 364, 365
McManus Case, II, 259
McNamara *v.* Henkel, I, 605
McPhun, In re, I, 599
McVeigh *v.* United States, II, 221
Magellan Pirates, The, I, 411, 417
Mager *v.* Grima, I, 352, 366
Magnet, The, II, 270
Mahler *v.* Transportation Company, I, 260, 270
Mahrousseh, The, II, 195
Maiorano *v.* Baltimore & Ohio R. R. Co., I, 359
Maipo, The (252 Fed.), I, 443, (259 Fed.), I, 443, 445
Maisonnaire *v.* Keating, II, 509, 584
Maley *v.* Shattuck, II, 452
Mallari, In re, I, 628
Manasse & Co.'s Case, I, 557
Manchester *v.* Massachusetts, I, 252, 419, 420
Manchuria, The, II, 548
Manouba, The, II, 643
Maracaibo, The, II, 632
Margaret, The, II, 634
Maria, The, II, 452, 454, 458, 538
Maria Dolores, The, II, 564
Marianna Flora, The, I, 407, II, 775
Marie Glaeser, The, II, 548, 549
Marquis de Somerueles, The, II, 527
Marryatt *v.* Wilson, II, 67
Marsicana *v.* Felice Ambrose, I, 818

Martinez Case, I, 581
Martinez *v.* Asociación de Señoras, I, 625
Martini Case, I, 550, 552, 553
Mary and Susan, The, II, 391, 392, 493, 560
Maryland *v.* West Virginia, I, 192
Mason *v.* Blaireau, I, 825
v. Intercolonial Ry., I, 446, 447
Masonic, The, I, 395
Massardo, Carbone & Co.'s Case, I, 485
Mather *v.* Cunningham, I, 428
Mathison's Case, I, 620
Matthews *v.* McStea, II, 212
Maxan Heirs, I, 644
May, R. H. *v.* Guatemala, I, 548, 550
Medea, The, I, 684
Medina Case, I, 508, 652
Meier *v.* Lee, I, 354
Melomane, The, II, 390
Memphis, The, II, 269, 682
Mena Case, II, 66
Mentor, The, II, 854
Mercer County *v.* Hackett, I, 560
Merrimack, The, II, 564
Messicano, The, I, 444
Metropolitan Life Insurance Company *v.* New Orleans, I, 363
Metzger Case, I, 361, 499, 550, II, 153
Metzger, Matter of, I, 568, 570
Meunier, Re, I, 573, 574
Michel Case, I, 529
Mighell *v.* Sultan of Johore, I, 429, 431, 446
Miliani Case, I, 621
Milligan, Ex parte, II, 388
Mineau, In re, I, 597
Minerva, The, II, 550
Minneapolis *v.* Reum, I, 633
Minnesota *v.* Wisconsin, I, 245
Minnesota Canal & Power Co. *v.* Pratt, I, 315
Minor *v.* Happersett, I, 630
Minotto *v.* Bradley, II, 228
Miramichi, The, I, 547, 565
Missouri *v.* Holland, II, 14, 19
v. Nebraska, I, 247
Mitchel *v.* United States, I, 236, 239
Mitchell, In re, I, 596
Mitchell *v.* United States, II, 203
Mohan Singh, In re, I, 628
Montault *v.* United States, I, 201, II, 50
Montgomery *v.* United States, II, 205, 210, 213
Montijo, The, I, 539, 542
More *v.* Steinbach, I, 200, 201, 202
Morgan Steamship Company *v.* Louisiana Board of Health, I, 380
Morrison Case, I, 484
Mortensen *v.* Peters, I, 262, 389
Mortimer *v.* New York Elevated R. R. Co., I, 203
Morton Claim, Maria A., I, 620
Moses, In re, I, 633
Mozumbar, In re, I, 628
Mudarri, In re, I, 628
Muir, In re, I, 443
Muir *v.* Chatfield, I, 445
Mukden, The, II, 557
Munns *v.* Dupont, I, 600
Munro *v.* Merchant, I, 613
Murray *v.* Schooner Charming Betsy, I, 678, II, 551, 558, 704
Muscat Dhows Case, II, 71
Mutual Assurance Society *v.* Watts's Ex'r., I, 236

Najour, In re, I, 628
Nancy, The (Bee), II, 774
(27 Ct. Cl.), I, 5, II, 459
Nannanga, In re, I, 629
Nash *v.* Lambert, II, 223
Nassau, The, II, 818
Naturalization of Aliens in Service of Army or Navy of United States, In re, I, 672
Naturalization of Subjects of Germany, In re, I, 629
Nebraska *v.* Iowa, I, 246, 247
Neck, The, I, 398
Neely *v.* Henkel, I, 592
Neilson *v.* Rhine Shipping Company, I, 399
Neptunus, The, II, 673
Nereide, The, I, 13, II, 169, 389, 390, 402, 403, 433, 455, 456, 459, 461, 514
Nereyda, La, II, 774
Neustra Señora de la Caridad, The, I, 417
Neutralitet, The, II, 632

[References are to pages]

Newbattle, The, I, 439
Newcomb *v.* Newcomb, I, 670
Newfoundland, The, II, 679, 815
Newman, In re, I, 592, 597
New Orleans *v.* Abbagnato, I, 520
v. Steamship Co. II, 363, 369, 378
v. Stempel, I, 363
v. United States, I, 203
New York, The, I, 399, 400
New York Central Railroad *v.* Miller, I, 362
New York Life Ins Co. *v.* Statham, II, 211
Nicola, In re, I, 630, 645
Ninfa, La, II, 157
Nishimura Ekiu *v.* United States, I, 94
Nitchencoff's Case, I, 430
Noordam (No. 2), The, II, 665
North and South American Construction Company Case, I, 552
North Atlantic Coast Fisheries Arbitration, I, 9, 108, 255, 256, 257, 262, 264, 265, 266, 275, II, 2, 34, 51, 66, 67, 68, 123, 124, 133, 154
Northeastern Boundary Dispute, I, 242, 243, II, 99, 116, 117, 118, 158
North German Lloyd S. S. Co. *v.* Hedden, II, 75
Norton Case, I, 483
Nuestra Señora de Regla (17 Wall.), I, 399, II, 679
(108 U. S.), II, 818
Nueva Anna and Liebre, The, I, 63, 77, II, 798

Oakes *v.* United States (30 Ct. Cl.), II, 818
(174 U. S.), II, 238, 509, 818
Oberlander and Messenger Case, I, 505
Ocean, The, II, 566
Ochoa *v.* Hernandez, II, 364, 368
Odessa, The, II, 565
O'Dwyer Case, I, 558
Oetjen *v.* Central Leather Co., I, 63, 272, 393
Oldhamia, The, II, 453, 599
Oldtown *v.* Bangor, I, 617
Olinde Rodriguez, The, II, 650, 656
Oliva Case, I, 103, 551
Olivera *v.* Union Insurance Co., II, 683
Olsen *v.* Smith, II, 78
Omnibus, The, II, 552
Ophelia, The, II, 541, 542
Opinion of Justices (7 Mass.), I, 365
(8 N. H.), I, 365
O'Reilly de Camara *v.* Brooke, I, 236
Orel, The, II, 541
Orinoco Steamship Company Case (Ralston's Report), I, 553, II, 123, 159
(Scott, Hague Ct. Rep.), I, 552, II, 30, 123, 134, 154, 155, 159, 160, 168
Ornelas *v.* Ruiz, I, 573, 574, 577, 601, 604
Orozembo, The, II, 635, 638
Orpen, In re, I, 586, 587
Orr *v.* Hodgson, II, 15
Ortega *v.* Lara, I, 202, 203
Ortiz, Ex parte, II, 50
Ouachita Cotton, The, II, 205, 688
Ozama Bridge Claim, *v.* The Dominican Republic I, 550

Packet De Bilboa, The, II, 564
Padrón Case, I, 539, II, 66
Pagano *v.* Cerri, I, 814, 817, 818
Pampa, The, I, 439
Panama, The, II, 403, 445, 517
Panama Railroad Co. *v.* Bosse, I, 202, 236
Panariellos, The, II, 203, 204
Papayanni *v.* Russian Steam Navigation Co., I, 386, 451, 457
Paquet Case, I, 103
Paquete Habana, The (175 U. S.), I, 6, 13, II, 524, 527, 801, 803
(189 U. S.), II, 802
Parchim, The, II, 565
Parkinson *v.* Potter, I, 750
Parlement Belge, The (L. R. 5 P. D.), I, 443, 444, 445, 446
(4 P. D.), I, 436
Parrott Case, I, 508, 555
Parrott and Wilson Case, I, 483
Passenger Cases, The, I, 95, 97
Patsone *v.* Pennsylvania, I, 357, 358, 359

Patterson *v.* Bark Eudora, I, 395, 822
Pearcy *v.* Stranahan, I, 272, 389
Pearl, The
(19 Fed. Cas.), II, 607, 614, 615
(5 Wall.), II, 607
Pearson *v.* Parson, II, 749
Pedro, The, II, 195, 517, 518, 548, 553, 815
Peggy, The, I, 510
Pelican, The, I, 63, 272
Pelletier Case, II, 152, 154, 159, 161
People *v.* Compagnie Générale Transatlantique, I, 97
v. Dennison, I, 446
v. McLeod
(1 Hill, N. Y.), I, 388
(25 Wend.), I, 388, 434
(26 Wend.), I, 434
Perez Case, I, 481
Perkins *v.* Rogers, II, 216
Pesaro, The, I, 443
Peterhoff, The
(Blatchf. Prize Cases), II, 269
(5 Wall.), II, 585, 611, 612, 615, 634, 667, 679, 680
Petersen *v.* Iowa, I, 367
Peterson, In re Estate of, I, 367
Petitt *v.* Walshe, I, 594, 596, 599
Pflaum Case, I, 499, 506
Pfleiger, In re, I, 629
Phillips *v.* Moore, I, 355
Phoenix, The (5 Ch. Rob.), II, 563
(Spinks, Prize Cas.), II, 517
Piaza, In re, I, 600
Pierce Case, I, 505
Pierce *v.* Creecy, I, 590
Pillow *v.* Brown, II, 223
Pious Fund Case, I, 9, 230, II, 30, 122, 133, 154, 155, 157
Pitt, The, II, 170
Pizarro, The (19 Fed. Cas.), I, 443
(2 Wheat.), II, 453, 514, 813, 815
Platt, Ex parte, II, 255
Plettenberg, Holthaus & Co. *v.* I. J. Kalmon & Co., II, 216, 220
Poggioli Case, I, 514, 621
Pollock, In re, I, 629
Polzeath, The, II, 550, 567
Ponce *v.* Roman Catholic Church, I, 236, 237
Pond Case, I, 557
Poole *v.* Fleeger, I, 272
Porter *v.* Freudenberg, II, 216, 217, 219, 221, 222, 368
Posselt *v.* D'Espard, II, 218
Pouren Case, I, 573, 601, 607
Powell *v.* United States, I, 597, 598
Pradel's Case, I, 497, 506
Prats Case, I, 468, 541
Prevost *v.* Greneaux, II, 50
Price Case (No 6), II, 155
Prigg *v.* Penna, I, 473
Prize Cases, The, I, 79, II, 198, 200, 650, 655, 683
Protector, The, II, 201, 823
Proton, The, II, 549, 807
Puget's Sound Agricultural Company's Case, II, 66
Pullman's Palace Car Co. *v.* Pennsylvania, I, 362
Putnam *v.* Johnson, II, 560

Queen *v.* Chesapeake, II, 737

Rabasse, Succession of, I, 818
Ragusz *v.* Les Commissionaires du Havre de Montreal, II, 217
Rainey *v.* United States, II, 59
Rallos, In re, I, 628
Rapid, The, II, 203, 204, 205
Rebecca, Case of the, I, 399, 492
Regina *v.* Anderson, I, 424
v. Cunningham, I, 260
v. Keyn, I, 241, 272, 388, 389, 405, 420
Reichenburg, In re, I, 634
Republic of Bolivia Exploration Syndicate, In re, I, 750
Republic of El Salvador *v.* Republic of Nicaragua, II, 5
Republic of Peru *v.* Dreyfus, I, 63, 272
v. Peruvian Guano Company, I, 63, 272
République Française *v.* Schultz, II, 81
Respublica *v.* De Longchamps, I, 739, 740
Revesno Case, I, 539, 541
Rhode Island *v.* Massachusetts
(4 How.), I, 192
(12 Pet.), II, 113
Rice *v.* Ames, I, 594, 597, 598
Rindjani, The, I, 398

Ringende Jacob, The, II, 631, 632
Rio Arriba Land and Cattle Company *v.* United States, I, 236
Rionda, In re, I, 644
Rita, The, II, 397
Rixner, Succession of, I, 366
Robert's Case, I, 529
Robinson *v.* Continental Insurance Co., II, 221
v. Minor, I, 272
Rocca *v.* Thompson I, 812, 814, 815, II, 71
Rodriguez, In re, I, 628
Romano, Ex parte, II, 254
Romeo, The, II, 815
Ronchi, Ex parte, I, 603
Ropes *v.* Clinch, II, 59
Rose *v.* Himely, I, 63, 116, 387, 419
v. Mexico, II, 259
Roseric, The, I, 443, 444
Rosina, La, II, 529
Ross, In re, I, 449, 454, 462, 480, II, 70, 71, 80
Roth *v.* Roth, I, 425
Rothbart *v.* Herzfeld, II, 220
Rothersand, The, II, 552
Roumanian, The, II, 547, 570
Rowe, In re, I, 583
Roy *v.* Owen, I, 747
Ruden Case, I, 485, 498, 508
Rudloff Case, I, 551, 553
Rudovitz Case, I, 414, 573, 574, 575, 576, 577
Ruiz Case, I, 652

Sadar Bhagwab Singh, In re, I, 628
St. Croix, The, II, 603
St. Joze Indiano, The, II, 564
St. Lawrence, The, II, 815
St. Louis *v.* Rutz, I, 175, 249
St. Tudno, The, II, 559, 567
Saito, In re, I, 628
Sally, The, II, 564
Sally (Hayes Master), The, II, 63
Sally Magee, The, II, 563, 564
Salomoni, The, I, 398
Salvador Commercial Co's Case, I, 489, 550
Sambiaggio Case, I, 539, 540, II, 63, 66
Samuel, The, II, 814
Sandberg *v.* McDonald, I, 399, 425
Sanderson *v.* Morgan, II, 216
San José, The, II, 625
San José Indiano, The II, 562, 563
Santa Clara Estates Company Case, I, 544
Santa Maria, The, II, 801
Santiago *v.* Nogueras, II, 363
Santissima Trinidad, The (1 Brockenbrough), II, 760, 774
(7 Wheat.), I, 417, 436, 662, II, 718, 737, 738, 749, 774, 800
Santo Domingo, The, II, 496, 819
Sarah Christina, The, II, 631
Sapphire, The, I, 465
Sasportas *v.* De La Motta, I, 617
Saurez, Re, I, 750
Savarkar Case, I, 581
Sawyer *v.* Maine F. & Mar. Ins. Co., II, 797
Saxlehner *v.* Eisner Mendelson Co., I. 370
Schaffenius *v.* Goldberg, II, 217, 346
Scharrenberg *v.* Dollar S. S. Co., I, 431
Schlippenbach, In re, I, 586, 587
Schneider, In re, I, 634
Scholefield & Taylor *v.* Eichelberger, II, 203, 209, 210
Schooner Adeline, The, II, 508, 803, 812, 814
Schooner Endeavor, The, II, 192
Schooner Exchange *v.* McFaddon, I, 322, 375, 386, 392, 428, 431, 432, 437, 438, 443, 445, 447, II, 847
Schooner Jane *v.* United States, II, 403
Schooner Möwe, The, II, 221
Schooner Nancy, The, I, 5
Schorer, Ex parte (195 Fed.), I, 596
(197 Fed.), I, 602
Schreck Case, I, 481
Schultz Case, I, 539
Schultze *v.* Schultze, I, 355, II, 67
Science, The, II, 612
Scott Case, I, 474
Sea Nymph, The, II, 459
Sea Witch, The, II, 679
Sechs Geschwistern, The, II, 552
Secretary of State *v.* Charlesworth, Pilling & Co., I, 429
Secretary of State in Council of India *v.* Kamachee Boye Sahaba, II, 802
Selwyn's Case, I, 551, 553

[References are to pages]

Semmes *v.* Hartford Insurance Co., II, 211, 220
Serralles' Succession *v.* Esbri, I, 209
Servas' Estate, In re, I, 816, 817
Shanks *v.* Dupont, I, 622, 662
Shenandoah, The, I, 414
Ship Amazon *v.* United States, II, 452
Ship Ann Green and Cargo, The, II, 564
Ship Resolution, The, I, 511, II, 506, 507
Ship Rose *v.* United States, The, I, 12, II, 452
Shively *v.* Bowlby, I, 260
Short Staple *v.* United States, I, 399
Shreck *v.* Mexico, No. 768, I, 620
Silva Case, I, 539
Simpson *v.* State, I, 422
Sir William Peel, The (Moore Arb.), I, 483
(5 Wall.), II, 787, 815
Slater *v.* Mason, I, 355
Slocum Case, I, 483
Sloop Ralph, The, II, 630
Smith Case (Charles B.), I, 492, 509
Smith *v.* Government of Canal Zone, I, 585
v. United States, I, 236
Smith's Case (1862), I, 413
Society for the Propagation of the Gospel *v.* New Haven, I, 355, II, 15, 93
Soglasie, The, II, 552
Solveig, The, II, 550
Soulard *v.* United States, I, 237
South African Republic *v.* Compagnie Franco-Belge, I, 446
Southern Pacific Co. *v.* Kentucky, I, 363
Speidel *v.* N. Barstow Co., II, 220
Spiegelberg *v.* Garvan, II, 235
Spratt *v.* Spratt, I, 627, 649
Springbok, The (Brit. and Am. Com.), II, 603, 604, 605
(Blatchf. Prize Cas.), II, 612
(5 Wall.), II, 612, 613, 614, 615, 616, 680
Sprung *v.* Morton, I, 630, 645
Standish Case, I, 529
Star, The, II, 507, 818
State *v.* Adams, I, 616
v. Ah Chew, I, 628
State *v.* Boyd, I, 642
v. Fenn, I, 425
v. Hall, I, 422
v. Neibekier, I, 388
v. Shattuck, I, 425
Steamship Appam, The (*see* also APPAM, THE), I, 13, II, 732, 733, 734, 735, 736, 737, 775, 800, 819
Steer, In re, II, 568
Stephen Hart, The, II, 269, 607, 608, 609, 680
Stephens *v.* Brown, II, 216
Sternaman, Ex parte, I, 598
Sternaman *v.* Peck, I, 591
Stetson *v.* United States, I, 260, 405
Stevenson Case, I, 481, 620, 621, 644
Stewart Case, I, 539
Stigstad, The, II, 665
Stixrud's Estate, In re, I, 367
Strathearn S. S. Co. *v.* Dillon, I, 399
Strother *v.* Lucas, I, 202, 236, 238
Strousberg *v.* Republic of Costa Rica, I, 446
Stumpf *v.* A. Schreiber Brewing Co., II, 213, 216, 218, 220
Stupp, In re (11 Blatchf.), I, 592, 606
(12 Blatchf.), I, 602, 604, 606
Sturm *v.* Flemming, II, 216
Success, The, II, 549
Sullivan *v.* Kidd, II, 64, 71
Summertime *v.* Local Board, II, 254
Susan and Mary, The, II, 564
Sutton *v.* Sutton, II, 93
Swayne & Hoyt *v.* Everett, I, 460
Sweden *v.* Norway, I, 252
Swift *v.* Phila. & R. R. Co., I, 386

Tagliaferro Case, I, 508
Talbot *v.* Janson, II, 389, 774, 775
Tampa, The, I, 443
Tang Tun *v.* Edsell, I, 100
Tarquin, The, I, 213
Tartaglio, In re, I, 819
Taylor, In re, I, 591
Taylor *v.* Albion Lumber Co., II, 220
v. Barclay, I, 63, 272
v. Best, I, 753
v. Morton, II, 59
Techt *v.* Hughes, I, 644, II, 94
Tellefsen *v.* Fee, I, 398
Teresita, The, II, 679, 801
Terlinden *v.* Ames, I, 568, 604, 605, II, 58, 86

Terry and Angus Case, I, 529
Texas *v.* White, I, 15
Thingvalla Line *v.* United States, II, 74
Thirty Hogsheads of Sugar *v.* Boyle, II, 363, 563, 803
Thomas Gibbons, The, II, 391, 392
Thompson, The, II, 801
Thorington *v.* Smith, I, 79
Three Friends, The, I, 63, 77, 81, 82, 541, II, 194, 783
Thurn and Taxis, Princess, *v.* Moffitt, II, 217
Tiaco *v.* Forbes, I, 100
Tillet Case, I, 103, 104
Tingley *v.* Müller, II, 213
Tivnan, In re, I, 411, 413
Tobin *v.* Walkinshaw, I, 624
Toscano, Ex parte, II, 745
Trippler Case, I, 529
Triquet et al. *v.* Bath, I, 750
Troop, The, I, 822
Truax *v.* Raich, I, 358
Trumbull Case, I, 558
Tucker *v.* Alexandroff, I, 432, 436, 441, 442, 447, 822, 823, II, 67, 71
Turnbull Case, I, 553
Turner *v.* Williams, I, 95, 100
Twende Brodre, The, II, 605

Ubeda *v.* Zialcita, II, 70
Udny *v.* Udny, II, 560
Underhill Case (Venezuela), I, 523
(Mexico), I, 555
Underhill *v.* Hernandez, I, 393
Union Refrigerator Transit Co. *v.* Kentucky, I, 362
Union Tank Line Co. *v.* Wright, I, 362
United Shoe Machinery Co. *v.* Duplessis Shoe Machinery Co., II, 59
United States, The, II, 665
United States *v.* Aakervik, I, 643
v. American Sugar Ref. Co., I, 368, II, 54
v. Ames, II, 798
v. Arredondo, I, 236, 239, 240, II, 47, 50, 63
v. Baker, I, 413
v. Balsara, I, 628
v. Bell, II, 254
v. Benner, I, 750
v. Bennett, I, 362
United States *v.* Bragg, I, 634
v. H. N. Bull, I, 393
v. A Canoe, II, 204
v. Cantini (199 Fed.), I, 634
(212 Fed.), I, 634
v. Chakraberty, II, 723
v. Chaves, I, 236
v. Clarke
(8 Pet.), I, 228, 236, 240
(9 Pet.), I, 239
v. Cohen, I, 644
v. D'Auterive, I, 201
v. Davis, I, 422
v. Diekelman, I, 476, II, 387, 449, 688
v. Eaton, I, 788
v. Eighteen Packages of Dental Instruments, II, 29
v. Elder, I, 240
v. Finley, II, 254
v. Four Packages of Cut Diamonds, II, 29
v. Fuld Store Company, II, 19
v. Ginsberg, I, 634
v. Gordon, I, 617
v. Grand Rapids and I. R. Co., II, 50
v. Greene, I, 590
v. Griminger, I, 634
v. Grossmayer, II, 213
v. Gue Lim, Mrs. II, 59
v. Guillem (2 How.), II, 672
(11 How.), II, 566, 680
v. Guinet, II, 711
v. Hamburg-American Co., II, 190
v. Hand, I, 740
v. Hayward, I, 176
v. Heirs of Clarke, I, 236, 239
v. Henry C. Homeyer, The II, 204
v. Hertz, II, 704, 707
v. Heyburn, II, 254
v. Holmes, I, 411, 412
v. Howe, I, 638, 672, 675
v. Jorgenson, I, 634
v. Kamm, I, 629
v. Kazinski, Louis, II, 704, 758
v. Kelly, I, 823
v. Kingsley, I, 239
v. Kinkead, II, 254
v. Klintock, I, 411, 412, 413
v. La Compagnie Française des Cables Télégraphiques, I, 375

United States *v.* Lane, II, 204, 205
v. La Vengeance, II, 242
v. Lee Yen Tai, II, 59, 60
v. Local Exemption Board, II, 255
v. Lynde, I, 272, II, 58
v. McDonald, II, 348
v. Meyer, I, 629
v. Mills's Heirs, I, 239
v. Minges, I, 823
v. Mitchell, II, 254
v. Morena, I, 630
v. Moreno, I, 236
v. Nagler, II, 299
v. Ness, I, 623, 631
v. Nord Deutscher Lloyd, I, 432
v. O'Keefe, I, 546
v. Ortega, I, 739
v. Pacific Railroad, I, 79
v. Palmer, I, 63, 77, 271, 411
v. Peralta, I, 240
v. Percheman, I, 236, II, 58, 71, 237, 238
v. Peters (5 Cranch), II, 797
(3 Dall.), II, 799
v. Pirates, I, 411
v. Power's Heirs, I, 202
v. Prioleau, I, 446
v. Quigley, II, 209
v. Ram Chandra, II, 723
v. Rauscher, I, 392, 568, 582, 583
v. Ravara, I, 807
v. Repentigny, I, 196, 241
v. Reynes, I, 201, 272, II, 50, 58
v. Rice, I, 175, 176, II, 363
v. Rio Grande Dam & Irrigation Co. I, 316
v. Rockefeller, II, 18
v. Rockteschell, I, 634
v. Rodgers (144 Fed.), I, 647
(185 Fed.), I, 647
(150 U. S.), I, 268, 405, 424
v. Samples, II, 18
v. Sander, II, 723
v. Santa Fé, I, 240
v. Selkirk, II, 18
v. Seuffert Bros. Co., II, 70
v. Shanahan, I, 634
v. Sheldon, II, 204
v. Smith, I, 410, 412
v. Swelgin, I, 650
v. Tauscher, II, 723
United States *v.* Texas (143 U. S.), I, 272 (162 U. S.), I, 242
v. Thierichens, I, 392
v. Thompson, II, 14, 18
v. Trumbull (48 Fed. 94), I, 791, 808
(48 Fed. 99), 783
v. Uhl, I, 633
v. Villato, I, 626
v. Western Union Telegraph Co., I, 376
v. Williams, I, 645
v. Winans, II, 70
v. Wong Kim Ark, I, 612, 613, 614, 615, 616, 618
v. Wursterbarth, I, 650
v. Yorba, I, 272
v. Zucker, I, 100
United States Cable Co. *v.* Anglo-American Telegraph Co, I, 260
University *v.* Finch, II, 212, 213, 215
Upton Case, I, 527
Urtetiqui *v.* D'Arbel, I, 697

Van Bokkelen Case, I, 391, 497, 499, 502, II, 57, 67
Van Dissel Case, I, 539
Van Voorhis *v.* Brintnall, I, 425
Vavasseur *v.* Krupp, I, 447, 448
Venezuelan Steam Transportation Company Case, I, 539
Venus, The (8 Cranch), II, 558, 559, 560, 566
(4 Ch. Rob.), II, 528, 529
Vesseron Case, I, 529, 530
Vilas *v.* Manila, I, 202
Virginia, The, II, 551
Virginia *v.* Tennessee, I, 192
v. West Virginia, I, 207
Volant, The, II, 612
Volkmar Case, I, 527
Von Hellfeld *v.* Russian Government, I, 446
Von Thorovitch *v.* Franz Joseph Beneficial Association, I, 796, 801
Vrow Anna Catherina, The, II, 563
Vrow Margaretha, The, II, 564, 565
Vujic *v.* Youngstown Sheet and Tool Co., I, 819
Wadge, In re, I, 600
Wadsworth *v.* Boysen, II, 59

Waldes *v.* Basch, I, 63
Walker's Case, 1, 558
Walker's Executors *v.* United States, II, 204, 210
Walsh Case, I, 539
Ward *v.* Smith, II, 223
Ware *v.* Hylton, II, 5, 237, 242
v. Wisner, I, 618
Washington, The, I, 260
Washington *v.* Oregon
(211 U. S.), I, 246
(214 U. S.), I, 246
Wassilieff Case, I, 573
Watts, Watts & Co. *v.* Unione Austriaca &c., II, 220, 222
Webb, Ex parte, II, 59
Webster Case, I, 529
Weil Case, (Benj.), II, 160, 161
(Lewis), I, 529, II, 259
Weisz, In re, I, 629
Wells *v.* Williams, II, 217
West Rand Central Gold Mining Co. *v.* The King, I, 7, 223, 231
Wheelright & Depeyster, II, 797
Whiteside *v.* Norton, I, 247
Whitney *v.* Robertson
(124, U. S.), II, 59, 74
(21 Fed.), II, 74
v. United States, I, 240
Wiborg *v.* United States, II, 722, 782, 783
Wilbraham *v.* Ludlow, II, 560
Wilcox *v.* Henry, I, 236, II, 216, 218, 237
Wildberger, In re, I, 671
Wildenhus's Case, I, 393, 396, 821
William, The, II, 604, 605
Williams *v.* Armoy II, 799
v. Bruffy, I, 79, 242
v. Paine, II, 212, 213
v. Suffolk Ins. Co., I, 271, 272
v. Venezuela, I, 192
Williamson *v.* Osenton, II, 560
Wilson, Ex parte, I, 581, 582
Wilson Case, (Joseph N.), I, 510
(Joseph O.), I, 527, 620
Wilson *v.* Blanco, I, 745
v. McNamee, I, 406, 423
v. Marryat, II, 557
v. United States, I, 561
Winslow Case, I, 583
Wipperman Case, I, 512
Wong Wai *v.* Williamson, I, 380
Wong Wing *v.* United States, I, 100
Woodruff Case, I, 552, 553
Wright *v.* Henkel, I, 570, 590, 596
Wulff *v.* Manuel, I, 642
Wunderle *v.* Wunderle, I, 355
Wyman, In re, I, 814, II, 77
Wyman Case, I, 539

Yamashita, In re, I, 628, 649
Yordi, Ex parte, I, 598
Yordi *v.* Nolte, I, 598
Young, In re, I, 628
Young *v.* Peck, I, 647
v. United States, I, 479, II, 206, 375
Young Jacob and Johanna, The, II, 524
Young, Smith & Co. Case, II, 155
Yunghauss, In re (210 Fed.), I, 630
(218 Fed.), I, 630

Zakonaite *v.* Wolf, I, 100
Zambrano's Case, I, 498
Zamora, The ([1916] P.), II, 805, 807
([1916] 2 A. C.), I, 9, II, 264, 269, 270, 549, 803, 807
Zaralla, The, II, 799
Zartarian *v.* Billings, I, 646, 647
Zee Star, The, II, 499
Zentner, Ex parte, I, 595, 598
Zinc Corporation, Lim. *v.* Hirsch, II, 211

LIST OF ABBREVIATIONS

TOGETHER WITH DESCRIPTIONS OF THE PRINCIPAL COLLECTIONS OF DOCUMENTS CITED IN ABBREVIATED FORM

This list does not embrace titles which are sufficiently described when cited in the foot-notes. It is not a bibliography of the several works to which reference is made in the text and foot-notes. Nor does it purport to explain the well known abbreviations of the reports of American and British cases.

Am.	American.
Am. Hist. Rev.	American Historical Review, 1895–
Am. J.	American Journal of International Law. New York, 1907–
Am. State Pap. For. Rel.	American State Papers, Class I, Foreign Relations. Documents Legislative and Executive of the Congress of the United States, 1789–1828. 6 folio vols. Washington, 1832–1859.
American White Book, European War.	United States, Department of State: European War. Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, and Commerce. 4 White Books, May 27, 1915–May 18, 1918.
Am. Law Reg.	See Univ. Penn. Law Rev.
Am. Law Rev.	American Law Review. Boston, 1866–1882, St. Louis, 1883–
Am. Pol. Sc. Rev.	American Political Science Review. Baltimore, 1907–
Alvarez.	Alvarez, Alejandro: *Le droit international américain.* Paris, 1910.
Annuaire.	*Annuaire de l'Institut de Droit International,* 1877–
Arch. Dip.	*Archives Diplomatiques.* Founded in 1861. Three series. Paris, 1861–1913.
Baker.	Sir Sherston Baker: First Steps in International Law. Boston, 1899.
Bluntschli.	Johann Kaspar Bluntschli: *Le Droit International Codifié.* Translated from the German into French by C. Lardy, and preceded by a biography of the author by Alph. Rivier. Fifth edition. Paris, 1895.
Bonfils-Fauchille.	Henry Bonfils: *Manuel de Droit International Public.* Seventh edition by Paul Fauchille. Paris, 1914.

Borchard, Diplomatic Protection.	Edwin M. Borchard: The Diplomatic Protection of Citizens Abroad or the Law of International Claims. New York, 1915.
Brit. and For. St. Pap.	British and Foreign State Papers. Issued by the Foreign Office of Great Britain. London.
Calvo.	Charles Calvo: *Le Droit International théorique et pratique.* Fifth edition. 6 vols. Paris, 1896.
Catalogue of Treaties.	United States, Department of State: Catalogue of Treaties (1814–1914). Confidential document. Washington, 1919.
Cd. or Cmd.	Great Britain, Parliament. Papers issued by command.
Charles' Treaties.	Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other powers: Supplement, 1913, to Senate Document No. 357, Sixty-first Congress, Second Session. Compiled by Garfield Charles. Senate Document No. 1063, Sixty-second Congress, Third Session. Washington, 1913.
de Clercq.	*Recueil des Traités de la France.* Published under the auspices of the Ministry of Foreign Affairs. Compiled by A. J. H. de Clercq and Jules de Clercq. 1864–1907.
	Journal du Droit International Privé et de la Jurisprudence Comparée. Founded in 1874, and published by Édouard Clunet, and from 1915 (42d year) entitled *Journal du Droit International.* Paris.
Clunet, Tables Générales.	*Tables Générales du Journal du Droit International Privé.* Augmented by several reports and numerous documents concerning international law, 1874–1904. 4 vols. Paris, 1905–1906.
Pitt Cobbett, Cases.	Pitt Cobbett: Cases and Opinions on International Law. Third edition, 2 vols. London, 1909–1913.
Collezione Celerifera.	*Collezione Celerifera delle Leggi, Decreti, Istruzione e Circolari.* Editor: Domenico Scacchi. Rome, 1915–
Cong. Record.	United States: Congressional Record.
Crandall, Treaties.	Samuel B. Crandall: Treaties, Their Making and Enforcement. Second edition. Washington, 1916.
"Cyc."	Cyclopedia of Law and Procedure. Editor-in-Chief, William Mack. 40 vols. New York, 1901–1912.
Davis.	George B. Davis: Elements of International Law. Third edition, New York, 1908.

	Fourth edition edited and revised by Gordon E. Sherman. New York, 1916.
Despagnet.	Frantz Despagnet: *Cours de Droit International Public.* Fourth edition revised and augmented by Ch. de Boeck. Paris, 1910.
Dana's Wheaton.	See Wheaton.
Dip. Cor.	Diplomatic Correspondence of the United States, 1783–1789. 3 vols. Washington, 1837. or, Diplomatic Correspondence of the United States, published by the Department of State for the years 1861–1868. No volume was published for the year 1869.
Evans, Int. Law Cases.	Lawrence B. Evans: Leading Cases on International Law. Chicago, 1917.
Fenwick.	Charles G. Fenwick: The Neutrality Laws of the United States. Washington, 1913.
Field.	David Dudley Field: Outlines of an International Code. Second edition. New York, 1876.
Fiore.	Pasquale Fiore: *Nouveau Droit International Public.* Second edition. Translated into French by Chas. Antoine. 3 vols. Paris, 1885–1886.
Fiore, Code.	Pasquale Fiore: International Law Codified and Its Legal Sanction. English translation from the fifth Italian edition with an introduction by Edwin M. Borchard. New York, 1918.
For. Rel.	United States, Department of State. Papers Relating to the Foreign Relations of the United States, 1870– (The volume for the year 1913 was the latest one published during 1920.)
Foulke.	Roland R. Foulke: International Law. 2 vols. Philadelphia, 1920.
Garner, Int. Law and The World War.	James W. Garner: International Law and The World War. 2 vols. New York and London, 1920.
Hall.	William Edward Hall: International Law. Seventh edition edited by A. Pearce Higgins. Oxford, 1917.
Halleck.	Henry Wager Halleck: International Law or Rules Regulating the Intercourse of States in Peace and War. Third edition by Sir G. Sherston Baker. London, 1893. Fourth edition by Sir G. Sherston Baker, assisted by M. N. Drucquer. 2 vols. London, 1908.
Harv. Law Rev.	Harvard Law Review. Cambridge (Mass.), 1887–
Heffter.	August Wilhelm Heffter: *Das Europäische*

	Völkerrecht der Gegenwart. Eighth edition by F. H. Geffcken. Berlin, 1888.
Hershey.	Amos S. Hershey: The Essentials of International Law. New York, 1912.
Hertslet's Commercial Treaties	A collection of the Treaties and Conventions, and Reciprocal Regulations, subsisting between Great Britain and Foreign Powers. London, 1820– The original compiler was Lewis Hertslet. The present editors and compilers are Edward Parkes and W. L. Berrow.
Hertslet's Map of Europe by Treaty.	The Map of Europe by Treaty. Showing the various political and territorial changes which have taken place since the general peace of 1814. Compiler, Sir Edward Hertslet. 4 vols. London, 1875–1891.
Higgins, Hague Peace Conferences.	A. Pearce Higgins: The Hague Peace Conferences and other international conferences concerning the laws and usages of war; texts of conventions with commentaries. Cambridge (Eng.), 1909.
Holland, Studies.	Thomas Erskine Holland: Studies in International Law. Oxford, 1898.
Holland, War and Neutrality.	Same author: Letters to *The Times* upon War and Neutrality. Second edition. London, 1914 (with a Supplement to 1916. London, 1917).
Holls.	Frederick William Holls: The Peace Conference at the Hague. New York, 1900.
Hurst and Bray's Russian and Japanese Prize Cases.	Russian and Japanese Prize Cases. (Being a collection of translations and summaries of the principal cases decided by the Russian and Japanese Prize Courts arising out of the Russo-Japanese War, 1904–1905.) Editors: C. J. B. Hurst and F E. Bray. 2 vols. London. 1912–1913.
Ills. Law Rev.	Illinois Law Review. Chicago, 1906–
Int.	International.
Int. Law Assoc. Reports.	International Law Association (The Association for the Reform and Codification of the Law of Nations), Conferences, 1873–
Jacomet.	Robert Jacomet: *Les Lois de la Guerre Continentale.* Paris, 1913.
Jour. Comp. Leg.	Journal of Comparative Legislation and International Law (prior to 1918 entitled Journal of the Society of Comparative Legislation). London. First Series, 1896–1897; "New Series", 1899–1918; Third Series, 1919–
Kent.	James Kent: Commentary on International Law. Second edition by J. T. Abdy. Cambridge (Eng.), 1878. Cited as Abdy's Kent.

Kleen.	Richard Kleen: *Lois et Usages de la Neutralité d'après le Droit International, Conventionnel et Coutumier des États civilisés.* 2 vols. Paris, 1898–1900.
Lawrence.	Thomas J. Lawrence: Principles of International Law. Third edition, Boston, 1900. Fourth edition, London, 1911. Sixth edition, Boston, 1915.
Lawrence's Wheaton.	See Wheaton.
Law Quar. Rev.	The Law Quarterly Review. London. 1885–
Liszt.	Franz von Liszt: *Das Völkerrecht systematisch dargestellt.* Ninth edition, Berlin, 1913. Eleventh edition, Berlin, 1920.
Lorimer.	James Lorimer: The Institutes of the Law of Nations. 2 vols. Edinburgh, 1883–1884.
Magoon, Reports.	Charles E. Magoon: Reports on the Law of Civil Government under Military Occupation. Washington, 1902.
Maine.	Sir Henry Sumner Maine: International Law. New York, 1888.
Malloy's Treaties.	Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1776–1909). Compiled by William M. Malloy, under Resolution of the Senate, January 18, 1909. Senate Document No. 357, Sixty-first Congress, Second Session. 2 vols., 1910.
MS. Desp.	United States, Department of State. Manuscript Despatches.
MS. Dom. Let.	United States, Department of State. Manuscript Domestic Letters.
MS. Inst.	United States, Department of State. Manuscript Instructions.
MS. Misc. Let.	United States, Department of State. Manuscript Miscellaneous Letters.
Martens, *Recueil.*	See *Rec.*
Martens.	F. de Martens: *Traité de Droit International.* Translated from the Russian into French by Alfred Léo. 3 vols. Paris, 1883–1887.
Martin and Baker.	Harold H. Martin and Joseph R. Baker: Laws of Maritime Warfare Affecting Rights and Duties of Belligerents as Existing August 1, 1914. Department of State. Washington, 1918.
Mérignhac.	Alexandre Mérignhac: *Traité de Droit Public International.* 3 vols. Paris, 1905–1912.
Mich. Law Rev.	Michigan Law Review. Ann Arbor, 1902–
Minn. Law Rev.	Minnesota Law Review. Minneapolis, 1917–
Moore, Arbitrations.	John Bassett Moore: History and Digest of the International Arbitrations to which the

	United States has been a party, together with appendices containing the treaties relating to such arbitrations, and historical and legal notes on other international arbitrations ancient and modern, and on the domestic commissions of the United States for the adjustment of international claims. House Misc. Doc. No. 212, Fifty-third Congress, Second Session. 6 vols. Washington, 1898.
Moore, Dig.	John Bassett Moore: Digest of International Law as embodied in diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts and the writings of jurists, and especially in documents, published and unpublished, issued by Presidents and Secretaries of State of the United States, the opinions of the Attorneys-General, and the decisions of courts, Federal and State. House Document No. 551, Fifty-sixth Congress, Second Session. 8 vols. Washington, 1906.
Moore, Extradition.	John Bassett Moore: A Treatise on Extradition and Interstate Rendition. 2 vols. Boston, 1891.
Naval War College, Int. Law Situations; Int. Law Topics; Int. Law Documents.	Annual publications of United States Naval War College, Newport, embracing topics, discussions and conclusions pertaining to international law, also the texts of treaties and other documents, under direction of Prof. John Bassett Moore for the year 1901, and since under that of Prof. George Grafton Wilson. Washington, 1901–
Naval Instructions Governing Maritime Warfare.	Instructions of the Navy of the United States Governing Maritime Warfare. Issued by the Secretary of the Navy, June 30, 1917. Washington, 1918.
Noradounghian	*Recueil d'actes internationaux de l'Empire Ottoman.* Collected and published by Gabriel Effendi Noradounghian. 4 vols. Paris, 1897–1903.
Nouv. Rec. or *Nouv. Rec. Gén.* or *Nouv. Rec. Supp.*	See *Rec.*
Nys.	Ernest Nys: *Le Droit International.* 3 vols. Brussels and Paris, 1904–1906. Second edition, Brussels, 1912.
Nys, *Origines.*	Ernest Nys: *Les Origines du Droit International.* Brussels, 1894.
Oakes & Mowat.	The Great European Treaties of the Nineteenth Century. Edited by Sir Augustus

	Oakes and R. B. Mowat, with an introduction by Sir H. Erle Richards. Oxford, 1918.
Olivart.	Marqués de Olivart: *Tratado de Derecho internacional público.* 4 vols. Madrid, 1903–1904.
Ogilvie.	Paul Morgan Ogilvie: International Waterways. New York, 1920.
Oppenheim.	L. Oppenheim: International Law. Second edition. 2 vols. London, 1912. Third edition edited by Ronald F. Roxburgh. Vol. I, London, 1920.
Phillimore.	Sir Robert Phillimore: Commentaries upon International Law. 4 vols. London. First edition, 1854–1861; Second edition, 1871–1874. Third edition, 1879–1889.
Piédelièvre.	Robert Piédelièvre: *Précis de droit international public ou droit des gens.* 2 vols. Paris, *1894–1895.*
Pol. Sc. Quar.	Political Science Quarterly. (Now published at New York) 1886–
Porter.	John Biddle Porter: International Law, having special reference to the laws of war on land. Second edition. Fort Leavenworth, Kansas. Press of the Army service schools. 1914.
Pradier-Fodéré.	P. Pradier-Fodéré: *Traité de Droit International Public, Européen et Américain.* 8 vols. Paris, 1885–1906.
Presidents' Messages.	A compilation of the messages and papers of the Presidents, prepared under the direction of the Joint Committee on Printing, of the House and Senate, pursuant to an Act of the Fifty-second Congress of the United States. 20 vols. New York (1917).
Ralston, Arbitral Law.	Jackson H. Ralston: International Arbitral Law and Procedure; being a résumé of the procedure and practice of international commissions, and including the views of arbitrators upon questions arising under the law of nations. Boston, 1910.
Ralston's Report.	Venezuelan Arbitrations of 1903, including protocols, personnel and rules of commissions, opinions and summary of awards, etc. Prepared by Jackson H. Ralston, assisted by W. T. Sherman Doyle. Washington, 1904
Rec.; Rec. Supp.; Rec., 2 ed.; Nouv. Rec.; Nouv. Rec. Supp.; Nouv. Rec. Gén.	*Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange,* etc. (1761–1801.) 7 vols. Göttingen, 1791–1801. Compiler: Georg Friedrich von Martens. Cited as *Rec.*

	Supplément au Recueil, etc. 10 vols. in 12. Göttingen, 1802–1828. Compilers: G. F. von Martens, Baron Charles de Martens and F. Saalfeld. Cited as *Rec. Supp.*
	Recueil des principaux traités d'alliance, de paix, de trêve, etc. 2 ed., 8 vols. Göttingen, 1817–1835. Compilers: G. F. von Martens and Baron Charles de Martens.
	Nouveau Recueil de traités d'alliance, de paix, de trêve, etc. 16 vols. Göttingen, 1817–1841. Compilers: G. F. von Martens, Baron Charles de Martens, F. Saalfeld and F. Murhard. Cited as *Nouv. Rec.*
	Nouveaux Supplémens au Recueil de traités, etc. 3 vols. Göttingen, 1839–1842. Compiler: F. Murhard. Cited as *Nouv. Rec. Supp.*
	Nouveau Recueil Général de traités, conventions, et autres transactions, etc. 20 vols. in 22. Göttingen, 1843–1875. Compilers: F. Murhard, Ch. Murhard, J. Pinhas, Charles Samwer and Jules Hopf. Cited as *Nouv. Rec. Gén.*
	Nouveau Recueil Général de traités et autres actes relatifs aux rapports de droit international. Second Series. 35 vols. Göttingen and Leipzig, 1876–1908. Compilers: Charles Samwer, Jules Hopf and Felix Stoerk. Cited as *Nouv. Rec. Gén.*, 2 sér.
	Nouveau Recueil Général de traités et autres actes relatifs aux rapports de droit international. Third Series. Leipzig, 1908– Compiler: Heinrich Triepel. Cited as *Nouv. Rec. Gén.*, 3 sér.
Rev. Stat.	Revised Statutes of the United States.
Rev. Droit Int.	*Revue de Droit International et de Législation Comparée.* First Series, 1869–1898 (30 vols.); Second Series, 1899–1913 (15 vols.); Third Series, 1920– Brussels.
Rev. Gén.	*Revue Générale de Droit International Public.* Paris, 1894–
Richardson's Messages.	A Compilation of the Messages and Papers of the Presidents, 1789–1897. Published, by authority of Congress, by James D. Richardson. 10 vols. Washington, 1896–1899.
Richardson's Messages, 1911 ed.	A Compilation of the Messages and Papers of the Presidents by James D. Richardson. 11 vols. New York, 1911.
Rivier.	Alphonse Rivier: *Principes du Droit des Gens.* 2 vols. Paris, 1896.
Riv. Dir. Int.	*Rivista di Diritto Internazionale.* First Series,

	Rome, 1906–1910; Second Series, Rome, 1912–
Rules of Land Warfare.	United States, War Department: Office of the Chief of Staff. Rules of Land Warfare. 1914, corrected to April 15, 1917. Washington, 1917.
Satow.	Sir Ernest Satow: A Guide to Diplomatic Practice. 2 vols. London, 1917.
J. B. Scott, Armed Neutralities.	The Armed Neutralities of 1780 and 1800. A collection of official documents preceded by the views of representative publicists. Edited by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law. New York, 1918.
Int. Law Cases.	Cases on International Law, etc., by James Brown Scott, Boston, 1902.
Controversy over Neutral Rights.	The Controversy over Neutral Rights between the United States and France, 1797–1800. A collection of American State papers and judicial decisions edited by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law. New York, 1917.
Dip. Cor.	Diplomatic Correspondence between the United States and Germany (August 1, 1914–April 6, 1917). Edited with an introduction by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law. Oxford, 1918.
Dip. Docs.	Diplomatic Documents Relating to the Outbreak of the European War. Edited with an introduction by James Brown Scott. 2 vols. Carnegie Endowment for International Peace, Division of International Law. New York, 1916.
Hague Court Reports.	The Hague Court Reports. Comprising the awards, accompanied by syllabi, the agreements for arbitration, and other documents in each case submitted to the Permanent Court of Arbitration and to Commissions of Inquiry under the provisions of the conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. Edited with an introduction by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law. New York, 1916.
Hague Peace Confer-	James Brown Scott: The Hague Peace Conferences of 1899 and 1907. 2 vols. Baltimore, 1909.

President Wilson's Foreign Policy.	President Wilson's Foreign Policy. Messages, Addresses, Papers. Edited with introduction and notes by James Brown Scott. New York, 1918.
Reports to Hague Conferences.	The Reports to the Hague Conferences of 1899 and 1907. Edited, with an introduction, by James Brown Scott. Carnegie Endowment for International Peace. Division of International Law. Oxford, 1917.
Resolutions.	Resolutions of the Institute of International Law dealing with the law of nations. Collected and translated under the supervision of and edited by James Brown Scott. Carnegie Endowment for International Peace, Division of International Law. New York, 1916.
Survey Int. Relations between United States and Germany.	A Survey of International Relations between the United States and Germany, August 1, 1914–April 6, 1917 (based on official documents), by James Brown Scott. New York, 1917.
Treaties for Advancement of Peace.	Treaties for the Advancement of Peace between the United States and other Powers, negotiated by the Honorable William J. Bryan, Secretary of State. With an introduction by James Brown Scott. Oxford, 1920.
Secy.	Secretary.
Senate Reports, For. Rel.	Compilation of Reports of Committee on Foreign Relations, United States Senate, 1789–1901. Senate Document No. 231, Fifty-sixth Congress, Second Session. 8 vols. 1901.
Snow, American Diplomacy.	Freeman Snow: Treaties and Topics in American Diplomacy. Boston, 1894.
Snow, Cases.	Freeman Snow: Cases and Opinions on International Law. Boston, 1893.
Soc.	Society.
Stat.	Statutes at Large of the United States, 1789–
Stockton's Naval War Code.	Captain Charles H. Stockton, U. S. N.: The Laws and Usages of War at Sea. A Naval War Code. Washington, 1900. (This code was also published as Appendix I of Naval War College, International Law Situations, 1903.)
Stockton, Outlines.	Rear-Admiral Charles H. Stockton, U. S. N.: Outlines of International Law. New York, 1914.
Stowell, Consular Cases or Stowell's Cases.	Consular Cases and Opinions from the Decisions of the English and American Courts and the Opinions of the Attorneys-General, by Ellery C. Stowell. Washington, 1909.

Stowell and Munro, Int. Cases.	International Cases, Arbitrations and Incidents Illustrative of International Law as Practiced by Independent States, by Ellery C. Stowell and Henry F. Munro. 2 vols. Boston, 1916.
Takahashi, Cases.	Sakuyé Takahashi: Cases on International Law during the Chino-Japanese War. Cambridge (Eng.), 1899.
Taylor.	Hannis Taylor: International Public Law. Chicago, 1901.
de Testa, *Rec.*	*Recueil des Traités de la Porte Ottomane avec les Puissances Étrangères* (from the first treaty concluded in 1536, between Suléyman I and Francis I). Editors: Baron I. de Testa, Baron Alfred de Testa and Baron Leopold de Testa. 10 vols. Paris, 1864–1901.
Treaty Series.	United States, Department of State: publications of treaties of the United States according to number.
Treaty Vol. (1776–1887).	Treaties and Conventions Concluded between The United States of America and Other Powers, since July 4, 1776. Edited by John H. Haswell, with notes by J. C. Bancroft Davis, and additions by the editor. Department of State, 1889.
Treaty Collections.	A Tentative List of Treaty Collections, issued by the Department of State of the United States, 1919.
Twiss.	Sir Travers Twiss. The Law of Nations. 2 vols. Oxford, 1861–1863. Second edition. 2 vols. Oxford, 1875.
Univ. Penn. Law Rev.	University of Pennsylvania Law Review and American Law Register, being a continuation since 1908 (vol. 56) of the American Law Register, 1852–1907. Philadelphia. (Cited as Am. Law Reg.)
U. S. Comp. Stat. 1918 ed.	United States Compiled Statutes, 1918 compact edition, embracing the statutes of the United States of a general and permanent nature in force July 16, 1918, with an appendix covering acts June 14 to July 16, 1918. Compiled on plan devised by John H. Mallory. West Publishing Company. St. Paul, 1918.
U. S. Comp. Stat. 1919 Supp.	1919 Supplement to U. S. Compiled Statutes, 1918 Compact Edition. St. Paul, 1919.
Van Dyne, Citizenship.	Frederick Van Dyne: Citizenship of the United States. Rochester, 1904.
Van Dyne, Naturalization.	The Law of Naturalizaton of the United States. Washington, 1907.
Walker.	Thomas Alfred Walker: Manual of Public International Law. Cambridge (Eng.), 1895.

Walker, Hist.	Same Author: History of the Law of Nations. Cambridge (Eng.), 1899.
Walker, Science.	Same Author: The Science of International Law. London, 1883.
Ward, Hist.	Robert Ward: An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans to the Age of Grotius. 2 vols. Dublin, 1795.
Westlake.	John Westlake: International Law. Second edition. 2 vols. Cambridge (Eng.), 1910–1913.
Westlake, Collected Papers.	The Collected Papers of John Westlake on Public International Law. Edited by L. Oppenheim. Cambridge (Eng.), 1914.
Wharton, Dig.	A Digest of the International Law of the United States. Edited by Francis Wharton. Second edition. 3 vols. Washington, 1887.
Wharton, Dip. Cor.	Diplomatic Correspondence of the American Revolution. Edited by Francis Wharton. 6 vols. Washington, 1889.
Wheaton.	Henry Wheaton: Elements of International Law. Second annotated edition by William Beach Lawrence. Boston, 1863. (Cited as Lawrence's Wheaton.) Eighth edition with notes by R. H. Dana, Jr., Boston, 1866. (Cited as Dana's Wheaton.) Fifth English edition revised, considerably enlarged and rewritten by Coleman Phillipson, with an introduction by Sir Frederick Pollock. London, 1916. (Cited as Phillipson's Wheaton.)
Wilson.	George Grafton Wilson: Handbook of International Law. St. Paul, 1910.
Wilson, Hague Arbitration Cases.	The Hague Arbitration Cases: Compromises and awards with maps in cases decided under the provisions of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and texts of the conventions, by George Grafton Wilson. Boston, 1915.
Wilson and Tucker.	George Grafton Wilson and George Fox Tucker: International Law. Fifth edition. New York, 1910. Sixth edition, New York, 1915.
Woolsey.	Theodore Dwight Woolsey: Introduction to the Study of International Law. Sixth edition revised and enlarged by Theodore Salisbury Woolsey. New York, 1901.
Yale L. J.	Yale Law Journal. New Haven, 1891–
Yale Rev.	Yale Review. New Haven, 1913–

Zeit. Int.	*Zeitschrift für Internationales Privat- und Strafrecht.* 1891– (Erlangen) Since 1913 (Munich and Leipzig).
Zeit. Völk.	*Zeitschrift fur Völkerrecht und Bundesstaatsrecht.* Breslau, 1906– Since 1913, beginning with Vol. VII, entitled *Zeitschrift für Völkerrecht.*

INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

VOLUME ONE

PRELIMINARY

CERTAIN ASPECTS OF INTERNATIONAL LAW

§ 1. Definition and Nature.

The term international law may be fairly employed to designate the principles and rules of conduct declaratory thereof which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other.[1] From a sense of legal obligation to respect what is thus prescribed, enlightened States, notwithstanding grave and occasional lapses, have generally molded their practice. That which prevailed when the United States came into being manifested the existence of a body of law which, although long in the making, had undergone a de-

[1] "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." Dana's Wheaton, § 14.

"We define international law to be the aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects." Woolsey, 6 ed., § 5.

"International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." Hall, Higgins' 7 ed., p. 1.

See also Bonfils-Fauchille, 7 ed., § 1; Calvo, 5 ed., § 1; Martens, French translation by Léo (1883–1887), I, § 3; Rivier, I, § 3; Sir Frederick Pollock, "The Sources of International Law", *Columbia Law Rev.*, II, 511.

velopment of barely a century and a half from the time when Grotius summoned the nations to follow the path which he blazed.[1]

§ 2. Causes and Processes of Evolution.

States would not have been disposed to unite, however loosely, in order to regulate their conduct with respect to each other by principles regarded as unresponsive to what were conceived to be the requirements of international justice; and there could have been no common zeal for that justice unless States were by their nature and composition intolerant of international disorder and incapable of remaining isolated from each other. Inasmuch as they were entities composed of human beings possessed as such with moral sensibilities and social instincts which grew in vigor and fineness as civilization strode forward, there was solid cause for a system of jurisprudence applicable to the requirements of the common life.[2] As soon as general acquiescence concerning those requirements became assured, an international law was capable of being and sprang into life.

The discovery and use of new methods of communicating intelligence, the development of means of transportation by sea and land and air, together with the transformation of instrumentalities employed in the military and naval operations of a belligerent, have, since the close of the eighteenth century, and particularly since the beginning of the twentieth, served to weld together the society of nations by fresh and enduring ties. The resulting growth of international social and commercial intercourse has not ceased to influence profoundly the trend of the law. Certain results seem to be already apparent. It has been perceived, for example, that rules of conduct, however definitely established, if applied under conditions differing sharply from those prevailing when they were laid down, fail to reflect, and may even oppose, the underlying principles to which their origin was due. Again, The World War has served to bring home to peoples and statesmen alike, a vivid sense of the oneness of interest binding the States of every continent, and a corresponding realization of the

[1] Grotius published his celebrated work *De Jure Belli Ac Pacis* in 1625. See, in this connection, Hamilton Vreeland, Jr., Hugo Grotius the Father of the Modern Science of International Law, New York, 1917.

[2] "The real appeal of Grotius was not to 'man in a state of nature', but to the sense of justice, humanity, righteousness, evolved under the reign of God in the hearts and minds of thinking men. His appeal was not to a 'contract made in the primeval woods', but to the hearts, minds, and souls of men, developed under Christian civilization." Andrew D. White, "The Warfare of Humanity with Unreason: Hugo Grotius", *Atlantic Monthly*, XCV, 105, 114.

harm sustained by all through contempt by a single State for definite obligations acknowledged by the international society to govern each of its members.

Thus it is now recognized on all sides that the welfare of each member of the family of nations, and, therefore, of the international society itself, demands fresh enunciation, by codification or otherwise, of the principles of law that are hereafter to govern the conduct of States. It is perceived also that differences between them must, within a wide range and far beyond limits heretofore accepted, be adjusted according to strict regard for those principles as impartially interpreted and applied by a permanent international court of justice. The sacrifices entailed by such procedure no longer appear to be heavier than individual States are prepared to make. The basis of general agreement is believed to exist.[1] It may be that enlightened States are prepared, also, generally to unite in the effort to adjust controversies not regarded as arbitrable (whether or not technically to be deemed justiciable) by recourse to some international non-judicial body.[2]

It is to be doubted, however, whether as yet the several States are prepared to acknowledge generally that the welfare of the international society requires each individual member thereof to undertake to become itself a belligerent in order to penalize a State which, in defiance of the law and of special obligations to adjust its differences by amicable means, resorts to war in order to attain even an unjust end. Nevertheless, it must be constantly borne in mind that what the consensus of opinion of enlightened States deems to be essential to the welfare of the international society is ever subject to change, and that the evolution of thought in this regard remains as constant as at any time since the United States came into being. Above all, it must be apparent that whenever the interests of that society are acknowledged to be at variance with the conduct of the individual State, there is established the ground for a fresh rule of restraint against which old and familiar precedents may cease to be availing.

[1] See Permanent Court of International Justice Designed by Advisory Committee of Jurists, 1920, *infra*, §§ 573–575.

[2] It should be observed that particular plans or methods of organization proposed for general acceptance are not to be taken as necessarily indicative of the nature or extent of what is at the time the actual existing basis of international accord. Opposition to the theory of certain devices, however scientifically formulated, is not proof that others cannot win approval. Diversity of opinion as to method is not to be taken as establishing the absence of general acquiescence as to principle.

The growth of the law governing the relations between States has been characterized in practice by acceptance of the theory that the society of nations is comprised primarily of a number of so-called independent States, resembling each other in their acknowledgment of no duty to recognize any common superior, and deemed accordingly to stand upon an equal footing.[1] The basis of the law imposing common rules of restraint has been the consent of the several independent States which were to be governed thereby. That consent has, moreover, been yielded by necessary implication by each new State as a condition essential to its recognition and admission to membership in the international society.[2] Thus the law of nations may be fairly deemed to reflect at any given time what the several members thereof have in fact accepted as the law governing their mutual relations.[3] Important consequences follow. While, on the one hand, there may be difficulty in ascertaining the extent to which the several independent States have accepted a particular principle or rule declaratory of it, still greater difficulty is encountered when attempt is made to effect alterations in the face of substantial opposition. It is not conceivable, for example, that the United States would admit the right of the principal European powers to deprive it against its will of privileges long acknowledged to be the possession of each independent State.[4] Nor would it be admitted that a mere

[1] See The Equality of Independent States, *infra*, § 11.

[2] See Recognition, In General, *infra*, § 36.

[3] "The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a State it is not necessary to show that the State in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule." Westlake, 2 ed., I, 16.

Story, J., in the case of La Jeune Eugenie, 2 Mason, 409, 448, declared: "What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations which is not universally recognised as such, by all civilized communities, or even by those constituting, what may be called the Christian States of Europe. . . .

"But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations which may be evidenced by their general practice and customs, it may be enforced by a court of justice whenever it arises in judgment."

[4] It is not suggested that the opposition of a strong and solitary State could ultimately prevail against the consensus of opinion of the entire civilized world,

group of States could so amend the law of nations as to increase the obligations of members of another less powerful group without their acquiescence, unless it wrung consent by the sword, and by the sword also stifled opposition until in fact no real objections were heard for a long period.[1] On principle, therefore, changes in the law of nations require the consent of the States affected thereby. For that reason the likelihood that proposals designed to effect a change will receive the necessary approval, must be proportional to the degree to which they are generally deemed to promote respect for fundamental principles of international justice. Doubtless any individual State may propose changes; and if they are accepted it is because the international society is convinced of the benefits derivable from them.[2] Modifications may also be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Thus without specific conventional arrangement, and by practices manifesting a common and sharp deviation from formerly accepted rules, the society of States may in fact modify the regulations governing its members.

The duty of a State to observe a rule of conduct with respect to any other is incompatible with a right on its part to free itself from such an obligation. If civilized States feel themselves bound to observe rules of international conduct established by general consent, and purport to do so from a sense of legal obligation, it is because they acknowledge that that consent has been irrevocably given. Such a theory has obtained in practice, forbidding the individual State to free itself from the operation of restrictions which the law of nations was deemed to impose.[3] The Department of State has on numerous occasions denounced attempts of delinquent States to invoke a looser doctrine.

or that such a State would not be finally compelled to acquiesce in changes which it once opposed. The reason, however, for its impotence would doubtless be in part the unsoundness of its stand; for it is hardly probable that a single isolated State could rightly denounce as unjust a proposed change which had won the approval of all other civilized powers.

[1] Thus the States signatory to the Declaration of Paris of 1856 announced that "The present declaration shall not be binding except upon those Powers which have acceded, or shall accede to it." *Nouv. Rec. Gén.*, XV, 791.

Compare the theory of Art. XVII of the Covenant of the League of Nations.

[2] The United States has at times proposed changes ultimately winning general approval, and that because of their inherent worth as a means of promoting international justice. Its action as a neutral before the close of the eighteenth century is illustrative, *infra*, §§ 844–847.

[3] The Schooner Nancy, 27 Ct. Cl. 99, 109.

§ 3. Sources. Evidence.

The sources of international law, that is, the places where the principles and rules governing the conduct of States first appear as such, as distinct from the causes responsible for that law and the evidence of what it is, are deemed to be primarily, custom, and secondarily, certain agreements or treaties.[1] Few treaties are to be regarded as sources of international law, because, apart from the design of the contracting parties, the provisions of such compacts infrequently give expression to new rules of conduct which, through their reasonableness and general responsiveness to the needs of the international society, win its full approval. Some agreements have, however, been so operative, serving to register not only the views of the contracting parties, but also the beginnings of rules of restraint which ultimately met with general acquiescence.

Custom as a source of international law must not be confounded, as Westlake has observed, "with mere frequency or habit of conduct." It signifies rather "that line of conduct which the society has consented to regard as obligatory."[2] In such a sense international custom is indicative of a general practice which may be fairly accepted as law.[3]

The evidence of international law is to be found in many places. A variety of acts and documents bear testimony as to the principles which are deemed actually to govern the conduct of States. The views of text-writers or commentators are oftentimes cited as authoritative. The Supreme Court of the United States has observed, however, that "such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[4] Whenever such writers do not evince a disposi-

[1] Frantz Despagnet, *Cours de Droit International Public*, 4 ed., §§ 55–60; Bonfils-Fauchille, 7 ed., § 46; Oppenheim, 2 ed., I, § 16.

[2] Westlake, I, 2 ed., 14, where it is added: "In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows — not always very well, as in the case of national law, in the ruder stages of national existence — and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed."

[3] See Art. XXXV, Section 2, of Draft-Scheme for the institution of the Permanent Court of International Justice, presented to the Council of the League of Nations by the Advisory Committee of Jurists, and communicated by the League to numerous States August 27, 1920.

[4] Mr. Justice Gray, in the opinion of the Court, in The Paquete Habana, 175 U. S. 677, 700.

According to Art. XXXV of the Draft-Scheme for the institution of the

tion to mirror the practice of their time, the views expressed lack evidential value.[1]

Doubtless some treaties afford evidence of international law. Those which, for example, purport to enunciate general rules of conduct, to which substantially all enlightened States consent, embracing those which have not formally adhered to the arrangements, are of such a kind.[2] Certain conventions of the Hague Peace Conferences of 1899 and 1907 may be deemed to fulfill such a function.

Official acts or declarations of individual States are at times referred to as evidence of international law. They may serve to indicate the understanding of the governments thereof with respect to the nature and scope of particular rights and obligations. The diplomatic correspondence of the United States has oftentimes revealed the precise views of those in charge of its foreign relations touching the requirements of the law of nations. Enunciations of legal principle emanating from the Department of State are to be respected when they purport to express what the United States officially declares to be the general usage or practice establishing

Permanent Court of International Justice, communicated by the Council of the League of Nations, August 27, 1920, "the teachings of the most highly qualified publicists of the various nations" were declared to be "subsidiary means for the determination of rules of law."

[1] The inclination of distinguished scholars to heed the views of other theorists rather than those upon which States act from a sense of legal obligation, tends in certain countries to weaken the respect entertained for treatises purporting to be declaratory of international law, because doubt is felt whether the authors have in fact made serious attempt to bear witness to the rules actually governing the relations of independent States.

See Lord Alverstone, C. J., in West Rand Central Gold Mining Co. *v.* The King [1905] 2 K. B. 391; Evans, Cases, 15.

[2] "There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole. A striking proof of this tendency was given in the war of 1898 between Spain and the United States. Neither belligerent was a party to the article of the Declaration of Paris of 1856 against privateering; the United States had in fact refused to join in it. Moreover, the Declaration of Paris was not, in point of form, an instrument of the highest authority. Nevertheless, when the war of 1898 broke out, the United States proclaimed its intention of adhering to the Declaration of Paris, and the rules thereby laid down were in fact observed by both belligerents. It is quite possible that some of the recommendations recorded at the Peace Conference at the Hague in 1899, may sooner or later, in like manner, be adopted as part of the public law of civilized nations by general recognition without any formal ratification." Sir Frederick Pollock, in *Columbia Law Rev.*, II, 511, 512.

the rule of international law.[1] American state papers have from time to time shed much light because they have embodied the testimony of witnesses zealous for the truth and sensitive to injustice. Notwithstanding occasional yieldings to the temptation to assert in diplomatic discussions pretensions at variance with accepted principle, as by way of defense of conduct denounced by a foreign power, the United States has throughout its experience manifested strongest disposition to observe and inculcate respect for international justice. Its Constitution, its statutory laws, its diplomatic correspondence, the codifications of its army and navy, as well as the decisions of its courts, afford abundant illustration.[2] For that reason the views of American statesmen have been heeded by the outside world and still exert a corresponding influence. The testimony borne by the United States deserves scrutiny because it has proved worthy of acceptation.

The decisions of local tribunals oftentimes afford evidence of international law. Those of American courts, both Federal and State, abound in opinions manifesting a careful and impartial effort to enunciate the principles observed by civilized States. The decisions of the prize courts of a belligerent are oftentimes commended as entitled to special authority because of the function of such tribunals to determine, according to the requirements of international law, the propriety of acts of capture and others

[1] It is not suggested that interpretations of international law given by those responsible for the conduct of the foreign relations of the United States are invariably sound, or ever above criticism when shown to be at variance with the principles generally obtaining among enlightened States. Such interpretations, whether sound or unsound, deserve close attention because, with respect to the principle or rule involved, they are, in a sense, the views of the nation, and as such attain larger international significance than those expressed unofficially by private individuals, at least as evidence of requirements recognized in fact by the society of nations. In a word, if the propriety of national conduct is to be tested according to principles and rules which States observe in practice from a sense of legal obligation, the views of the Department of State as to the requirements of that practice are believed to be entitled to great respect, and to closer consideration than the utterances of writers whose purpose is rather to emphasize what, in their judgment, and regardless of current practice, the law of nations ought to be.

[2] "Founded upon the idea of law, and existing under the protection of law, the United States of America, more perhaps than any other sovereign power, has aimed to establish its relations with other governments on the basis of law; and has instinctively shrunk from extending them, even when provoked by the turbulence and insolence of comparatively impotent neighbors, on a basis of preponderant power. In all the international councils in which we have as a nation hitherto participated, our government has endeavored to establish law as a standard for the conduct of sovereign states. Being itself a creation of law, it has appeared natural to base its foreign relations upon it." David Jayne Hill, "The Nations and the Law", *Reports of American Bar Association*, 1919, XLIV, 171, 179.

incidental thereto.[1] It has been found, however, that even when not restrained by the tenor of local statutory or other regulations, the natural prejudices of the most enlightened and scrupulous tribunal established under belligerent authority tend to weaken its impartiality and to diminish foreign respect for its conclusions.[2]

Awards of international tribunals such as courts of arbitration possessed of a neutral empire (if not of entire neutral membership) afford impressive evidence of the requirements of international law. The impartiality and acumen revealed by the neutral members of such bodies have oftentimes been productive of decisions entitled to great respect by States generally. This has been notably true in the case of the awards of the Court of Arbitration organized in pursuance of the Hague Conventions of 1899 and 1907.[3] Those to be rendered by the Permanent Court of International Justice (of which the establishment is anticipated at an early date) will doubtless serve from time to time increasingly to bear testimony of the highest order as to what the law of nations really is.[4]

§ 4. Absence of a Legal Sanction.

The domestic laws of a State are commonly enforced by the territorial sovereign. There is a sanction which, although not essential to the existence of the law, is of a strictly legal character, inasmuch as it is established and applied by the lawgiver, and because in theory it is enforced only when a legal duty has been violated, and with close regard for the extent of the harm publicly or privately sustained.

With respect to international law the situation is otherwise. Doubtless the society of civilized States approves of the enforcement of the rules of that law by appropriate means, and by various processes. It does not, however, as yet prescribe the procedure to be followed by an aggrieved State, nor even enjoin, under certain conditions, recourse to war. Powerful forces, nevertheless,

[1] Dana's Wheaton, Dana's Note No. 11. In this connection, see judgment by Lord Parker of Waddington in The Zamora [1916], 2 A. C. 77; 4 Lloyd's Prize Cases, 84.

[2] See Discussion between United States and Great Britain during The World War, §§ 894–895.

[3] See, for example, the award in the Pious Fund Case between the United States and Mexico, Oct. 14, 1902, For. Rel. 1902, Appendix II, 15; J. B. Scott, Hague Court Reports, 3; also award in the North Atlantic Coast Fisheries Arbitration between the United States and Great Britain, Sept. 7, 1910, *Proceedings*, North Atlantic Coast Fisheries Arbitration, Senate Doc. No. 870, 61 Cong., 3 Sess., I, 103; J. B. Scott, Hague Court Reports, 146.

[4] See Permanent Court of International Justice Designed by Advisory Committee of Jurists, 1920, *infra*, §§ 573–576.

unceasingly operate to produce respect for international law. There is, as Mr. Elihu Root has pointed out, "an indefinite and almost mysterious influence exercised by the general opinion of the world" regarding the character and conduct of every State. "The greatest and strongest governments recognize this influence and act with reference to it; they dread the moral isolation that accompanies it and they desire general approval and the kindly feeling that goes with it."[1] Again, the fear of war also serves frequently to restrain States from violating international obligations. A weak State, however strongly inclined to disregard a legal duty with respect to a powerful neighbor, is reluctant to test its strength on unequal terms with such an adversary. Nevertheless, it should be observed that a weak State may, on the other hand, anticipate with certainty that its adherence to a lawful and commendable course which opposes the designs of an unscrupulous and stronger State will invite attack upon its own domain.[2] Thus if war ensues because of the breach of international law, or because of fidelity to the principles of that law, the consequences may prove to be in fact identical. For that reason the fear of war, which may serve in a particular case to encourage disregard of an international duty as well as respect for it, is not to be deemed a sanction possessed of a legal character.[3]

Although without what may fairly be described as a legal sanction, the principles and rules governing the conduct of States do not lack the quality of law. It is no longer seriously maintained

[1] "The Sanction of International Law", *Proceedings*, American Soc. Int. Law, II, 14, 19-20, where it is added: "The real sanction which enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent lawbreaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law."

[2] Belgium was confronted with such a difficulty in 1914. It was given sharp warning that attempts to maintain the inviolability of its territory against Germany would subject that territory to the full opposition of German belligerent force.

[3] It is not suggested that the fear of war is as strong or frequent an incentive to violations of international law as to acts in pursuance thereof. It seems necessary to observe, however, that the fear of measures which may be undertaken to thwart lawful as well as unlawful conduct, and by a State controlled by conscienceless rulers, with an unjust purpose, cannot be regarded as an agency of the law designed to enforce respect for its precepts.

"The sanction of public opinion, if such there be, attaches equally to principles of purely moral obligation; to identify such a sanction with the sanction of law is to sacrifice the distinction between positive law and ideal morality. War as a sanction is analogous to the act of an individual in a community in enforcing his rights by brute force." Note, *Harvard Law Rev.*, XVIII, 476.

See also Bonfils-Fauchille, 7 ed., § 29; Pradier-Fodéré, I, § 23, p. 77.

that the existence of law is necessarily dependent upon the presence of a power to enforce it.[1] Nor have enlightened States in the course of their practice been disposed to take such a view.[2]

Acknowledgment that the welfare of the international society is jeopardized by the absence of an appropriate means of enforcing its collective will against a member which is contemptuous of its duties,[3] involves no admission that, until a strictly legal sanction is devised and in fact generally accepted for common application, the principles of international law are entitled to less respect than is accorded the domestic statutes of a single State.[4] It is a cheering and certain token of the advance of civilization that countries which long remain indisposed or impotent to observe as legal duties the common obligations which international law is acknowledged to impose upon the entire membership of the family of nations, are regarded by enlightened powers with increasing intolerance, and as unfit for the acquisition or retention of normal privileges of independent statehood.

§ 5. Relation to Each State as the Law Thereof.

If there exists a body of international law which States, from a sense of legal obligation, do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a State, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual State of international law; for the processes by which general acquiescence in its principles has been effected manifest

[1] Bonfils-Fauchille, 7 ed., § 29; Rivier, § 3, Vol. I, p. 21.
See, also, J. B. Scott, "The Legal Nature of International Law", *Am. J.*, I, 831.

[2] "The general opinion of States approves certain rules, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but to be enforced by such means as exist.
"The conduct directed by those rules is in fact generally observed by States and that, not as freely choosing it in each instance, but as obeying the rules; not necessarily from fear of enforcement, but at least from the persuasion that the rules are law." Westlake, 2 ed., I, 7.

[3] The Covenant of the League of Nations expresses agreement to apply a sanction of a legal character against members of the League which disregard certain specified undertakings with reference to the adjustment of disputes by amicable means.

[4] With or without the instrumentality of the League of Nations, or the processes developed in the Covenant thereof, the society of nations appears to be no longer disposed to leave merely to the mercies of an aggrieved State, whether strong or weak, and to the application of penalties of its own devising, the international law-breaker whose offense is deemed to have attained the character of an international felony.

the requisite irrevocable assent of each member of the society of nations.

International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane. The precise relationship of a recognized rule of international law to a local statute in contravention thereof is oftentimes obscured by occurrences which take place before the superiority of the former is ultimately established. A local court may be obliged, on account of the nature and the limits of the powers conferred upon it, to enforce the statute; and even a domestic tribunal of last resort may be compelled to affirm such action. This merely signifies that no local forum is possessed of jurisdiction to pass upon the propriety of the conduct of the State in enacting the law; it does not imply that that conduct is internationally defensible, or that the judges approve of it. Moreover, the finality of the local adjudication does not indicate that the conflict has passed through more than a preliminary stage. If the controversy is pressed further, through the diplomatic channel, the State whose enactment is denounced by another as at variance with international law may in fact deny the truth of the allegation. It cannot, however, admit the charge without acknowledging responsibility to make reparation. If disagreement as to the nature of the statute or the extent of the harm produced by it proves incapable of adjustment by negotiation, and the issue be referred to an international court of arbitration clothed with requisite jurisdiction, it will denounce the statute (if deemed to violate international law) and formulate its award accordingly. Observance of the award by the delinquent State (possibly entailing amendatory legislation) will terminate the conflict and establish the supremacy of the international obligation.[1]

It is important to observe, however, that States are not commonly disposed to defy by local statute recognized duties of international law, and that they are instinctively reluctant to admit that domestic enactments manifest such a purpose. Contro-

[1] It is this absence of a local court possessed of requisite jurisdiction which is productive of confusion of thought. Difficulty has been encountered in perceiving how an international duty, contractual or otherwise, which cannot be locally enforced in a domestic forum is the local law. The fact is that the duty is locally enforced when the controversy is pressed to a conclusion resulting in an international adjudication, and in an award which is respected by the delinquent State.

Cf. The Ship Rose *v.* The United States, 36 Ct. Cl. 290, 301, where a tribunal in the United States was clothed with the requisite jurisdiction.

versies of such a character, although oftentimes recurring, are not sufficiently frequent in times of peace to manifest a condition of habitual conflict between international obligations and local enactments. Normally, it is taken for granted that international law prevails in the domain of an enlightened State and will be respected in all the activities of its several agencies. This is notably true in the United States.[1] Its tribunals, and in particular the Supreme Court, are reluctant to impute to the Congress or the Executive an intention to violate the law of nations, construing enactments as contemplating observance thereof.[2] Moreover those tribunals, when unrestricted by statutory limitations, apply and enforce the principles of international law as those constituting the law of the land.[3]

[1] See, for example, Art. I, Section 8, of the Constitution conferring on the Congress power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Other paragraphs and sections contemplate acts by various departments of the Government, executive, legislative and judicial, pertaining to the foreign relations of the nation, and contemplating by implication, respect for international law. This is manifest, for example, in the provisions of Art. III, Section 2, with respect to the lodgment and exercise of the judicial power of the nation, and in those of Art. II, Section 2, with respect to the treaty-making power.

See Cyril M. Picciotto, The Relation of International Law to the Law of England and of the United States of America, New York, 1915; W. W. Willoughby, "The Legal Nature of International Law", *Am. J.*, II, 357; T. E. Holland, Studies in International Law, Oxford, 1898, Chap. X.; John Westlake, "Is International Law a Part of the Law of England?" *Law Quar. Rev.*, XXII, 14.

[2] Marshall, C. J., in the case of The Charming Betsy, 2 Cranch, 64, 118; opinion of Mr. Justice Day in MacLeod *v.* United States, 229 U. S. 416, 434.

[3] Declared Mr. Justice Gray, in The Paquete Habana, 175 U. S. 677, 700: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

See Marshall, C. J., in The Nereide, 9 Cranch, 388, 423; also, The Steamship Appam, 243 U. S. 124.

§ 9, Chap. 20 of the Act of Sept. 24, 1789, 1 Stat. 77, declared that the district courts of the United States should have "cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." § 24, Paragraph 17, Chap. 231, of the Act of March 3, 1911, 36 Stat. 1093, gave to the district courts original jurisdiction in such cases.

See Philip Quincy Wright, The Enforcement of International Law through Municipal Law in the United States, 1915, 227; Simeon E. Baldwin, "The Part Taken by Courts of Justice in the Development of International Law", *Int. Law Association*, 15th Report, 35; Evans, Cases, 18, Note, and cases there cited.

PART I

STATES. THEIR CLASSIFICATION

TITLE A

SUBJECTS OF INTERNATIONAL LAW

1

STATES

a

§ 6. Significance of the Term in International Law.

It is necessary to observe what are the political entities described as States which are deemed to constitute the members of the family of nations and to be governed as such in their relations with each other by the principles of international law. Great Britain and Illinois are each doubtless properly designated as a State, although the latter, while subject to the operation of those principles, is not itself a person of international law. If the term State is fairly descriptive of political bodies such as the several commonwealths of the United States, the States which enjoy membership in the international society and which are recognized by it as persons of international law are confined to those which possess certain well-defined qualifications, and which comprise a relatively small number of those which are given the same appellation.[1] Thus any definition of the term State in its generic sense must fail, because of its very breadth, to point out the distinctive elements which characterize every political entity deemed to be a subject or person of international law.[2]

[1] Westlake, 2 ed., I, 1–5.

[2] Thus Mr. Justice Miller, in Keith *v.* Clark, 97 U. S. 454, 459–463, in referring to the status of Tennessee during the Civil War, was concerned merely with the problem of describing the nature of a State of the Union rather than a State of international law. See, also, Texas *v.* White, 7 Wall. 700, 720–721.

"Most of the definitions of the publicists may, however, be traced back, in substance if not in form, to Cicero, who, in his *De Republica*, defines the

b

§ 7. Requisites of a State of International Law.

A State or person of international law must, according to enlightened practice, possess the following qualifications:

First, there must be a people. According to Rivier, it must be sufficient in numbers to maintain and perpetuate itself. This requirement could not, he declares, be met by a casual gathering of individuals or by a chance group of bandits or by a society of pirates.[1]

Secondly, there must be a fixed territory which the inhabitants occupy. Nomadic tribes or peoples are thus excluded from consideration.[2]

Thirdly, there must be an organized government expressive of the sovereign will within the territory, and exercising in fact supremacy therein.[3]

Fourthly, there must be an assertion of right through governmental agencies to enter into relations with the outside world. The exercise of this right need not be free from external restraint. Independence is not essential.[4] It is the possession and use of the right to enter into foreign relations, whether with or without restriction, which distinguishes States of international law from the

'populus' as a numerous society united by a common sense of right and a mutual participation in advantages. In almost the same words Grotius defined the state (*civitas*) as a perfect society of free men, united for the promotion of right and the common advantage. Pufendorf propounded the idea, which has been so generally adopted, of treating the state as a moral person, endowed with a collective will. According to Vattel, a nation or state is a body politic or society of men who seek their well-being and common advantage in the combination of their forces. This definition is substantially adopted by Wheaton. But it must be admitted that all the foregoing definitions are imperfect, and that they can be accepted only with certain limitations." Moore, Dig., I, 14.

Cf. Dana's Wheaton, § 17.

[1] Rivier, I, 46. For an abstract of the views of this author see Moore, Dig., I, 16–17, 18. See, also, Bonfils-Fauchille, 7 ed., § 162.

[2] Rivier, *supra;* also Phillimore, 2 ed., I, 81.

[3] Phillimore, *supra;* Bonfils-Fauchille, *supra;* Hall, Higgins' 7 ed., § 1.

[4] "It is not necessary for a State to be independent in order to be a State of international law." Westlake, 2 ed., I, 21.

"As international law deals with actual conditions, it recognizes the fact that there are states not in all respects independent that maintain international relations, to a greater or less extent, according to the degree of their dependence." Moore, Dig., I, 18, *citing* Rivier, I, 52.

If independence be regarded as a necessary possession of a State of international law, the existing practice of treating as persons or subjects of that law various types of so-called dependent States is incapable of explanation. Even those who assert that independence is a necessary attribute of a State, are frequently unwilling to employ the term "State" to designate what they believe that it fairly signifies, and are impelled to utilize the adjective "independent" or "sovereign" in order to make clear their meaning.

larger number of political entities given that name and which are wholly lacking in such a privilege. It illustrates the difference between Ecuador and Alaska, and between Cuba and South Carolina.

Fifthly, the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which by common assent govern the members of the international society in their relations with each other.[1]

c

Excluded Associations or Entities

(1)

§ 8. American Commonwealths. Colonies. Corporations.

Political entities failing to meet any of the requirements above noted are regarded as incapable of treatment as persons of international law. Thus, as has been observed, the several States of the United States, by reason of their inability to enter into diplomatic relations with the outside world, lack the requisite capacity.[2] Such is the situation also of a colony or other possession likewise under such a disability, and that regardless of the autonomy which it may enjoy in respect to domestic affairs. Thus, for example, the Philippine Islands and Porto Rico, as well as Alaska, are not States of international law.

When, however, an autonomous colony such as a self-governing dominion is permitted by its sovereign to hold direct intercourse with the outside world, it thereby attains an international personality, with the capacity requisite for a certain form of membership in the society of States, and thereupon appears to acquire a status difficult to distinguish from that possessed by what are known as dependent States.[3]

[1] See Countries not Possessed of European Civilization, *infra*, § 33.

[2] International responsibility for what may occur in the territory of each is lodged in the State of international law — the United States — of which each is a part, and to which each, in an international sense, belongs.

[3] The participation of the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, the Dominion of New Zealand and India in the Peace Conference of 1919, the signing of the Treaty of Versailles with Germany, of June 28, 1919, by representatives of each in behalf of their respective portions of the British Empire, and their acceptance as original members of the League of Nations, must be taken to signify that, with the consent of Great Britain, each of these self-governing dominions has attained an international personality, and is to be dealt with accordingly. It would be consistent with the status which each has acquired should any one of them, such as Canada, be accorded the right to maintain permanent diplomatic relations with a neighboring State.

Great corporations, such as the East India Company, or the Hudson's Bay Company, or the Russian-American Company, notwithstanding the scope of the political and other powers delegated to them, have also necessarily been excluded from the category of States of international law.[1]

(2)

§ 9. Religious Societies. The Pope.

Religious societies, such as the Holy See, are not regarded as States of international law, save when circumstances combine to enable them to satisfy all of the conditions of statehood which have been noted.

The position of the Pope since the days when he was a territorial sovereign has been anomalous.[2] As the head of the Roman Catholic Church to which certain States officially avow attachment, he possesses international political significance and wields international power.[3] He holds diplomatic intercourse with various States through the medium of repesentatives whom he both accredits and receives.[4] As head of the Church he concludes with certain States arrangements known as concordats, and which pertain to ecclesiastical matters.[5] By reason of its institutions which divorce political from religious matters, the United States

[1] See, in this connection, Dana's Wheaton, § 17, where it is said: "Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe, without the direct control of the crown, and still less can it be so considered since it has been subjected to that control." See, also, Westlake, Collected Papers, Chap. X.

[2] Concerning the Italian law of guaranties of May 13, 1871, see Bonfils-Fauchille, 7 ed., §§ 377–385; also *id.*, §§ 386–396, concerning diplomatic relations of the Papacy, and the international personality of the Pope; also extensive bibliography, *id.*, § 370. See, also, Oppenheim, 2 ed., I, Chap. X; Clunet, *Tables Générales*, I, 440, 443, 873.

[3] It should be observed, however, in this connection that the Pope was not permitted to participate in the First Hague Peace Conference of 1899, and was not a participant in that of 1907.

It will be recalled that in 1917, the Pope urged the opposing groups of belligerents to make an endeavor to negotiate peace. See *Am. J.*, XI, Supp., 212; also reply of the United States, *id.*, 216.

[4] With respect to the privileged rank of papal nuncios, see Arts. I, II, and IV of Rules of the Congress of Vienna of March 9, 1815, Instructions to the Diplomatic Officers of the United States (1897), § 18.

[5] "In our day, this term [concordats] is applied to conventions concluded between the Holy Apostolic See and the governments of certain States whose population, in whole or in part, is Catholic, and not in regard to questions of faith or dogma, but concerning ecclesiastical discipline, organization of the

has been deterred from maintaining diplomatic relations with the Vatican since the loss by the Pope of temporal power.[1] The nature of his relations with other States has not been a matter of concern to the United States.

(3)

§ 10. American Indians.

The American Indians have never been regarded as constituting persons or States of international law. Chief Justice Marshall, in 1821, thus described them:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage. . . . They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.[2]

Foreign States are not, therefore, concerned with the domestic relationship between the United States and its wards inhabiting its domain,[3] and which is governed by its Constitution, and by American treaties and laws in accordance therewith.[4]

clergy, diocesan circumscriptions, the nominations of bishops, priests, etc. — The conventions concluded with Protestant States are called Bulls of circumscription." Bonfils-Fauchille, 7 ed., § 896.

[1] Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, June 4, 1875, For. Rel. 1875, 1119, Moore, Dig., I, 39; Mr. Bayard, Secy. of State, to Mr. Dwyer, Nov. 7, 1887, For. Rel. 1887, 642, Moore, Dig., I, 40.

[2] Cherokee Nation *v.* Georgia, 5 Pet. 1, 17. See, also, Holden *v.* Joy, 17 Wall. 211; Jones *v.* Meehan, 175 U. S. 1, 10; Mr. Adams, Secy. of State, to Mr. Dallas, July 26, 1856, MS. Inst. Great Britain, Moore, Dig., I, 34–35.

[3] It has been a matter of concern, however, to neighboring States that the control exercised by the United States over the American Indians was sufficient to prevent incursions by them into the territories of those States. Moore, Dig., II, 808–809, and documents there cited. In several of its early treaties with foreign States the United States agreed to provisions with respect to the Indians. See, for example, Art. III of the Jay Treaty of Nov. 19, 1794, Malloy's Treaties, I, 592; explanatory Article thereof, May 4, 1796, *id.*, 607; Art. IX of the Treaty of Ghent of Dec. 24, 1814, *id.*, 618; Art. V of the treaty with Spain of Oct. 27, 1795, *id.*, II, 1642; Art. VI of the treaty with France of April 30, 1803, *id.*, I, 510; Art. XXXIII of treaty with Mexico of April 5, 1831, *id.*, 1095.

[4] See, generally, Moore, Dig., I, 30–39, and documents there cited.

2

THE EQUALITY OF INDEPENDENT STATES

§ 11. Observance of the Principle.

In legal contemplation all independent States are regarded as equal, and the rights of each not deemed to be dependent upon the possession of power to insure their enforcement.[1] Such States not only enjoy equality before the law, a possession shared also by dependent States, but also are entitled to claim, at least under normal circumstances and for most purposes, what has been tersely described as "equal capacity" for legal rights.[2] The nature of the condition of independent States and the singleness of their class or status appear to justify such a pretension. American statesmen have constantly made it.[3] There is, moreover, wide observance of this principle by the international society notwithstanding the circumstance that States differ widely with respect to material strength and political influence,[4] and although some possess the power to control their weaker neighbors, and despite the fact that a certain small group is capable of enforcing its collective will throughout a great portion of the world. International law is concerned with the habit and disposition of enlightened

[1] Declared Chief Justice Marshall, in The Antelope, 10 Wheat. 66, 122: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade [the slave trade with Africa], in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it."

[2] Edwin DeWitt Dickinson, The Equality of States in International Law, Cambridge, 1920, 3–5, 334–336.

[3] While American statesmen have not always expressed with exactness the theories of State equality which they proclaimed, their utterances appear at times to have recognized the principle that rights of equality are the peculiar possession of States enjoying alike freedom from external control.

See Mr. Root, Secy. of State, address before Third Conference of American Republics, at Rio de Janeiro, July 31, 1906, contained in Latin America and The United States: Addresses by Elihu Root, collected and edited by Robert Bacon and James Brown Scott, Cambridge, 1917, 3, 10.

Cf. American Institute of International Law: Declaration of the Rights and Duties of Nations (with official commentary), Washington, 1916; J. B. Scott, The American Institute of International Law: Its Declaration of the Rights and Duties of Nations, Washington, 1916.

[4] See Mr. Olney, Secy. of State, to Mr. Bayard, American Ambassador at London, July 20, 1895, with reference to the relation of the United States to other countries of the American continents, For. Rel. 1895, I, 545, 558. See *infra*, § 91.

States to refrain from uniting for lawless ends, and with the evidence of the practice tending to subordinate the exercise of power to the requirements of law. It is the restraints which from a sense of legal obligation enlightened States have endeavored to observe, and for which also they have by various processes undertaken to demand general respect, which establish the reality of the equality of independent powers, and justify constant reference to the fact.

Nevertheless, the influence of the selfish designs of individual States, not only upon the attainment of political ends, but also upon the formulation of legal principle must not be ignored.[1] Inasmuch as the number of independent States is large, and the interests of each are not identical, the attempt of any one to impose its theories upon the international society so as to rob its several members of their equal rights would doubtless fail. Should, however, a group of powerful States unite in such an endeavor, success might reward their effort; and if it did, numerous States which were previously independent would find themselves reduced to a condition of relative subordination. Whether, therefore, the international society is to remain a body composed principally of independent States enjoying equal rights, rather than become transformed into an organization comprising a series of groups of States of differing rank and unequal before the law, and in which rights of independence are the sole possession of a few powers belonging to the primary group, will depend upon whether there is sufficient inducement to create the necessary oneness of interest among those States which actually possess the power collectively to enforce their will.[2]

The practice of nations has revealed the fact that a State cannot be permitted to retain its independence after it has become

[1] "When we come to formulate our foreign policies upon the belief that justice in the abstract is a dominant force in the regulation of world affairs, we are building on a foundation which, however desirable, is by no means certain. We must recognize the fact, unpalatable though it may be, that nations to-day are influenced more by selfishness than by an altruistic sentiment of justice. The time may come when the nations will change their present attitude through a realization that uniform justice in foreign as well as domestic affairs is the highest type of expediency; but that time has not yet come, and, if we are wise, we will not deceive ourselves by assuming that the policies of other Governments are founded on unselfishness or on a constant purpose to be just even though the consequences be contrary to their immediate interests." Robert Lansing, "Some Legal Problems of the Peace Conference", *Reports of American Bar Association*, 1919, XLIV, 238, 242–243.

[2] It is not believed that the United States would acquiesce in any arrangement which contemplated the demotion in rank of an enlightened State on account of the narrow limits of its domain or the relative insignificance of its military establishment.

impotent to fulfill the responsibilities incidental to its status. When it has sunk to such a condition, it forfeits the right thereafter to claim equality of treatment, and must anticipate in consequence at least a temporary subordination to some foreign power.[1] It is perceived that the maintenance of justice is of greater concern to the international society than the continued independence of any member thereof; and justice among nations is obstructed and held in contempt whenever a State which loses its capacity or disposition to perform its common duties towards the outside world is long permitted to continue its existence without external restraint. This principle is believed to be relentless in its operation.

[1] The establishment of a guardianship for such a State does not signify opposition to its interests, but rather an attempt to protect and preserve it for its own good as well as that of the international society, and with a view also to its ultimate restoration to a normal condition such as to justify its claim to the right to resume independence.

TITLE B

CLASSIFICATION OF STATES OF INTERNATIONAL LAW

1

STATES IN RELATION TO THEIR FREEDOM FROM EXTERNAL CONTROL

a

§ 12. In General.

The chief concern of the international society respecting the character of a person or State of international law pertains to the degree of freedom from external control with which it conducts its foreign relations. Of less consequence is the method by which such a person or State came into being, or the cause which was productive of it, or the nature of its structure. To the family of nations whatever circumstances serve to deny to one of its members the right to deal as it may see fit with the outside world, or to exercise in other ways such rights of political independence as are the common possession of its freest members, must, however, remain a matter of importance.[1]

b

§ 13. Independent States.

A State is independent when it is free from the control of any other State or States in the management of its domestic or foreign

[1] "When it is proposed to place a community under the head of those which are capable of entering into some only of the relations with other States which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree. The nature of the bond derogating from independence which unites the community to another society is a matter, not of international, but of public law; because in so far as the former is identified with that society in its relations with other States, it is either a part of it, or in common with it is part of a composite State." Hall, Higgins' 7 ed., 23–24.

affairs.[1] The United States, Japan, Spain and Brazil afford instances.

c

Dependent States

(1)

§ 14. Preliminary.

A dependent State is one which by reason of its subordination to another State or States is subjected to external restraint in the control of its foreign or domestic affairs, and thus deprived of those rights of political independence which are commonly exercised by the freest members of the international society.[2] Various forms of dependence are seen. While they differ greatly with respect to the extent and manner of the restraint imposed, it may be doubted whether any classification indicates with precision useful distinctions of legal value. General terms have been roughly and equivocally employed to describe relationships manifesting the dependence of one State upon another, and without a common design of attaching to them a signification purporting to refer to any peculiar degree of subordination.[3] For that reason it is believed to suffice to note some of the actual and yet differing forms of dependence which have been established, with a view to observing in each case the nature and manner of the restriction. Inasmuch as the United States has, by virtue of treaties, undertaken in various ways to become the protector of certain neighboring States, the relationships thus established merit close examination.

[1] "Independence means freedom from control, and a State like the United Kingdom or France is independent because it is free from all control either over its internal government or over its foreign relations." Westlake, 2 ed., I, 20.

Obviously no State is wholly free from external control. The society of nations, notwithstanding its imperfect organization, imposes restrictions which the individual State is not free to disregard. For that reason it might not be inaccurate to describe an independent State as one which enjoys that freedom from external control which is acknowledged to be the possession of the freest States belonging to the international society.

[2] W. W. Willoughby and C. G. Fenwick, "Types of Restricted Sovereignty and of Colonial Autonomy", Dept. of State, confidential document, Jan. 10, 1919; C. G. Fenwick, "Wardship in International Law", Dept. of State, confidential document, 1919.

[3] For sake of convenience, the terms "protectorate" and "protected State" are employed in the text to refer generally to States in a temporary or permanent condition of dependency, and without the design of attaching to either a special significance purporting to illustrate a particular degree or kind of subordination. See, in this connection, Roland R. Foulke, International Law, Philadelphia, 1920, §§ 50–52.

(2)

Certain So-called Protectorates and Protected States

§ 15. The Ionian Islands.

A relationship may be established whereby one State, on account of the protection afforded by another, is unable to enter into foreign relations without the consent of its protector. The large restraint imposed upon the inferior State serves to burden its superior with a proportional responsibility in the according of protection,[1] and for the conduct of its ward.[2] The Ionian Islands, placed under the protection of Great Britain by virtue of the treaty concluded by that Power with Austria, Prussia and Russia, November 5, 1815, and until annexation to Greece in 1863, are commonly mentioned as illustrative of such a relationship, which is described as constituting a protectorate.[3] Apart from the right to receive commercial agents or consuls, and to display a distinctive trading flag,[4] the Islands possessed no right to control their foreign relations.[5]

[1] Westlake, 2 ed., I, 22–23.

[2] "A protectorate, however qualified, assumes a greater or less degree of responsibility on the part of the protector for the acts of the protected State, without the ability to shape or control these acts, unless the relation created be virtually that of colonial dependency, with paramount intervention of the protector in the domestic concerns of the protected community." Mr. Sherman, Secy. of State, to Mr. Powell, Minister to Haiti, No. 97, Jan. 11, 1898, MS. Inst. Haiti, III, 629, Moore, Dig., VI, 475, 476.

[3] Brit. and For. State Pap., III, 250; The Ionian Ships, 2 Spinks, 212, 221.

[4] Art. VII of the treaty of Nov. 5, 1815, Brit. and For. State Pap., III, 257.

[5] Declares Hall: "The head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality the validity of which was acknowledged in the English Courts." Higgins' 7 ed., 28.

Concerning the Republic of San Marino, under the protection of Italy, see Fernand Daguin, *La République de Saint-Marin*, Paris, 1904; E. Engelhardt, *Les Protectorats Anciens et Modernes*, Paris, 1896, 102–105. It may be observed that the United States concluded an extradition treaty with San Marino June 6, 1906. Malloy's Treaties, II, 1598.

Concerning the Republic of Andorra in the Pyrenees under the co-protection of France and Spain (exercised through the Bishop of Urgel) see Joseph Roca, *De la Condition Internationale des Vallées d'Andorre*, Antibes, 1908; also Bonfils-Fauchille, 7 ed., § 177, and works there cited.

Concerning the Principality of Monaco, see Hall, Higgins' 7 ed., 28, and note 2 by the editor; Bonfils-Fauchille, 7 ed., § 178, with bibliography; W. W. Willoughby and C. G. Fenwick, "Types of Restricted Sovereignty and of Colonial Autonomy", Dept. of State, confidential document, Jan. 10, 1919, p. 59.

§ 16. The Free City of Danzig.

By the treaty of peace with Germany, of June 28, 1919, the Principal Allied Powers undertook to establish the town of Danzig as a "Free City" to be placed under the protection of the League of Nations.[1] Those Powers agreed to negotiate a treaty between the Polish Government and the Free City of Danzig, whereby the Polish Government should undertake the conduct of the foreign relations of that City, as well as the diplomatic protection of its citizens when abroad.[2]

(3)

So-called Suzerainties

§ 17. Bulgaria, 1878–1908.

A relationship manifesting the dependence of one State upon another has, in particular cases, been described as a suzerainty.[3] Until it proclaimed its independence on October 5, 1908,[4] Bulgaria was a vassal State, and, according to the Treaty of Berlin of July 13, 1878, constituted an "autonomous and tributary Principality, under the suzerainty of His Imperial Majesty the Sultan" of Turkey.[5] That agreement provided that the treaties between the Powers and Turkey were to be maintained in the Principality, and that no change should be made in them with regard to any Power without its previous consent. Privileges and immunities of foreigners and rights of consular jurisdiction and protection, "as established by the capitulations and usages", were to remain in force until modified with the approval of the parties concerned. To Turkey, the suzerain, the Principality was to pay an annual tribute. Save for provisions substituting the Principality for the Sublime Porte in specified engagements in relation to certain railways, and contemplating further conventions in that regard,

[1] Art. 102. [2] Art. 104 (6).

[3] Declares Professor Moore with respect to the relationship of suzerainty: "The extent of the authority or subordination comprehended by this term is not determined by general rules, but by the facts of the particular case. The foreign relations of a subject State may be wholly and directly conducted through the ministry of foreign affairs of the suzerain. It may, on the other hand, maintain diplomatic relations, and, subject to the veto of the suzerain, conclude treaties of all kinds; but, more frequently, its right of initiative, if it possesses any, is confined to a limited sphere; and a consul-general accredited to it, though he may also bear the title of agent or even of diplomatic agent, exercises only consular powers." Dig., I, 27.

[4] For. Rel. 1908, 57.

[5] *Nouv. Rec. Gén.*, 2 ser., III, 449; Brit. and For. State Pap., LXIX, 749; U. S. For. Rel. 1878, 895; also, T. E. Holland, The European Concert in the Eastern Question, 277.

no arrangement was made for the conclusion of treaties by the Principality.[1] Nevertheless, it proceeded to exercise such a right, and maintained direct diplomatic relations with foreign States.[2]

§ 18. Egypt, 1840–1914.

Prior to the establishment of the protectorate proclaimed by Great Britain December 18, 1914, Egypt was said to be subject to the suzerainty of the Sultan of Turkey. By the treaty of July 15, 1840, concluded by Great Britain, Austria, Prussia, Russia and Turkey,[3] and the so-called firman of June 1, 1841,[4] Egypt became an hereditary Pashalic under the rule of the family of Mehemet Ali.[5] The ruler of the country, who bore the title of Khedive, paid annual tribute to the Sultan. The former was authorized to negotiate with foreign powers non-political treaties not interfering with the political treaties of the Sultan, or with his sovereignty over Egypt. It was required, however, that treaties negotiated by the Khedive should, prior to their promulgation by him, be communicated to the Sultan.[6]

(4)

Relationships Established between the United States and Certain Neighboring States

(a)

§ 19. Cuba.

By virtue of a treaty with the United States of May 22, 1903, in pursuance of declarations in the Cuban Constitution of May 20,

[1] Arts. I–XII of the Treaty of Berlin, Brit. and For. State Pap., LXIX, 751–755; For. Rel. 1878, 895, 896–899.

[2] The United States accredited a diplomatic agent to Bulgaria in the person of its minister to Greece. See *Am. J.*, I, Supp., 86–87, containing List of Diplomatic Officers of the United States, corrected to Jan. 1, 1907.

G. Scelle, "*La situation diplomatique de la Bulgarie avant la proclamation de son independence le 5, octobre 1908*", *Rev. Gén.*, XV, 524.

[3] *Nouv. Rec. Gén.*, I, 156.

[4] "*L'Egypte et les firmans*", *Rev. Gén.*, III, 291.

[5] For texts of the firmans of the Sultan from 1841 to 1879, illustrative of the international position of Egypt, see T. E. Holland, European Concert in the Eastern Question, 110–205.

[6] See firman of June 8, 1873, *Nouv. Rec. Gén.*, XVII, 629; also that of Aug. 14, 1879, *Nouv. Rec. Gén.*, 2 scr., VI, 508.

It should be observed, however, that for many years prior to 1914, Egypt was occupied by Great Britain, whose influence was predominant in the administration of the government. See generally, Bonfils-Fauchille, 7 ed., § 189, with extensive bibliography; E. Engelhardt, *Les Protectorats Anciens et Modernes*, 66–70. See, also, The Charkieh, (1873) L. R. 4 Adm. and Ecc. 59.

Concerning the diplomatic relations of the United States with Egypt, *cf.* Moore, Dig., V, 584–586, and documents there cited.

1902, and in accordance with provisions of an Act of Congress of the United States of March 2, 1901, the Government of Cuba consented:

> that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.[1]

That Republic also agreed never to enter into any treaty or other compact with any foreign power or powers

> which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island.[2]

It undertook also not to assume or contract any public debt to pay the interest upon which, and to make reasonable sinking-fund provision for the ultimate discharge of which the ordinary revenues of the island, after defraying the current expenses of the Government, should be inadequate.[3] The Cuban Government agreed to execute, and, as far as necessary, to extend existing plans, or other plans to be mutually agreed upon, for the sanitation of the cities of the Island, with a view to preventing a recurrence of epidemic and infectious diseases, for the protection of the people and commerce of Cuba, and for the benefit also of the commerce of the southern ports of the United States and the people residing therein.[4]

By the foregoing provisions Cuba is believed to have accepted a status of dependency under the protection of the United States. The rights and undertakings of the latter, and the restrictions acquiesced in by the former with respect also to the exercise of the treaty-making power, compel such a conclusion. It may be observed that the United States has found occasion to intervene for the purposes announced in the convention and with a view

[1] Art. III, Malloy's Treaties, I, 364.
[2] Art. I, *id.*, 363. See also President Roosevelt, Annual Message, Dec. 3, 1901, For. Rel. 1901, XXXI.
[3] Art. II.
[4] Art. V. See, in this connection, Decree of Chas. E. Magoon, Provisional Governor of Cuba, Sept. 27, 1908, For. Rel. 1908, 254.

to preserving and maintaining a government adequate for the purposes described therein.[1] The references in the compact to "independence" must be taken generally to refer to Cuban freedom from external control as exerted by States other than the United States, and by the United States beyond the extent which the convention permits.[2]

(b)

§ 20. **Panama.**

By the treaty of November 18, 1903, between the United States and Panama, the former undertook to guarantee and maintain the "independence of the Republic of Panama."[3] The latter not only granted to the United States in perpetuity the use, occupation and control of a specified zone of land and land under water for the construction, maintenance, operation, sanitation and protection of an inter-oceanic ship canal, and of ten miles in width (together with certain lands and islands outside of the zone), as well as rights akin to those of sovereignty over the zone and auxiliary lands and waters,[4] but also agreed that

> If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways, and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.[5]

[1] The United States intervened in Cuba in 1906, establishing a military occupation which continued until 1909.

See For. Rel. 1906, I, 454–494, especially President Roosevelt to Señor Quesada, Cuban Minister, Sept. 14, 1906, *id.*, 480. See, also, Mr. Knox, Secy. of State, to Mr. Jackson, Minister to Cuba, June 21, 1910, For. Rel 1910, 416; Mr. Knox, Secy. of State, to the American Chargé d'Affaires, Aug. 15, 1912, For. Rel. 1912, 314.

[2] The description of States placed under the protection of others as "independent" in the very documents which purport to establish a status of dependency is not uncommon. The reference to the Ionian Islands as a "single, free and Independent State", in the treaty of Nov. 5, 1815, is illustrative. Brit. and For. State Pap., III, 250, 254.

[3] Art. I, Malloy's Treaties, II, 1349.

[4] Arts. II and III. By Art. V Panama granted to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

[5] Art. XXIII. It was provided in Art. XXIV that if the Republic of Panama should thereafter enter as a constituent into any other government or into any union or confederation of States, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under the convention should not be in any respect lessened or impaired.

The Republic granted also to the United States both within the limits of the cities of Panama and Colon and within the harbors and territory adjacent thereto, the broad right to acquire properties of various kinds necessary and convenient for the construction, maintenance, operation and protection of the Canal, embracing works of sanitation. It was agreed that those cities should comply in perpetuity with the sanitary ordinances prescribed by the United States, and it was declared that

> in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States, the Republic of Panama grants to the United States the right and authority to enforce the same.
>
> The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.[1]

Although the foregoing provisions may not have been designed to impose a status of dependency upon the Republic of Panama, the nature and scope of the rights conferred as incidental to the maintenance and protection of the Canal, and outside of as well as within the zone, served to subject that country to a marked degree of external control. By granting to a foreign State the right to conduct for all time an enterprise of the kind and magnitude of the Canal, and bearing the geographical relationship which it did to the territory of the grantor, Panama undertook, and doubtless wisely, to subordinate its interests, whether domestic or foreign, to those of the grantee in relation to the Canal, in case of any conflict between them.[2] By so doing it relinquished, with respect to such matters, its independence. Otherwise that Republic retained its freedom of action.[3]

[1] Art. VII.

By Art. XXV the Government of Panama agreed to sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon by the President of the United States.

For the rights, powers and privileges granted to it, the United States agreed to pay to the Republic of Panama the sum of $10,000,000, and an annual payment during the life of the convention of $250,000. Art. XIV.

[2] See Mr. Root, Secy. of State, to Mr. Taft, Secy. of War, Feb. 21, 1906, concerning the right of the United States under the treaty with Panama to maintain public peace and order in the territory of that State, For. Rel. 1906, II, 1203; also Mr. Knox, Secy. of State, to Mr. Squiers, Minister to Panama, April 19, 1909, For. Rel. 1909, 469.

[3] In the proclamation of President Valdes of Panama, of April 7, 1917,

(c)

§ 21. The Dominican Republic.

By a convention of February 8, 1907, for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic,[1] it was agreed that the President of the United States should appoint a General Receiver of Dominican Customs, who (with such assistant receivers and other employees of the receivership similarly appointed) should collect all customs duties,[2] applying the sums collected according to a specified plan.[3] The Dominican Republic agreed not only to make provision for the payment of all customs duties to the General Receiver and his assistants and to give them all needful aid and assistance as well as protection "to the extent of its powers", but also that the Government of the United States should give to the General Receiver and his assistants "such protection as it may find to be requisite for the performance of their duties."[4] It was also agreed that until the Dominican Republic had paid the whole amount of the bonds of the debt mentioned in the convention, its public debt should not be increased except by a previous agreement between the Dominican Government and the United States.[5]

concerning the coöperation of that Republic with the United States in war against Germany, it was said: "Our clear and indisputable duty in this dreadful hour of human history is that of a natural ally whose interests, and whose very existence, are linked in a perpetual and indissoluble manner with the United States of America, and this is the meritorious attitude which it is encumbent upon us to adopt." Declarations of War, Dept. of State, confidential document, 1919, 53, 54.

[1] The preamble of the convention referred at length to the financial difficulties of the Dominican Republic, the magnitude of its indebtedness, created in part by revolutionary governments, the prevention of the peaceable and continuous collection of revenues for the payment of interest or principal of its debts, the arrangement of a conditional plan of settlement with foreign creditors, the issuance and sale of bonds for their benefit, and the conditioning of the plan upon the assistance of the United States in the collection and application of customs revenues to meet the interest and effect the amortization and redemption of the bonds. See Malloy's Treaties, I, 418.

[2] Art. I. The period of such collection was to continue "until the payment or retirement of any and all bonds issued by the Dominican Government in accordance with the plan and under the limitations as to terms and amounts hereinbefore recited."

[3] The funds received were to be applied "first, to paying the expenses of the receivership; second, to the payment of interest upon said bonds; third, to the payment of the annual sums provided for amortization of said bonds including interest upon all bonds held in sinking fund; fourth, to the purchase and cancellation or the retirement and cancellation pursuant to the terms thereof of any of said bonds as may be directed by the Dominican Government; fifth, the remainder to be paid to the Dominican Government." Art. I.

[4] Art. II. See Jacob H. Hollander, "The Convention of 1907 between the United States and the Dominican Republic", *Am. J.*, I, 287.

[5] Art. III. It was here added: "A like agreement shall be necessary to

By the foregoing provisions it is believed that the Dominican Republic accepted the protection of the United States, for the period of the receivership, and for the sake of its benefits yielded to such American control as might be entailed. To that extent there was an impairment of independence, even though there was no establishment of a permanent status of dependency. Save as the convention implied restraint on account of the requirements of the receivership, the Republic was not hampered in the control of its foreign affairs.

It will be recalled that in November, 1916, the United States undertook the military occupation of Dominican territory by a naval force on account of the failure of the Republic to observe the terms of the convention with respect to the increase of its public debt and by reason of the resulting disturbance of domestic tranquillity.[1]

On December 24, 1920, the Department of State gave to the press a proclamation which the President had directed Rear-Admiral Snowden, the Military Governor of Santo Domingo, to issue, in which was announced the achievement of the purposes of the United States in the employment, pursuant to the treaty of 1907, of military forces within Dominican territory, the contemplated withdrawal of responsibilities assumed in connection with Dominican affairs, and the plan of appointing a Commission of Dominican citizens to formulate amendments to the Constitution and a general revision of the laws of the Republic (including the drafting of a new election law), for submission, upon approval by the Military Government in occupation, to a Constitutional Convention and to the National Congress of the Dominican Republic.

(d)

§ 22. Haiti.

In order to remedy the existing condition of its finances, and to assist in the economic development and tranquillity of the

modify the import duties, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of the United States recognize that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been for each of such two years in excess of the sum of $2,000,000 United States gold."

[1] See proclamation of Capt. H. S. Knapp, U. S. N., Nov. 29, 1916, *Am. J.*, XI, Supp., 96; also editorial comment by Philip Marshall Brown, on "The Armed Occupation of Santo Domingo", in *Am. J.*, XI, 394. See, also, Mr. Knox, Secy. of State, to the American Minister to the Dominican Republic, Jan. 23, 1912, For. Rel. 1912, 341.

Republic, Haiti concluded a treaty with the United States September 16, 1915,[1] whereby the latter undertook "by its good offices", to give its aid.[2] The President of Haiti was to appoint, upon nomination by the President of the United States,[3] a General Receiver and necessary aids, who were to collect, receive and apply all customs duties on imports and exports; and he was to appoint, upon like nomination, a Financial Adviser, to be an officer attached to the Ministry of Finance, clothed with broad advisory and constructive powers.[4] Haiti undertook to give all needful aid to these officers and to the receivership, and the United States on its part agreed to "extend like aid and protection."[5] All sums collected and received by the General Receiver were to be applied according to a specified arrangement.[6] The Government of Haiti undertook not to increase its public debt except by previous arrangement with the President of the United States, and not to contract any debt or assume any financial obligation unless the ordinary revenues of the Republic available for that purpose, after defraying the expenses of the Government, should be adequate to pay the interest and provide a sinking fund for the final discharge of such debt.[7] Modification of customs duties was also rendered subject to agreement with the President of the United States; and there was assurance by Haiti to coöperate with the Financial Adviser in his recommendations.[8]

There was arrangement for the establishment of an efficient constabulary to be composed of native Haitians, "organized and officered by Americans to be appointed by the President of Haiti upon nomination by the President of the United States."[9]

The Government of Haiti acquiesced in the important undertaking not to surrender any of the territory of the Republic by sale, lease, or otherwise, or jurisdiction over such territory, to any foreign government or power, or to enter into any treaty or contract with any foreign power or powers that would impair or tend to impair the independence of Haiti.[10] It was agreed also that

[1] 39 Stat. 1654; also, in this connection, editorial comment by George A. Finch, *Am. J.*, X, 859.

[2] Art. I.

[3] Art. II. *Compare* this provision with Art. I of the Convention with the Dominican Republic of Feb. 8, 1907, Malloy's Treaties, I, 419.

[4] *Id.* [5] Art. III.

[6] Art. V. See, also, Art. IV with respect to the classification of Haitian debts.

[7] Art. VIII. [8] Art. IX.

[9] Art. X. The authority and ultimate organization of the constabulary were here described.

[10] Art. XI. Art. XII made provision for the adjustment of pecuniary claims.

> The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian independence and the maintenance of a government adequate for the protection of life, property and individual liberty.[1]

The treaty was to remain in force for the term of ten years from the date of the exchange of ratifications, and for a subsequent term of ten years if, for specific reasons presented by either of the high contracting parties, the purpose of the agreement had not been fully accomplished.[2]

By clothing the United States with the right to preserve domestic tranquillity and to rehabilitate financial conditions, and by relinquishing certain rights pertaining to the exercise of its normal power to contract or cede territory, the Republic of Haiti appeared to accept the protection of the United States, and to that extent to consent, during the life of the treaty, to an abridgment of its independence.

(e)

§ 23. Nicaragua.

A convention between the United States and Nicaragua, of August 5, 1914, contained a grant in perpetuity to the United States of the exclusive proprietary right necessary and convenient for the construction, operation and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua, or by way of any route over Nicaraguan territory.[3] In order to enable the United States to protect the Panama Canal and "the proprietary rights granted to the Government of the United States by the foregoing Article", and also to enable it to "take any measures necessary to the ends contemplated herein",

Art. XIII provided for sanitary and public improvements to be made under the supervision and direction of engineers to be appointed by the President of Haiti on nomination by the President of the United States.

[1] Art. XIV. *Compare* Art. III of the convention with Cuba of May 22, 1903, Malloy's Treaties, I, 364.

[2] Art. XVI. Ratifications were exchanged at Washington May 3, 1916, on which day the treaty was proclaimed by the President of the United States.

[3] 39 Stat. 1661. See, also, in this connection, editorial comment by George A. Finch, in *Am. J.*, X, 344, reviewing the history of this convention. The provisions mentioned in the text are contained in Art. I. It may be noted that the convention was ratified by the President of the United States June 19, 1916, and that ratifications were exchanged at Washington, June 22, 1916. See, also, the terms on which the Senate advised and consented to ratification, 39 Stat. 1664.

there was leased to it, for a term of ninety-nine years, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island, and there was granted to it for a like period the "right to establish, operate and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select." It was declared that

> the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.[1]

Apart from the right conferred upon the United States to take measures, should occasion arise, necessary to achieve the ends contemplated by the convention, there appears to have been no design to accord to it the rights or functions of a protector. Neither the grant nor the lease sufficed in themselves to reduce Nicaragua to a condition of subordination, although they doubtless yielded to the grantee and lessee privileges likely to be productive of such a result in case of need. Nicaragua did not consent to accept, save under such a contingency, a condition of dependency involving the protection of another State.

(f)

§ 24. Certain Conclusions.

The relationships with Cuba, Panama, the Dominican Republic and Haiti reveal a willingness on the part of those Republics to accept, for the reasons that have been observed, the protection of the United States, and to yield to it broad and definite rights for the maintenance of public order.[2] These rights, whether incidental to the execution of plans for financial rehabilitation, as in the case of the Dominican Republic and Haiti, or to the operation of an interoceanic canal, as in the case of Panama, or to the general establishment and advancement of a new State, as in the case of Cuba, exhibit a readiness on the part of the grantors to relinquish or suspend during the lives and according to the terms of their respective conventions, normal rights of political inde-

[1] Art. II. For the rights acquired under the convention, the United States agreed to pay to Nicaragua the sum of $3,000,000. Art. III.

[2] The convention with Nicaragua is omitted from this summary because of its terms, which, as has been observed, appear in only a faint degree to reveal a design which is common to the other agreements.

pendence. This voluntary yielding to varying degrees of external control is the significant fact to be reckoned with. It has not been accompanied by a surrender also of the agreement-making power to the protector, although these Republics have undertaken not to exercise that power with respect to certain important matters without the approval of the United States. This circumstance does not, however, alter the distinctive character of these relationships which, despite differences between any two of them, with respect to permanence or design, permit the United States to enforce tranquillity and maintain public order as a protector. In so doing it fulfills in the estimation of the outside world a quasi-domestic function for the benefit chiefly of its ward, and is not subject to the principles which generally determine the propriety of intervention in the affairs of independent States.[1] In proportion as the United States by virtue of these conventions exercises rights which they confer as a privilege peculiarly its own, and in which no foreign State is permitted to participate, it appears to assume internationally a certain responsibility for conditions of government within the territories concerned.

(5)

§ 25. Protection of Countries Lacking European Civilization.

Not infrequently a so-called protectorate is established by a State over a territory or country unfamiliar with and not possessed of what is known as European civilization, or over a region which may be fairly deemed to be uncivilized. An uncivilized community, while it remains such, lacks the capacity to be a person or State of international law.[2] The outside world regards territory occupied by such a community as subject to the control of the State which exercises in fact a right of protection therein. Thus, in a broad sense, the relationship established between the State and the protected region is not internationally important. An anomalous situation exists, however, when the protector, claiming the right to exclude foreign States from intercourse with the protected territory, does not purport to annex it, or to assume responsibility for the establishment of government therein.[3]

[1] See Intervention, In General, *infra*, § 69.

[2] "Where there is no State, that is to say, in an uncivilized region, there can be no protected State, and therefore no such protectorate as has been described in the last paragraph." Westlake, Collected Papers, 182. See Countries Not Possessed of European Civilization, *infra*, § 33.

[3] See General Act of the Berlin Conference of Feb. 26, 1885, concerning the

Where a so-called protectorate is established over a country possessing a civilization other than European, and occupying territory within definite limits, a situation arises somewhat resembling in theory that which presents itself when the protected political entity is a State. While the protected country by reason of the nature and degree of its civilization may not, in the course of its development, have reached the stage indicative of a capacity for statehood, it may, nevertheless, have previously enjoyed extensive diplomatic intercourse with independent powers, and have concluded treaties with them. In such case, the change wrought by the creation of the protectorate becomes a matter of direct international significance. Thus Tunis was a party to numerous treaties with enlightened States when, in 1881, it became a French protectorate.[1] Likewise Zanzibar[2] and Korea had contracted conventions with the outside world when Great Britain and Japan, respectively, established protectorates over them.[3] The States of international law doubtless lack the right to object to the establishment of a protectorate over such a country with which they have concluded treaties, and by virtue of which they have obtained commercial or other benefits. Nevertheless, they are disposed to insist that their contractual privileges shall remain unaffected until at least the protector agrees equitably to supplant them with direct undertakings of its own, or by annexing the protected territory, deals with it as a part of its own domain.[4]

The point seems to require emphasis that in an international sense, a protectorate, regardless of the degree or kind of civiliza-

assumption of protectorates on the African coast by any of the contracting parties, and the requirements incidental thereto in the matter of notification, and in the establishment of governmental authority in regions occupied, *Nouv. Rec. Gén.*, 2 ser., X, 414, 426; Moore, Dig., I, 267–268. See in this connection Westlake, 2 ed., I, 121–129.

Concerning the protected princes of India, *cf.* William Lee-Warner, The Protected Princes of India, London, 1894; Westake, Collected Papers, 220–224.

[1] See treaty between France and Tunis of May 12, 1881, *Nouv. Rec. Gén.*, 2 ser., VI, 307; also treaty of June 8, 1883, *id.*, IX, 698. See, also, in this connection, Bonfils-Fauchille, 7 ed., § 184, and literature there cited.

As early as August, 1797, the United States concluded a treaty with Tunis, and did so again Feb. 24, 1824. Malloy's Treaties, II, 1794 and 1800.

[2] Brit. and For. State Pap., LXXXII, 654, embracing text of notification of the British protectorate under date of Nov. 4, 1890; also declarations of Great Britain and France, of Aug. 5, 1890, *id.*, 89.

[3] See arrangements between Japan and Korea of Aug. 24, 1904, U. S. For. Rel. 1904, 439, and Nov. 17, 1905, *id.*, 1905, 612.

[4] See, for example, treaty between the United States and France, March 15, 1904, in which the former renounced its rights under existing treaties with Tunis, and the latter undertook on its part "to assure these rights and privileges

tion prevailing in the country over which it is exercised, contemplates the retention by that country of a personality recognizable as such by the family of nations. Such retention is manifested by some participation, however slight, in the conduct of foreign relations, or by the continuance of a political entity maintaining, although possibly through the representation of the protector, diplomatic relations with the outside world. When France established its protectorate over Morocco in 1912,[1] and Great Britain proclaimed a protectorate over Egypt in 1914,[2] neither of the paramount States appeared to thwart the operation of this principle. If a protecting State seeks to destroy the international personality of its ward, and so put an end to its capacity for statehood, it would seem to be obliged to annex the territory concerned, and by such process make known the assertion of supremacy as the territorial sovereign.

(6)

§ 26. Mandatory States under the League of Nations.

The Covenant of the League of Nations contemplated a special form of protection for colonies and territories which, as a conse-

in Tunis to the consuls and citizens of the United States and to extend to them the advantage of all treaties and conventions existing between the United States and France." Malloy's Treaties, I, 544, 545.

See convention between the United States and Great Britain of May 31, 1902, concerning import duties in Zanzibar, Malloy's Treaties, I, 784. See declaration between Great Britain and France of Aug. 5, 1890, embracing French recognition of the British protectorate over Zanzibar, and British recognition of the French protectorate over Madagascar, Brit. and For. State Pap., LXXXII, 89. By the agreement between Japan and Korea of Nov. 17, 1905, the former undertook "to see to the execution of the treaties actually existing between Korea and other powers." For. Rel. 1905, 612.

[1] See treaty between France and Morocco of March 30, 1912, *Am. J.*, VI, Supp., 207; *Nouv. Rec. Gén.*, 3 ser., VI, 332. *Cf.*, also, convention between France and Spain concerning Morocco, Nov. 27, 1912, *id.*, VII, 323; *Am. J.*, VII, Supp., 81. See, in this connection, N. Dwight Harris, "The New Moroccan Protectorate", *Am. J.*, VII, 245.

[2] See British notification of Dec. 18, 1914, that Egypt was placed under the protection of His Britannic Majesty, and would thereafter constitute a British protectorate, Brit. and For. State Pap., CVIII, 185. See British note of Dec. 19, 1914, addressed to His Highness Prince Hussein Kamel Pasha, respecting the establishment of the protectorate, *id.*, CIX, 437. Also "The Egyptian Protectorate", *The Law Journal* (London), Dec. 24, 1914, XLIX, 710.

It may be noted that the United States did not cease to accredit a diplomatic agent to Morocco, and also to Egypt in consequence of the establishment of a protectorate over the former country in 1912, and over the latter in 1914. See Mr. Lansing, Secy. of State, to the French Ambassador at Washington, Jan. 17, 1917, announcing recognition by the United States "of the French protectorate over the French zone of the Shereefian Empire." Naval War College, Int. Law Documents, 1918, 208.

quence of The World War, "ceased to be under the sovereignty of the States which formerly governed them", and which were inhabited by peoples "not able to stand by themselves under the strenuous conditions of the modern world", and whose well-being and development were declared to "form a sacred trust of civilization."[1] To that end, it was announced that the tutelage of such peoples should be entrusted to advanced nations which by reason of their resources, experience or geographical position could best undertake the responsibility, and which were able to accept it, and that this tutelage should be exercised by such States as Mandatories on behalf of the League.[2]

It was provided that in every case of mandate, the Mandatory should render to the Council of the League an annual report in reference to the territory committed to its charge. The degree of authority, control or administration to be exercised by the Mandatory was, if not previously agreed upon by the Members of the League, to be explicitly defined by the Council. A permanent Commission was to be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates. The plan of making the protector of dependent peoples responsible to an organization representative of the States constituting the League, and as a trustee, was designed to prevent abuse of power

[1] Art. XXII of the Covenant of the League of Nations, and embraced in the Treaty of Versailles, of June 28, 1919.

It was observed that "the character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances."

[2] It was declared that certain communities belonging to the Turkish Empire had reached a state of development "where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone." The wishes of such communities should be, it was said, a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, were said to be "at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and liquor traffic and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League."

Attention was called to other territories, such as Southwest Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, could, it was declared, be best administered under the laws of the Mandatory as integral portions of its territory, subject to safeguards previously mentioned in the interests of the indigenous population.

by the Mandatory, and to assure the proper performance of the trust.[1]

(7)

§ 27. Certain Minor Impairments of Independence through the Medium of the League of Nations.

Events of The World War impelled the Principal Allied and Associated Powers to require[2] that certain new States resulting from the conflict should be subjected to a slight measure of external control not commonly suffered by independent States, and that such control should be exercised for the collective interests of all concerned through the medium of the League of Nations. Both the Czecho-Slovak State[3] and Poland[4] consented in the Treaty of Versailles with Germany, of June 28, 1919, to the principle involved. The treaty of that date signed in behalf of the United States, the British Empire, France, Italy and Japan, on the one hand, and Poland on the other, gave effect to the design.[5] Poland there accepted as its fundamental and supreme law the undertaking to assure full and complete protection of life and liberty to all inhabitants of its territory, without distinction of birth, nationality, language, race or religion, and to accord Polish nationals belonging to racial, religious or linguistic minorities the same treatment and security in law and in fact as that accorded other Polish nationals.[6] That Republic agreed, moreover, that the latter stipulations should constitute obligations of international concern and should be placed under the guarantee of the League of Nations, that any member of the Council thereof should have the

[1] It will be recalled that on May 24, 1920, President Wilson requested the Congress to grant to the Executive power to accept for the United States a mandate in Armenia, in pursuance of a formal request of the statesmen in conference at San Remo. Cong. Rec., May 24, 1920, Vol. LIX, No. 143, p. 8137.

[2] See Conditional Recognition, *infra*, § 38.

[3] Art. 86. [4] Art. 93.

[5] British Treaty Series, No. 8 (1919), Cmd. 223, embracing letter of M. Clemenceau, President of the Supreme Council of the Principal Allied and Associated Powers, of June 24, 1919, to M. Paderewski, President of the Polish Republic, adverting to the fact that the principles applied to Poland and Czecho-Slovakia would find expression also in treaties with Austria, Hungary and Bulgaria.

[6] Arts. I, II and VIII. According to Art. II all inhabitants of Poland were to be entitled to the free exercise, whether public or private, of any creed, religion or belief, the practices of which were not inconsistent with public order or public morals. Art. VIII provided that the racial, religious or linguistic minorities of Polish nationals should have an equal right to establish, manage and control, at their own expense, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

right to bring to the attention of that body any infraction or danger of infraction of these obligations, and that the Council might thereupon take such action and give such direction as it might deem proper and effective in the circumstances.[1] This treaty may be taken as typical of the new system designed to respond to actual conditions in certain States of Central and Eastern Europe.[2] The two characteristics which merit special attention are, first, the disposition of the controlling Powers of Europe to require that those States, regardless of their affiliations in the war, be subjected to the oversight of an international organization, and secondly, the resulting establishment of a secondary grade of States denied certain rights of political independence which are the common possession of the freest States of the international society, such as the United States or France.

(8)

§ 28. Turkey.

By the terms of the treaty of peace signed at Sèvres, August 10, 1920, Turkey was called upon to subject itself to a condition of dependence upon the Principal Allied Powers acting in certain matters in conjunction with the League of Nations. This sub-

[1] See Art. XII, where it was also agreed by Poland that these obligations of international concern should not be modified without the assent of a majority of the Council of the League of Nations. The other contracting powers agreed, however, not to withhold their assent from any modifications of the Articles containing these stipulations, which were in due form assented to by a majority of that Council.

See, also, Arts. 62–69 of the treaty of peace with Austria of September 10, 1919, Senate Doc. No. 92, 66 Cong. 1 Sess.; also letter of M. Clemenceau, President of the Peace Conference, to Dr. Renner, President of the Austrian Delegation, Sept. 2, 1919, Senate Doc. No. 121, 66 Cong., 1 Sess., p. 12.

See, also, Chap. I of the treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, signed at Saint-Germain-en-Laye, Sept. 10, 1919, *Current Hist. Mag.*, XII, No. 3, 546–547; also Arts. 49–57, of treaty of peace between the Allied and Associated Powers and Bulgaria, signed at Neuilly-sur-Seine, Nov. 27, 1919, *id.*, 548–549.

[2] Declared M. Clemenceau, in his note to M. Paderewski, of June 24, 1919: "It is indeed true that the new treaty differs in form from earlier conventions dealing with similar matters. The change of form is a necessary consequence and an essential part of the new system of international relations which is now being built up by the establishment of the League of Nations. Under the older system the guarantee for the execution of similar provisions was vested in the Great Powers. Experience has shown that this was in practice ineffective, and it was also open to the criticism that it might give to the Great Powers, either individually or in combination, a right to interfere in the internal constitution of the States affected which could be used for political purposes. Under the new system the guarantee is entrusted to the League of Nations. The clauses dealing with this guarantee have been carefully drafted so as to make it clear that Poland will not be in any way under the tutelage of those Powers who are signatories to the treaty." Brit. Treaty Series, No. 8 [Cmd. 223], p. 2.

ordination was manifested, for example, by the conditions on which the Turkish Government and His Majesty the Sultan were to be entitled to reside in Constantinople and there maintain the capital of the Turkish State,[1] by the nature of the provisions establishing a Commission of the Straits,[2] by the acceptance of an Allied Financial Commission clothed with vast powers of fiscal oversight and control until the satisfaction of the Turkish pecuniary burden imposed by the treaty,[3] and by the mode of safeguarding the civil, political and religious rights of minorities.[4]

By this agreement, apart from provisions contemplating the retention of extraterritorial jurisdiction by the Allied and other Powers,[5] Turkey, even within the restricted limits of its territory, was to relinquish rights of freedom from political control which are the common possession of independent States.

d

§ 29. Neutralized States.

The common interests of a group of States may demand that the territory of one of their number be isolated from belligerent operations, and that it itself be shielded so far as possible from participation therein. Such an end may be achieved by attaching to the State thus sought to be protected or isolated, a status of neutralization.

A State is neutralized when, in return for a guaranty of permanent immunity from attack given by other States, it agrees to relinquish the right to participate in war except in defense of its territory.[6] A State so circumstanced would appear to lack

[1] Art. 36, in which it was declared that: "Nevertheless, in the event of Turkey failing to observe faithfully the provisions of the present treaty, or of any of the treaties or conventions supplementary thereto, particularly as regards the protection of the rights of racial, religious, or linguistic minorities, the Allied Powers expressly reserve the right to modify the above provision, and Turkey hereby agrees to accept any disposition which may be taken in this regard."

[2] Arts. 37–61. *Cf.* The Bosphorus and the Dardanelles, *infra*, § 158.

[3] Part VIII, Financial Clauses.

Through the courtesy of the Division of the Near East of the Department of State, the author was enabled to examine the text of the treaty in October, 1920.

[4] Part IV, Arts. 140–151. According to Art. 151 the Principal Allied Powers, in consultation with the League of Nations, were to decide what measures might be necessary to guarantee the execution of the provisions of this Part. Moreover, the Turkish Government undertook to accept all decisions which might be taken on the subject.

[5] See Art. 136 respecting the scheme of reform to replace the capitulary system in judicial matters in Turkey.

The treaty has not as yet been ratified by Turkey.

[6] See, in this connection, Bonfils-Fauchille, 7 ed., §§ 348–367, with extensive

the right to destroy its status without the consent of the States participating in the arrangement of guaranty.[1]

A neutralized State suffers no infringement of the right generally to conduct its foreign affairs as it may see fit. Its independence is, however, impaired to the extent that it cannot lawfully commit any act or conclude any agreement inconsistent with the duty to abstain from war or not to render abortive the scheme of neutralization.[2] Thus it would seem to be precluded from concluding a treaty of alliance, or of guaranty, or even a convention serving to place the State under the political domination of a neighboring power.[3]

In the course of the nineteenth century Switzerland, Belgium, Luxemburg and the Independent State of the Congo were neutralized. Neutralization was impressed upon Switzerland in consequence of the declaration of the Congress of Vienna, March 20, 1815,[4] by the Act of Accession of the Swiss Cantons, May 27, 1815,[5] and by the Final Act of the Treaty of Paris of November 20, 1815.[6] Belgium acquired such a status by virtue of Articles VII and XXV of the Treaty of London of November 15, 1831,[7] and by Article I of the Treaty of London, April 19, 1839.[8] By the treaty of peace of June 28, 1919, Germany, recognizing that the treaties which had established the neutralized status of

bibliography; Oppenheim, 2 ed., I, §§ 95–101; Aldo Baldassarri, *La Neutralizzazione*, Rome, 1912; Emmanuel Descamps, *L'État Neutre à Titre Permanent*, Paris, 1912; Cyrus F. Wicker, Neutralization, Oxford, 1911; same writer, "Some Effects of Neutralization", *Am. J.*, V, 639; F. W. Baumgartner, The Neutralization of States, Kingston, Ontario, 1917.

[1] Bonfils-Fauchille, 7 ed., § 349.

See The Protection of Areas by Neutralization and Other Processes. International Waterways, *infra*, §§ 197–198.

[2] In a word, the effect of the arrangement of neutralization seems to deprive the State that is neutralized of common rights which are possessed and exercised by independent States as the freest members of the international society.

[3] In correspondence between the United States and Belgium concerning participation by the latter in the military operations of the Allied powers in China in 1900, Count Lichtervelde informed Mr. Hay, Secy. of State, Aug. 16, 1900: "Under the circumstances which will govern the mission of that body, we cannot, and the powers in interest undoubtedly will not, see anything therein that could possibly be contrary to the position occupied by Belgium in the law of nations." For. Rel. 1900, 308, 309. Belgium was a party to the protocol of Sept. 7, 1901, between the Allied Powers and China. For. Rel. 1901, Appendix, China, 312.

[4] *Nouv. Rec.*, II, 157. [5] *Id.*, 173.

[6] *Id.*, 734. See Paul Schweizer, *Geschichte der Schweizerischen Neutralität*, Fraunfeld, 1895; Rivier, I, 111–117.

[7] *Nouv. Rec.*, XI, 390, 394, 404. Belgium was not itself a party to this treaty. Concerning events leading up to its conclusion, *cf.* Frank Lord Warrin, Jr., "The Neutrality of Belgium", Dept. of State, 1918; Ed. Descamps, *La Neutralité de La Belgique*, Brussels, 1902; René Dollot, *Les Origines de la Neutralité de La Belgique*, Paris, 1902.

[8] *Nouv. Rec.*, XVI, 791.

Belgium before the war no longer conformed to the requirements of the situation, consented to their abrogation.[1] Events of the War thus served to free Belgium from its status of neutralization.

Luxemburg was neutralized by virtue of Article II of the Treaty of London of May 11, 1867.[2] The neutralization of the Independent State of the Congo was accomplished by means of Article X of the General Act of the Berlin Conference, February 26, 1885,[3] and by the acceptance by King Leopold II as head of that State, of the terms of the Act.[4] The State was, however, annexed by Belgium by the treaty of November 28, 1907.[5]

[1] Art. XXXI. [2] *Am. J.*, III, Supp., 118.

[3] *Nouv. Rec. Gén.*, 2 ser., X, 414, 419.

[4] See communication of Administrator General of Dept. of For. Affairs, Aug. 1, 1885, U. S. For. Rel. 1885, 59. See, also, documents in *Am. J.*, III, Supp., 5–96.

[5] *Nouv. Rec. Gén.*, 3 ser., II, 101–109; *Am. J.*, III, Supp., 73. P. Fauchille, "*L'Annexation du Congo à la Belgique et le droit international*", *Rev. Gén.*, II, 400.

According to Art. I of the General Act of Berlin, of June 14, 1889, concluded by the United States, Great Britain, and Germany, the Samoan Islands were to be "neutral territory in which the citizens and countries of the Three Signatory Powers have equal rights of residence, trade, and personal protection." For. Rel. 1889, 353, 354. The convention concluded by the same Powers, Dec. 2, 1899, providing for the partition of the Islands, declared that all previous agreements relating to Samoa were annulled. For. Rel. 1899, 665, 667.

2

STATES IN RELATION TO THEIR STRUCTURE AND COMPOSITION

a

§ 30. In General.

The structure of a State is not necessarily a matter of international concern. Thus whether it be what is described as simple,[1] or composite,[2] is unimportant. Nor is the mode by which a group of political entities have united and formed a person of international law a matter of concern, so long as a single State of international law has resulted. To the outside world, the method by which the United States came into being, with respect at least to the nature of its statehood, is merely a matter of historic interest.

b

Unions of States

(1)

§ 31. Where International Personality of Members Is Not Relinquished.

States may and oftentimes do unite. In such event it becomes a matter of international concern whether any constituent member of the new State has retained its international personality by not relinquishing wholly its right to participate in foreign affairs. If such be the case the union, however described, is in a strict sense a group of states of international law each of which remains to be regarded as a distinct person in the family of nations. Unions of such a kind have appeared in various forms. In some instances the individual members have retained broadest privileges, reducing proportionally the importance of the bond uniting them.[3]

[1] "The characteristic of the simple State is that it has one supreme government, and exerts a single will, whether it be the individual will of a sovereign ruler, or the collective will of a popular body or of a representative assembly." Moore, Dig., I, 21.

[2] "A composite State is one composed of two or more States." *Id.*, I, 22. It may be noted that the permanence of a State may be affected by the nature of its structure. Thus a composite State is likely to find that its durability is jeopardized by reason of its composition. Nevertheless, while such a State holds its place as a member of the family of nations, its rights as such are not affected by that circumstance.

[3] Thus when, in 1885, the King of the Belgians assumed the title of sovereign of the Independent State of the Congo, that State and Belgium, remaining

In others, the union has itself predominated in importance, notwithstanding the definite participation in foreign affairs enjoyed by its constituents.[1] In still others, that predominance has been such as to leave to the individual member slight although technical freedom to deal with the outside world, and to present accordingly for all practical purposes a united front in international affairs. The German Empire under the constitution of April 16, 1871, is illustrative.[2] While the several States comprising it retained rights to enable them technically to preserve their individual membership in the family of nations, to the outside world it was the German Empire — the *Bundesstaat* — which was of chief significance.[3] It may be said to have attained it-

separate and distinct, were united only by reason of their having the same monarch. The relationship constituted what has been described as a personal union. See letter of King Leopold to President Cleveland, Aug. 1, 1885, For. Rel. 1885, 58.

Cf. also the relationship between Great Britain and Hanover, 1714–1837, as described by Coleridge. C. J., in Isaacson *v.* Durant, 17 Q. B. D. 54, 59.

Westlake refers to the advance from a personal union to one where "the rules of succession in the two monarchies may be assimilated to one another, so as to exclude the chance of the crowns being separated by their operation", declaring that "this was done for Austria and Hungary by the Pragmatic Sanction of 1723, which provided for the succession of Maria Theresa in both countries in accordance with the Hungarian rule, while enacting the Austrian exclusion of females as the rule in both countries thereafter." He notes also the situation where "the common sovereign, instead of habitually taking international action for his countries separately, may habitually unite them in his international action, so that the one being at war while the other is at peace becomes a contingency which, though theoretically possible, is not dreamed of in practical politics so long as the crowns continue to rest on the same head." Int. Law, 2 ed., I, 32–33.

[1] The German Confederation, 1815–1866, may be taken as illustrative. See Dana's Wheaton, §§ 47–51. This union was described as a *Staatenbund*.

[2] See Edwin H. Zeydel, "Constitutions of the German Empire and German States", Dept. of State, confidential document, 1919; also Karl Binding, *Deutsche Staatsgrundgesetze*, I, 18; U. S. For. Rel. 1871, 383–393; *id.*, 1877, 183.

[3] Declared Prof. Moore, in 1906: "The several [German] States preserve the right of legation; they grant exequaturs to foreign consuls within their territories, although all German consuls are sent out by the Empire; they may enter into conventions with foreign powers concerning matters not within the competence of the Empire or of the Emperor, and within the limits fixed by the laws of the Empire; they may conclude *concordats* with the Holy See. On the other hand, by the constitution of 1871, the laws of the Empire are within their proper sphere supreme. There is one citizenship for all Germany, and all Germans in foreign countries have equal claims upon the protection of the Empire. The supervision of the Empire and its legislature comprehends, among other things, the right of citizenship; the issuing and examination of passports; the surveillance of aliens; colonization and emigration; customs duties and commerce; coinage, and the emission of paper money; foreign trade and navigation, and consular representation abroad; and the imperial army and navy. The Emperor represents the Empire among nations; enters into alliances and other conventions with foreign countries; sends and receives ambassadors; and declares war and concludes peace in the name of the Empire, with the proviso, however, that for a declaration of war, the consent of the federal council is required, except in case of 'an attack upon the territory of the confederation or its coasts.'" Dig., I, 25.

self the status of a person of international law, notwithstanding the character of its constituent members.

The German Republic under the constitution adopted at Weimar, July 31, 1919, appeared to indicate the welding together of a still closer union such that the constituent States almost completely relinquished their international personalities for the sake of the national entity. Thus the Republic became practically if not technically the only State of international law within the limits of its domain.[1]

The establishment of the Swiss Confederation under the constitution of May 29, 1874,[2] did not deprive the constituent Cantons of an international personality. They retained the right to conclude certain minor and specified classes of agreements with foreign States, such as those respecting "the administration of public property and border and police intercourse."[3] All separate alliances and all treaties of a political character between the Cantons were forbidden.[4] To the Confederation was entrusted the "sole right of declaring war or making peace, and of concluding alliances and treaties with foreign powers, particularly treaties relating to tariffs and commerce."[5] Official intercourse between the Cantons and foreign governments, or their represent-

[1] According to Art. VI, the Government of the Republic was given the exclusive right of legislation over foreign relations. Art. XLV declared that the President should represent the Republic in matters of international law, that he should, in the nation's name, conclude alliances and other treaties with foreign powers, and that he should accredit and receive ambassadors. The declaration of war and conclusion of peace were to be subject to national law. Alliances and treaties with foreign States, in relation to subjects covered by national law, were to require the approval of the Reichstag. Art. LXXVIII announced that the relations with foreign States concerned the nation exclusively. It was there provided, however, that in matters regulated by provincial law, the confederated States might conclude treaties with foreign States. These treaties were, however, to require the consent of the nation. Agreements with foreign States regarding change of national boundaries were to be concluded by the nation on consent of the State involved. In order to assure the representation of interests arising for special States through their special economic relations or their proximity to foreign countries, the Government was to decide on the measures and arrangements required in concert with the States involved.

In March, 1920, the Department of State reported the announcement of the abolishment of the Ministry of Foreign Affairs by Bavaria, as part of a movement towards greater centralization of the Government at Berlin.

[2] For an English translation of the federal constitution of the Swiss Confederation, see "Old South Leaflets", General Series, No. 18, reprinted as Appendix II to "Government in Switzerland", by John Martin Vincent, New York, 1900. See, also, *Die Schweizerische Bundesgesetzgebung*, Basel, 1890–1891, edited by Prosper Wolf. Also in this connection, S. B. Crandall, Treaties, Their Making and Enforcement, 2 ed., § 148.

[3] Art. IX. [4] Art. VII.

[5] Art. VIII. By an Act of Jan. 22, 1892, matters of extradition were placed in the hands of the Federal Council which was authorized to conclude treaties

atives, was to take place through the Federal Council of the Confederation.[1] To the outside world Switzerland appeared to take its stand as itself a State of international law endowed with the right of controlling generally the foreign affairs of the several Cantons, notwithstanding the retention of statehood by the latter.

(2)

§ 32. Where International Personality of Members Is Relinquished.

The terms of the union between two or more States may result in or demand the entire relinquishment by the constituent members of all right to deal with the outside world. In such case the union becomes a person or State of international law of which the composition is a matter of unconcern to foreign powers. They recognize the completeness of the merger, and while it lasts, necessarily regard as non-existent the former States which surrendered their international personality. The Austro-Hungarian Monarchy created in 1867 by a union of the Empire of Austria and the Kingdom of Hungary was illustrative. Thereafter until its dissolution, the Dual Monarchy was a State of international law, and the only State of that character to represent externally its constituent parts.[2]

As a result of the World War the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy united of their own free will with Serbia in a permanent union for the purpose of forming "a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes." [3]

with foreign States. Brit. and For. State Papers, LXXXIV, 671. An extradition treaty was concluded with the United States, May 14, 1900. Malloy's Treaties, II, 1771.

[1] Art. X.

[2] That by the Act of Union of Austria and Hungary, each of those States retained the right to approve of treaties pertaining to it, was not at variance with the circumstance that externally the Dual Monarchy was a person of international law, and that the countries comprising it were not. Neither of the latter was permitted to enter into foreign relations or to maintain an international personality.

See, also, in this connection, S. B. Crandall, Treaties, Their Making and Enforcement, 2 ed., § 142, and documents there cited.

In 1896, the Republics of Honduras, Nicaragua, and Salvador united in forming a "single political entity, for the exercise of their sovereignty as regards their intercourse with foreign nations", which was known as the Greater Republic of Central America. See text of treaty of union, of June 20, 1895, For. Rel. 1896, 390. Concerning the dissolution in 1898 of the union which had assumed the name of the Republic of the United States of Central America, see For. Rel. 1898, 172–178.

[3] See preamble of treaty between the Principal Allied and Associated Powers, and the Serb-Croat-Slovene State, signed at Saint-Germain-en-Laye, Sept. 10, 1919, British Treaty Series, 1919 [Cmd. 461].

It suffices to observe that, regardless of the description of such a union,[1] the family of nations is concerned solely with the result effected, namely, the single political entity asserting an international personality which has supplanted for purposes of statehood the several constituents which were thus welded together.

3

§ 33. Countries Not Possessed of European Civilization.

The existence and observance of principles of an international system of law designed to govern the members of the society of nations, is due to the circumstance that there is a common civilization possessed by and familiar to each of them, and which enables each to regulate its conduct in accordance with the demands made upon all. Thus what are known as the States of international law, notwithstanding the sharp differences between some of them, resemble each other in the possession of what is described as European civilization. This is none the less true despite the completeness of the occasional failure of particular States under certain conditions to respond to the requirements of that civilization.[2]

The situation is otherwise with respect to countries not possessed of and, therefore, unfamiliar with European civilization. This is true whether they are essentially uncivilized, or enjoy a civilization which, however tested, fails habitually to enable the possessors to meet the standards accepted by the States constituting the international society. Such failure commonly manifests itself in the inability to accord the requisite protection of foreign life and property, and in abuses of what are known as rights of jurisdiction.[3]

With such countries the States of international law, nevertheless, find it expedient to hold diplomatic intercourse; and the

[1] Thus the Austro-Hungarian Monarchy was described as a "real union." Moore, Dig., I, 22.

Concerning the United States as a federal union, see J. B. Scott, The United States of America: A Study in International Organization, New York, 1920, Chap. III, and documents there quoted.

[2] The Equality of Independent States, *supra*, § 11.

The temporary loosening of restraints rigidly demanded by that civilization does not, however, necessarily indicate total incapacity to respect its precepts, even though the State which suffers such a breakdown may, during the period of its impotence, be subjected to external restraint and demoted in rank.

[3] See, for example, the participation by the Imperial Government of China in the so-called Boxer uprising in that country in 1900. In this connection, see President McKinley, Annual Message, Dec. 3, 1900, For. Rel. 1900, xii–xiii.

capacity of the former to exercise rights of property and control over territory which they occupy is usually recognized. It is not, however, deemed to be incompatible with such conduct to withhold from such countries full rights of statehood.[1] So long as they lack the capacity or disposition to accept the burdens of European civilization, at least in what pertains to the outside world, the States of international law demand and secure, as is elsewhere observed,[2] the yielding of important rights of jurisdiction which are never relinquished by the territorial sovereign of a full-fledged and independent member of the family of nations.

When, however, any country previously not possessed of European civilization, attains in the course of its normal development the stage where it is both capable and desirous of observing in its external relations the full requirements of international law even as applied to foreign persons and property within its domain, the society of nations is not disposed longer to withhold the privileges of statehood. Japan has furnished an impressive instance. Its recognition not only as a State of international law, but also practically as one of the Powers of the first order, resulted from a transformation wrought in barely fifty years.[3]

In 1856, Turkey was admitted to membership in the international society for certain purposes, although the leading members of it remained unwilling to yield to Turkey full rights of jurisdiction over resident aliens.[4]

Certain countries still regarded as unpossessed of European civilization enjoy great international significance by reason of

[1] "The European and American States maintain diplomatic intercourse and conclude treaties with them [Morocco, Turkey, Muscat, Persia, Siam and China], they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves. But the civilisation of those countries differs from that of the Christian world in such important particulars, especially in the family relations and in the criminal law and in its administration, that it is deemed necessary for Europeans and Americans among them to be protected by the enjoyment of a more or less separate system of law under their consuls." Westlake, 2 ed., I, 40.

[2] Extraterritorial Jurisdiction, *infra*, §§ 259–260.

[3] See treaty between the United States and Japan of Nov. 22, 1894, in revision of previous agreements, Malloy's Treaties, I, 1028; Imperial rescript on the new treaties of Japan, June 30, 1899, For. Rel. 1899, 469. See, also, Moore, Dig., V, 758–762, and documents there cited, referring to acts on the part of Japan recognizing principles of international law prior to its admission to full membership in the family of nations. *Cf.* Holland, Studies, 112–129; S. Takahashi, Cases on International Law during the Chino-Japanese War; John W. Foster, American Diplomacy in the Orient, 344–364.

[4] By Art. VII of the Treaty of Paris of March 30, 1856, the signatory parties comprising Great Britain, France, Russia, Sardinia, Austria and Turkey "declare the Sublime Porte admitted to participate in the advantages of the public law and system of Europe." *Nouv. Rec. Gén.*, XV, 770.

their geographical extent and relationship to the territories of other States, and on account of the volume of their foreign trade. China is one of these.[1]

The requirements of European civilization are not to be regarded beyond the reach of any country which is zealous to meet them. Nor is any with which diplomatic relations are held to be deemed permanently incapacitated for statehood. The requisite degree of internal development must be looked upon as the normal achievement to be expected of a country brought within close and familiar contact with enlightened foreign States. For that reason the United States has, on occasion, expressed in a formal treaty a readiness to aid a country lacking the requisite conformity to European civilization yet strongly desirous of reforming its judicial system, and has held out to it the hope of the relinquishment of extraterritorial privileges when conditions should warrant such action.[2]

§ 34. The International Organization of States.

Ever since its birth as a nation the United States has witnessed endeavors to weld States into international organizations for a variety of common purposes.[3] In numerous instances the attempts have been successful, especially where the identity of interest of enlightened States generally has been recognized, and the nature of the organized effort to advance it has not been

[1] It may be noted that China, as well as Siam and Persia, were each participants in the Hague Peace Conferences of 1899 and 1907.

[2] Art. XV of treaty with China of Oct. 8, 1903, Malloy's Treaties, I, 261, 269. The progress of Siam since the beginning of the twentieth century has been marked. See treaty between Siam and France of Feb. 13, 1904, For. Rel. 1905, 835; also treaty between Siam and Denmark of March 24, 1905, *id.*, 839.

By the Treaty of Peace of Versailles of June 28, 1919, Germany recognized that all contractual rights of extraterritorial jurisdiction in Siam were terminated as from July 22, 1917. Art. 135. Austria in the treaty of peace of September, 1919, made like acknowledgment. Art. 110.

On December 16, 1920, there was signed, on behalf of the United States and Siam, a treaty providing for the complete relinquishment of rights of extraterritorial jurisdiction by the former in the territory of the latter, five years after the promulgation by Siam of a series of judicial codes to which reference was made, and for the conditional relinquishment of those rights pending the lapse of that interval.

[3] See, in this connection, Paul S. Reinsch, Public International Unions, 2 ed., Boston, 1916; L. S. Woolf, International Government, London, 1916; Francis Bowes Sayre, Experiments in International Administration, New York, 1919; J. B. Scott, United States of America, New York, 1920. Also documents in Moore, Dig. (under heading of "International Coöperation"), II, 466–480.

calculated to produce serious friction.[1] Under such conditions the United States has oftentimes lent its coöperation as a participant.[2]

The relation of international law to the organization of States is a matter to be observed without reference to questions of national policy touching the expediency of participation in particular arrangements, and regardless of the efficacy of special plans devised for the achievement of a desired end. The establishment of an international organization may, however, give rise to problems of an essentially legal character affecting both participating and non-participating States. Those pertaining to the former are the natural products of the arrangement creating the organization, involving interpretative inquiry, for example, as to the power of a central representative body to legislate for, or otherwise bind, the several constituent members.[3] Those pertaining to the latter are of a different kind. They raise the question to what extent the States comprising the organization may through their united action modify the rights or enlarge the obligations of non-participating States, and incidentally compel them to unite with the organization. Thus the inquiry may present itself whether the effect of the establishment of, and participation in, the organization is to clothe its members collectively with rights in relation to the outside world which they previously as individual States did not possess. The solution must be sought in those principles of international law which always afford the test of the propriety of intervention, and which are discussed elsewhere.[4] It suffices here to observe that the United States

[1] This has been true in the case of the Universal Postal Union. For the text of the general international postal convention signed at Rome, May 26, 1906, see Brit. and For. State Pap., XCIX, 254; *Nouv. Rec. Gén.*, 3 ser., I, 355.

[2] In two distinctly American international public organizations, the Pan-American Union, and the International High Commission (which resulted from the recommendation of the First Pan American Financial Conference of 1915), the United States has been an active and interested participant. Concerning the latter see W. G. McAdoo, "The International High Commission and Pan American Coöperation", *Am. J.*, XI, 772. See, also, the International Sanitary Convention signed at Paris, Jan. 17, 1912, and of which the ratification was advised by the Senate of the United States, Feb. 19, 1913, Charles' Treaties, 390.

[3] Since the outbreak of The World War, questions of international administrative policy through governmental organization have engrossed the attention of statesmen and publicists. Modes of expressing a collective will through an appropriate agency and of legislative action through a central body have been discussed and analyzed. The expediency of conferring large governmental powers upon such a body, as well as the effect of such action upon the freedom of States uniting in the concession, have been much debated. There has been wide comment as to the efficacy of definite proposals and as to the significance of conventions recording them.

[4] See Intervention, In General, *infra*, § 69; The League of Nations and

is as yet far from admitting that a legal obligation rests upon it to become a member of any international organization in which for any reason it is deemed inexpedient to participate, and that it has refrained from asserting that any organization not representative of substantially the entire membership of the international society may lawfully impress fresh obligations upon non-participating States without their consent.

States may doubtless agree to organize for purposes of international government, and to that end, as in the case of the League of Nations, confer a large measure of authority upon a central body, empowering it to restrict in various ways the normal freedom of action of the several members.[1] It must be apparent that regardless of the feasibility of the design, the yielding of such a concession implies no inequality on the part of the grantor States with respect to each other. This is true although extrinsic agreements among the members may serve to clothe the League with powers subjecting a contracting party to subordination, and depriving it of certain rights of political independence retained by the group of States comprising the most favored members.[2] The degree to which the member States within that group have in fact by the terms of the Covenant restricted their own freedom of action, is not yet regarded by non-participants such as the United States as marking authoritatively the requirements of the international society, or as indicating that its interests oppose the retention by each State of what has not thus been relinquished.

Intervention, *infra*, § 84; Rights of Independence during Existence, *infra*, § 52.

[1] See, for example, Arts. VIII–XVI of the Covenant, contained in the treaty of peace with Germany of June 28, 1919.

It may be noted that according to Art. XXIV: "There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League."

[2] Certain Minor Impairments of Independence through the Medium of the League of Nations, *supra*, § 27.

PART II

NORMAL RIGHTS AND DUTIES OF STATES

TITLE A

RIGHTS OF POLITICAL INDEPENDENCE

1

§ 35. The Right to Become a State of International Law.

The birth of a State of international law may be due to one of many causes. Thus it may be attributable to the revolution of a colony, or to the secession of the inhabitants occupying a portion of the territory of a State, or to the determination of a controlling group of powers to establish and recognize a new State within territory previously belonging to an existing State.

When a political entity or country is possessed of a people occupying a well-defined territory, and a government exercising control therein and free to enter into foreign relations, it has attained the likeness of a State and may in a broad sense be deemed to be one. Such a State, nevertheless, finds itself unable by virtue of its own acts to enjoy fullest rights of intercourse with the several members of the family of nations, and so to live the life of a State of international law, until they acquiesce and permit it to do so. This is true although the birth of its state life precedes in point of time, and is not, therefore, technically dependent upon external acknowledgment.[1]

[1] "The position of the new State in relation to the international system is not one of admission into a society. This is the fundamental error into which Huber and a great many other writers have fallen, and as long as this view persists we cannot understand the true relationship. When the new State has come into being there is, as has heretofore been pointed out, an indeterminate situation in the existing international order. From the purely juristic standpoint, the whole subsequent relationship between the new State and the existing system is an attempt to reëstablish the legal continuity. The most potent argument in favor of the participation of the new State itself in this process is the fact that the period between its existence as a State from the point of view of its internal constitution and the so-called recognition by third States cannot be, as far as policy is concerned, a period totally devoid of law. To accept the doctrine of creative recognition is to deny this proposition. A protracted period without law in the international sense would mean what

2

RECOGNITION

a

§ 36. In General.

Recognition has been defined as the "assurance given to a new State that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations." "The rights and attributes of sovereignty" are said to "belong to it independently of all recognition", although "it is only after it has been recognized that it is assured of exercising them." [1]

When a country has by any process attained the likeness of a State and proceeds to exercise the functions thereof, it is justified in demanding recognition.[2] There appears to be no disposition to withhold it provided the fact be established that the requisite elements of state life are present and give promise of remaining. The method by which a new State comes into being may, however, have an effect upon the time when recognition is accorded.

outlawry means in private law, that the new political entity might be subjected to violence at the hands of other States and in general be treated as beyond the pale, without such treatment being in any way a violation of the international obligation of the third State." Julius Goebel, Jr., The Recognition Policy of the United States, New York, 1915, 60.

[1] Moore, Dig., I, 72, adverting to Rivier, I, 57, where it is added: "Recognition is therefore useful, even necessary to the new State. It is also the constant usage, when a State is formed, to demand it. Except in consequence of particular conventions, no State is obliged to accord it. But the refusal may give rise to measures of retorsion. When, after the formation of the Kingdom of Italy, certain German States persisted in refusing to recognize it, Count Cavour withdrew the exequaturs of their consuls. Recognition was then accorded."

See, in general, Moore, Dig., I, 72–248, and documents there cited; Julius Goebel, Jr., The Recognition Policy of the United States (with bibliography), New York, 1915; A. P. C. Griffin, List of References on Recognition in International Law and Practice, Washington (Library of Congress), 1904; Memorandum on The Method of "Recognition" of Foreign Governments and Foreign States by the Government of the United States, 1789–1897, by A. H. Allen, Chief of Bureau of Rolls and Library, Department of State, Senate Doc. No. 40, 54 Cong., 2 Sess.; Memorandum upon the Power to Recognize the Independence of a New Foreign State, presented by Mr. Hale in the Senate Jan. 11, 1897, Senate Doc. No. 56, 54 Cong., 2 Sess.; Frederic L. Paxson, The Independence of the South-American Republics, Philadelphia, 1903; Frederick Waymouth Gibbs, Recognition, London, 1863; The Recognition of the Confederate States, by Juridicus, Charleston, 1863; George Bemis, Hasty Recognition of Rebel Belligerency, Boston, 1865.

Also, Bonfils-Fauchille, 7 ed., §§ 195–213; Dana's Wheaton, Dana's Note No. 16; Hershey, 115–128 (with bibliography); Higgins' 7 ed. of Hall, §§ 26–27; Oppenheim, 2 ed., I, §§ 71–75; Rivier, I, 57–61; Westlake, 2 ed., I, 49–58.

[2] Mr. Adams, Secy. of State, to the President, Jan. 28, 1819, Am. State Papers, For. Rel., IV, 413, Moore, Dig., I, 79.

There can be no ground for withholding recognition of a new State whose life is due to a peaceable dissolution of a previous union, as in the case of Norway and Sweden in 1905.[1]

When the demand for recognition comes from a State whose very existence is due to revolution, foreign powers act with deliberation. This is because premature recognition is regarded by the parent State as an act of intervention, and oftentimes, therefore, as a cause of war.[2] It has been found, moreover, that a State resulting from revolution commonly seeks recognition before the conflict is at an end, and that it may do so even when its territory is infested with hostile and unbeaten armies.

b

§ 37. Mode of Recognition.

The mode of according recognition is not material, provided there be an unequivocal act indicating clearly that the new State is dealt with as such and is deemed to be entitled to exercise the privileges of statehood in the society of nations.[3] The entering

[1] See documents concerning the dissolution of the Union between the Kingdoms of Sweden and Norway, in For. Rel. 1905, 853–874, and especially telegram of Mr. Root, Secy. of State, to the Norwegian Minister of Foreign Affairs, Oct. 30, 1905, *id.*, 865; and communication of Mr. Root to the Swedish Minister at Washington, No. 362, Nov. 8, 1905, *id.*, 866.

"There can be no reason for refusing to recognize a federated State, formed by the union of recognized States, such as the German Empire in 1871 and the North German Confederation in 1866; or as Switzerland in 1848, after the confederation of States became a federated State. For those States, being sovereign, had the incontestable right to bind themselves together by a federal bond. It was a matter which concerned them, and did not concern third powers." J. B. Moore, in Moore, Dig., I, 72.

[2] This was true in the case of the United States. Attempts were made to secure recognition in 1776. It was not, however, until the news of Burgoyne's defeat at Saratoga in 1777 reached Europe, that France recognized and contracted with the new Republic. This conduct was understood by France itself as being nothing less than intervention. At that time it was doubtless true that continental statesmen did not believe that international law contemplated any lawful recognition of a new State born of revolution prior at least to its recognition by the parent State. Julius Goebel, Jr., The Recognition Policy of the United States, 92–93. See, also, Edward S. Corwin, French Policy and the American Alliance of 1778, Princeton, 1916.

[3] "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate in its executive character would be necessary, and in the second in its legislative character." Report of Mr. Clay, Committee on Foreign Relations, Senate, June 18, 1836, Sen. Ex. Doc. 406, 24 Cong., 1 Sess., Moore, Dig., I, 96, 97.

into a formal diplomatic or conventional relationship is conduct of such a character.[1]

Recognition may be collective. Thus the Treaty of Berlin of 1878, to which Great Britain, Germany, Austria, France, Italy, Russia and Turkey, were signatories, registered the collective recognition of Montenegro, Servia and Roumania.[2]

Again, the treaty concluded in behalf of the Allied and Associated Powers with the Polish Republic in June, 1919, contained in its preamble a collective confirmation of the prior acts of those Powers in according to Poland recognition as a new State.[3]

c

§ 38. Conditional Recognition.

States are free to accord recognition on such terms as they may see fit to impose. A group of States contemplating collective recognition may lay down those which it deems imperative. According to the Treaty of Berlin of 1878, Bulgaria was recognized as an autonomous and tributary principality of the Sultan of Turkey, but with a Christian government and a national militia; Servia and Roumania were recognized subject to the condition that complete religious toleration should prevail within the territories of those countries; and in the case of Roumania, the further condition was imposed that certain specified territory should be restored to Russia.[4]

If the terms on which recognition is conceded be violated by the new State, the group of States according recognition may assert the right to intervene for the purpose of establishing a state of affairs in accordance with the condition specified.[5] Experience

[1] As Hall states: "Any act is sufficient which clearly indicates intention. . . . Again the official reception of diplomatic agents accredited by the new State, the despatch of a minister to it, or even the grant of an exequatur to its consul, affords recognition by necessary implication." Higgins' 7 ed., 88–89.

[2] Arts. XXVI, XXXIV and XLIII, *Nouv. Rec. Gén.*, 2 ser., III, 458, 460 and 462, respectively; Holland, The European Concert in The Eastern Question, 277 and following.

See, also, treaty concluded by Great Britain, Austria, France, Prussia and Russia, with Belgium, Nov. 15, 1831, with respect to the separation of Belgium from Holland, Brit. and For. State Pap., XVIII, 645.

[3] See text contained in British Treaty Series No. 8, 1919 [Cmd. 223]; also communication of M. Clemenceau, as President of the Peace Conference, to M. Paderewski, Premier of Poland, in transmitting the treaty to the latter, June 24, 1919, *id.*

[4] Arts. I, V, XXXIV, XXXV and XLIII–XLV. *Nouv. Rec. Gén.*, 2 ser., III, 451, 453, 460 and 462–463, respectively. See, also, Holland, The European Concert in The Eastern Question, 277.

[5] "The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the

has shown, however, that the exercise of such a right is likely to be ineffective. Consequently a new system has been devised and applied with reference, as has been observed, to certain of the newer States of Europe, as in the treaty of June 28, 1919, between the Principal Associated and Allied Powers, on the one hand, and Poland on the other.[1]

It has been observed that European and other States have found it possible to maintain diplomatic relations with countries not possessed of or attached to that civilization which is commonly described as European, without recognizing those countries for all purposes as States of international law.[2]

d

Time of According Recognition to a New State Produced by Revolution

(1)

§ 39. After Recognition by Parent State.

The recognition by the parent State of its former colony which by force of arms has attained independence and won such respect therefor, justifies other States in taking similar action. Under such circumstances their conduct cannot be regarded as premature.[3]

(2)

§ 40. Prior to Recognition by Parent State.

When recognition by foreign States precedes that accorded by the parent State, complaint on the part of the latter is to be an-

thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the internationally legal duty upon such State of complying with the condition; failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition." Oppenheim, 2 ed., I, § 73.

Cf., also, statement in Moore, Dig., I, 73, from Rivier, I, 60.

[1] States, Certain Minor Impairments of Independence through the Medium of the League of Nations, *supra*, § 27.

[2] States, Countries Not Possessed of European Civilization, *supra*, § 33.

[3] Mr. Adams, Secy. of State, to Mr. Anduaga, Spanish Minister, April 6, 1822, Am. State Pap. For. Rel., IV, 846, Moore, Dig., I, 87.

"While Spain maintained a doubtful contest with arms to recover her dominion, it was regarded as a civil war. When that contest became so manifestly desperate that Spanish viceroys, governors, and captain-generals themselves concluded treaties with the insurgents, virtually acknowledging their independence, the United States frankly and unreservedly recognized the fact, without making their acknowledgment the price of any favor to themselves, and although at the hazard of incurring the displeasure of Spain." Mr. Adams, Secy. of State, to Mr. Anderson, Minister to Colombia, May 27, 1823, MS. Inst. to U. S. Ministers, IX, 274, 282, 283, Moore, Dig., I, 89.

ticipated.[1] Nevertheless, the opinion has long prevailed in the United States that the propriety of recognition is not necessarily dependent upon the approval of such State. In harmony with the theory early advocated by Jefferson respecting the recognition of new governments,[2] it has long been the accepted American doctrine that the right to accord recognition depends solely on the circumstance whether a new State has in fact come into being, and that the test of the existence of that fact is whether the conflict with the parent State has been substantially won.[3] Statements of principle have not always drawn a sharp line of distinction between the time when the cause of the parent State was desperate or hopeless, and that when the contest was at an end.[4]

[1] "The law of nations does not undertake to fix the precise time at which recognition shall or may be extended to a new State. This is a question to be determined by each State upon its own just sense of international rights and obligations; and it has rarely happened, where a new State has been formed and recognized within the limits of an existing State that the parent State has not complained that the recognition was premature." Mr. Hay, Secy. of State, to General Reyes, Colombian Envoy, Jan. 5, 1904, For. Rel. 1903, 294, Moore, Dig., III, 90.

[2] Recognition of New Governments, *infra*, § 44.

[3] "In every question, relating to the Independence of a Nation, two principles are involved, one of *right* and the other of *fact*. The former exclusively depending upon the determination of the Nation itself, and the latter resulting from the successful execution of that determination. . . . Under these circumstances, the Government of the United States, far from consulting the dictates of a policy questionable in its morality, has yielded to an obligation of duty of the highest order, by recognizing as Independent States, Nations, which, after deliberately asserting their right to that character, had maintained and established it, against all the resistance which had been or could be brought to oppose it. This Recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view of reuniting those Provinces to the rest of her Dominions. It is the mere acknowledgment of existing facts, with the view to the regular establishment with the Nations newly formed, of those relations, political and commercial, which it is the moral obligation of Civilized and Christian Nations to entertain reciprocally with one another." Mr. Adams, Secy. of State, to Don Joaquin de Anduaga, Spanish Minister at Washington, April 6, 1822, Brit. and For. State Pap., IX, 754, 755.

[4] "But there is a stage in such contests when the parties struggling for independence have, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived." Mr. Adams, Secy. of State, to the President, Aug. 24, 1818. Monroe MSS., Dept. of State, Moore, Dig., I, 78.

See, also, Report of Mr. Clay, from Senate Committee on Foreign Relations, June 18, 1836, Senate Ex. Doc. 406, 24 Cong., 1 Sess., Moore, Dig., I, 96; President Jackson, message concerning Texas, Dec. 21, 1836, Richardson's Messages, Moore, Dig., I, 98; Mr. Forsyth, Secy. of State, to Mr. Castillo, March 17, 1837, MS. Notes to Mexican Legation, VI, 71, Moore, Dig., I, 102; President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, I, vii–viii, Moore, Dig., I, 107; President McKinley, special message, April 11, 1898, For. Rel. 1898, 750, Moore, Dig., I, 108.

The point to be observed is, however, that the right of recognition, according to American theory, depends upon a fact, namely, the success of the revolutionary force, and that regardless of the illegitimacy thereof in the eyes of the parent State.[1] Thus recognition based upon careful regard for such a fact is deemed to be consistent with the maintenance of friendly relations between the recognizing State and the parent State, and as not reasonably provocative of war.

The according of recognition to a country still in the throes of warfare against the parent State partakes of a different character. Such action constitutes participation in the conflict. It makes the cause of independence a common one between the aspirant for it and the outside State. Participation must be regarded as intervention, and therefore essentially antagonistic to that State.

Thus the rightfulness of recognition depends in each case upon its unlikeness to participation in the conflict. When the struggle is over and independence won, recognition bears no resemblance to such conduct. On principle, the test should always be whether the contest is practically at an end. As there may be great difficulty in ascertaining with precision when such a moment has arrived, the wisdom of allowing an interval to elapse between the termination of the struggle and the according of recognition is apparent. The deliberation of States in this regard is, however, due to a sense of expediency rather than to one of duty. As soon as a revolting colony has in fact gained its independence and attained the qualifications for statehood, the according of recognition is not at any time thereafter to be deemed premature.[2]

[1] If the position taken by Secretary Seward, with respect to the much dreaded recognition by Great Britain and France of the Confederacy appears to be at variance with the previous attitude of the Department of State, it must be recalled that the conflict was raging at the time when he expressed himself, and that no *de facto* control exercised at any time by the Confederate forces over any territory remained unchallenged or proved to be capable of maintenance. The Civil War was not terminated until it was brought to a close by force of the Union arms. Therefore, it is believed that at any stage thereof the United States might fairly have regarded recognition of the Confederacy as a State as an act of intervention. See, in this connection, Mr. Seward, Secy. of State, circular to all Ministers of the United States, March 9, 1861, Dip. Cor. 1861, 32, Moore, Dig., I, 104; Mr. Seward, Secy. of State, to Mr. Adams, American Minister at London, April 10, 1861, Dip. Cor. 1861, 71, 79, Moore, Dig., I, 105.

[2] The people of Panama, by a bloodless revolution, November 3 and 4, 1903, declared themselves independent of Colombia. For. Rel. 1903, 230–240. On November 2 and 5, 1903, the commanders of American naval vessels near the Isthmus were ordered to maintain free and uninterrupted transit across the same, to prevent the landing of any armed force with hostile intent whether Colombian or insurgent at any point, to prevent the landing of a Colombian force reported to be approaching the Isthmus, if such landing would precipitate

The recognition by the United States of Poland in January, 1919, is fairly illustrative of the principle involved.[1] Poland then possessed in fact the attributes of sovereignty, exercising supremacy within certain territorial areas, although the extent of the limits thereof was a matter of controversy. No duty on the part of the United States with respect to Germany or Austria-Hungary forbade recognition, while the freedom of the new Republic from actual domination by Russia removed from the act of recognition a character to be regarded as hostile to that country.[2] It remained, however, for the Peace Conference at Paris to adjust the boundaries of the new State, and to prescribe requisite cessions to it, as well as to establish its relations with Danzig.[3]

a conflict, to make every effort to prevent, in the interest of peace, Colombian troops at Colon from proceeding to Panama, and to prevent the recurrence of a (reported) bombardment of Panama by a Colombian gunboat. On November 6, the United States recognized the independence of Panama. Mr. Hay, Secy. of State, to Mr. Ehrman, Vice-Consul-General, Nov. 6, 1903, *id.*, 233; Same to Mr. Beaupré, American Minister, same date, *id.*, 240. On November 13, Señor Bunau-Varilla, Minister of Panama, presented his letters of credence to the President of the United States. *Id.*, 245. A treaty between the United States and Panama was signed at Washington, November 18. Malloy's Treaties, II, 1349. The part taken by the United States was one of intervention. Its conduct was so described and acknowledged by President Roosevelt. For. Rel. 1903, 272–273. The case is, therefore, without value as a precedent with regard to the time when the recognition of the statehood of a country attaining independence by revolution may be justly accorded.

See President Roosevelt, remarks on occasion of presentation of letters of credence by the Minister from Panama, Nov. 13, 1903, For. Rel. 1903, 246; President Roosevelt, Annual Message, Dec. 7, 1903, *id.*, vii, xxxvi; President Roosevelt, special message, Jan. 4, 1904, *id.*, 260, 272–273, 276–277; General Reyes, Colombian Envoy, to Mr. Hay, Secy. of State, Dec. 23, 1903, *id.*, 284, 288–290; Same to Same, Jan. 6, 1904, *id.*, 306; Same to Same, Jan. 11, 1904, *id.*, 311; Mr. Hay, Secy. of State, to General Reyes, Colombian Envoy, Jan. 5, 1904, *id.*, 294. The messages of President Roosevelt, and the Hay-Reyes correspondence are contained in Moore, Dig., III, 46–113.

Cf. Diplomatic History of the Panama Canal, submitted by President Wilson to the Senate April 23, 1914 (embracing documents compiled by Department of State), Senate Doc. No. 474, 63 Cong., 2 Sess.

See, also, Shelby M. Cullom, "The Panama Situation", *The Independent*, LV, 2787; Theodore S. Woolsey, "The Recognition of Panama and Its Results", *Green Bag*, XVI, 6; G. G. Phillimore in *Law Magazine and Review*, XXIX, 212; G. W. Scott, "Was the Recognition of Panama a Breach of International Morality", *The Outlook*, LXXV, 947; W. C. Dennis, "The Panama Situation in the Light of International Law", *Am. Law Reg.*, LII, 265.

[1] Official Bulletin, III, No. 525, Jan. 30, 1919, containing communication of Mr. Lansing, Secy. of State, to Mr. Paderewski, Polish Premier. See, also, Dept. of State *communiqué* for the Press, No. 1, April 24, 1920, concerning the recognition the previous day by the United States of the *de facto* Government of the Armenian Republic.

[2] The preamble of the treaty between the Associated and Allied Powers, on the one hand, and Poland, on the other, of June 28, 1919, adverted to the fact that by a proclamation of March 30, 1917, the Government of Russia assented to the reëstablishment of an independent Polish State.

[3] Part III, Section VIII of treaty of peace with Germany, of June 28, 1919. See, also, treaty concluded by the Associated and Allied Powers with Poland. June 28, 1919, British Treaty Series No. 8, 1919 [Cmd. 223].

The recognition by the United States in September, 1918, of the Czecho-Slovak National Council as a *de facto* belligerent government, and the announcement simultaneously of a readiness to enter into formal relations with it, is to be regarded as a form of belligerent activity incidental to the prosecution of the war then existing against Germany and Austria-Hungary, rather than as illustrative of the exercise of the right of recognition as such.[1]

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§ 41. Recognition, by Whom Determinable.

The recognition of a foreign State is a matter peculiarly within the province of the political as distinct from the judicial department of the government. The position taken by the former is rigidly followed by the latter. As Sir William Grant expressed it in 1809:

> It always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide.[2]

Such is the position of the courts of the United States.[3]

[1] Concerning the recognition by the United States of the Czecho-Slovaks, see announcement of Mr. Lansing, Secy. of State, Official Bulletin, Sept. 3, 1918, Vol. II, No. 402; Editorial Comment, *Am. J.*, XIII, 93.

Cf., also, note of Mr. Lansing, Secy. of State, to Mr. Ekengren, Swedish Minister at Washington, concerning the unwillingness of the United States to accept the mere autonomy of the Czecho-Slovaks and the Jugo-Slavs as a basis for peace with Austria-Hungary, Oct. 18, 1918, Official Bulletin, Oct. 19, 1918, Vol. II, No. 441.

See text of Declaration of Independence of the Czecho-Slovak Nation adopted by its provisional government at Paris, Oct. 18, 1918, Official Bulletin, Oct. 19, 1918, Vol. II, No. 441; Waldes *v.* Basch, 179 N. Y. Supp. 713. Also

recognized the complete independe
cluded the autonomous territory of the Ruthenians to the south of the Carpathians.

[2] The Pelican, Edw. Admr., Append. D.

[3] "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Clarke, J., in the opinion of the Court in Oetjen *v.* Central Leather Co., 246 U. S. 297, 302.

See, also, Emperor of Austria *v.* Day, 3 De G. F. and J., 217, 221, 233; Republic of Peru *v.* Peruvian Guano Co., 36 Ch. Div. 489, 497; Republic of Peru *v.* Dreyfus, 38 Ch. Div. 348; Taylor *v.* Barclay, 2 Sim. 213; Rose *v.* Himely, 4 Cranch, 241, 272; Kennett *v.* Chambers, 14 How. 38; Luther *v.* Borden, 7 How. 1; Foster *v.* Neilson, 2 Pet. 253, 307; Gelston *v.* Hoyt, 3 Wheat. 246, 324; United States *v.* Palmer, 3 Wheat. 610, 634; The Nueva Anna, 6 Wheat. 193; The Three Friends, 166 U. S. 1; Fifield *v.* Insurance Co., 47 Penn. St. 166, 172.

As a matter of domestic practice, in the case of the United States, recognition has been accorded by the President in some cases following coöperation with the Congress, and in others independently thereof.[1]

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§ 42. Acts Falling Short of Recognition of a New State.

The holding of intercourse with agents of a revolutionary body does not necessarily signify that it is accorded recognition as a State. Whether a particular act possesses such a character depends partly upon whether, as has been seen, it is in defiance of, or at variance with, the pretensions of any third State claiming a right of domination. Certain forms of intercourse are clearly of such a kind.[2] Others may be equivocal in point of character. They may, for example, justify although not compel the inference that they are in derogation of the rights of a parent State. In such case their exact significance must depend upon the intention of the actor. Still other acts are in no sense equivocal, and are not to be regarded as involving recognition. Thus the holding of unofficial communication with a country struggling for independence and claiming to have won it, does not imply acknowledgment of the existence of a new State. Nor does the sending unofficially to such a country of agents in order to gain information therein or for purposes requiring no formal diplomatic intercourse, possess greater significance.[3] Dealings with revolutionary authorities in actual control of territory within which foreign persons

[1] Declares Prof. Moore: "In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and coöperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility. The question of the power to recognize has, however, been specifically discussed on various occasions." Dig., I, 243–244. See documents, *id.*, I, 244–246, and in particular Mr. Seward, Secy. of State, to Mr. Dayton, American Minister at Paris, April 7, 1864, MS. Inst. France, XVII, 42, Moore, Dig., I, 246. *Cf.*, also, instructions given by Mr. Clayton, Secy. of State, to Mr. Mann, special and confidential agent to Hungary, June 18, 1849, Sen. Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 218.

See C. A. Berdahl, "The Power of Recognition", *Am. J.*, XIV, 519.

[2] Thus Mr. Seward declared in a communication to Mr. Adams, American Minister at London, May 21, 1861: "It is, of course, direct recognition to publish an acknowledgment of the sovereignty and independence of a new power. It is direct recognition to receive its ambassadors, ministers, agents, or commissioners, officially." Dip. Cor. 1861, 73, Moore, Dig., I, 206.

[3] See statement in Moore, Dig., I, 206.

and property are located, are oftentimes had, and that without any design to accord recognition of statehood.[1]

The United States has frequently found it expedient to hold unofficial intercourse with communities engaged in revolution through the medium of its own agents sent thereto,[2] and of others received therefrom without any intention of according recognition through such action, and without in fact having done so.[3]

In 1849, Mr. A. Dudley Mann was sent to Europe as "special and confidential agent of the United States to Hungary", under instructions authorizing him, according to his discretion and prudence, to enter into official diplomatic relations with the Government of Hungary in case it should appear to him that it was able to maintain the independence which it had declared.[4] This procedure is believed to have been unfortunate, because there was entrusted to an agent abroad the determination of the question whether a contingency had arisen which legally justified recognition. Ultimate decision in such a matter should, for the sake of the safety of the State likely to accord recognition, be left with the highest executive authority thereof and so remain undelegated to any inferior officer.[5]

[1] The fact that a foreign State may, for the sake of protecting its own citizens or their property, by some means enter into communication with the *de facto* government in complete control, at least of a certain portion of territory whose population is in rebellion against the parent State, does not necessarily imply the according of recognition. See Earl Russell, to Mr. Adams, Nov. 26, 1861, Dip. Cor. 1862, 8–9, Moore, Dig., I, 209.

[2] Mr. Monroe, Secy. of State, to Mr. J. Poinsett, agent to Buenos Ayres, June 28, 1810, H. Rep. 72, 20 Cong., 2 Sess., Moore, Dig., I, 214; Mr. Adams, Secy. of State, to Messrs. Samuel Smith and James Lloyd, U. S. Senate, Feb. 24, 1824, 20 MS. Dom. Let. 300, Moore, Dig., I, 216; Mr. Buchanan, Secy. of State, to Gen. Alvear, Aug. 14, 1846, MS. Notes, Argentine Legation, VI, 19, Moore, Dig., I, 217.

[3] Concerning the unofficial reception by the United States Government in 1900, of a delegation representing the South African Republics, see documents in Moore, Dig., I, 212–214.

Compare attitude of Mr. Seward, Secy. of State, concerning unofficial intercourse between emissaries of the Confederate States of America and Great Britain during the Civil War, and expressed in Moore, Dig., I, 208–210, *citing* Dip. Cor. 1861, 72, 87, 88; *id.*, 1862, 8–9; *id.*, 1865, III, 378.

[4] "Mr. Mann proceeded to Vienna, but when he arrived there the revolution was practically ended, and he did not visit Hungary." Moore, Dig., I, 219, *citing Political Science Quarterly*, X, 264.

[5] Mr. Clayton, Secy. of State, to Mr. Mann, special and confidential agent to Hungary, June 18, 1849, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 218; protest of Chevalier Hülsemann, Austrian Chargé d'Affaires, Sept. 30, 1850, Senate Ex. Doc. 9, 31 Cong., 2 Sess., Moore, Dig., I, 221; Mr. Webster, Secy. of State, to Chevalier Hülsemann, Dec. 21, 1850, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 223. *Cf.* also President Taylor, special message, March 28, 1850, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 220. It should be noted in this connection that while the instructions to Mr. Mann stated that under certain contingencies the President would cheerfully recommend to Congress the recognition of Hungary, the special and confidential agent was empowered to commit acts which in themselves would

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Recognition of New Governments

§ 43. In General. (1)

After a State or person of international law has come into being, its duties to the outside world are not affected by reason of any internal changes which it may undergo. The transformation of a monarchy into a republic, or the overthrow of the existing government of an opposing political party are in one sense matters of local concern. Said Mr. Webster, Secretary of State, to Mr. Rives, Minister to France, January 12, 1852:

> From President Washington's time down to the present day it has been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change institutions at discretion, and to transact its business through whatever agents it may think proper to employ. This cardinal point in our policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France in the series of revolutions with which that country has been visited.[1]

On the other hand, as any new government, regardless of its origin or kind, must in consequence of the exercise of supremacy over the national domain, enter into foreign relations and respond to the international obligations of the State, the outside world is necessarily concerned with respect to each change which takes place. Such concern becomes acute when the attempt to bring about a change is marked by widespread disorder, especially if the contest for the reins of government be protracted and the issue long unsettled. Notwithstanding their detachment or aloofness from the conflict, foreign States are obliged ultimately to decide what power is to be recognized as the *de jure* government with which formal and indefinitely prolonged diplomatic relations are to be had. It may be contended that in theory, the question involved is merely one of fact, and that regardless of the method by which the party gaining supremacy attained control, provided it be disposed and competent to respond to the international obligations of the State. Doubtless in the long run, outside States

have amounted to recognition in behalf of the State of which he was made the representative.

[1] Senate Ex. Doc. 19, 32 Cong., 1 Sess., 19, Moore, Dig., I, 126. See, also, Mr. Jefferson, Secy. of State, to Mr. Morris, American Minister at Paris, Nov. 7, 1792, Jefferson's Works, ed. by H. A. Washington, III, 488, 489, Moore, Dig., I, 120; Mr. Buchanan, Secy. of State, to Mr. Rush, American Minister, March 31, 1848, Senate Ex. Doc. 53, 30 Cong., 1 Sess., 3, Moore, Dig., I, 124.

are obliged to acknowledge the applicability of this principle when a party which by ruthless measures and in defiance of local institutions or popular opposition firmly establishes itself in power and thus appears to have gained permanent control.[1]

Enlightened States have perceived that any insurrectionary government notoriously opposed to the theory of popular sovereignty is likely to be short-lived, and, therefore, to inspire rather than check local disorder which may interfere also with the tranquillity of foreign relations. They appear to be increasingly disposed to discourage the activities of arbitrary and essentially non-popular aspirants to governmental control, when their methods are heedless of the laws of God or man. In such case, the according of recognition may be fairly delayed as long as possible, and moral support thus given the opposition. It may be urged that such action constitutes direct interference in the domestic affairs of a foreign State, and may be unjustly applied at the caprice of interested powers for political ends. While the danger of abuse of such a power is to be acknowledged, it should be observed that there is no legal duty imposed upon a State to accord recognition to a new government at any particular time. The right to withhold it is not wrongful. The influence exerted upon the outcome of a domestic conflict through the exercise of the right to postpone recognition of a particular party until it becomes highly inexpedient longer to withhold it, does not resemble in kind those affirmative acts of opposition which are deemed to restrain political independence and to constitute intervention.

If in the interest of the society of nations the members thereof should habitually manifest extreme reluctance in recognizing as a new government one which acquired power in the teeth of popular opposition and by inhuman methods, evidence both of popular support and of abstinence from arbitrary procedure would be commonly if not invariably offered by a party demanding recognition, as a necessary means of preventing indefinite delay.

(2)

§ 44. The Position of the United States.

Before the beginning of the nineteenth century Jefferson declared it to be in accord with American principles "to acknowledge

[1] It may be urged that any government which thus establishes itself enjoys in fact the consent of the State because the former has possessed itself of power to control the latter; and it may be contended that by having overcome local resistance, the will of the sovereign as such is to be regarded as lodged in the government, regardless of the extent of popular indignation.

any government to be rightful which is formed by the will of the nation, substantially declared." [1]

He perceived both the continuity of state life in spite of governmental changes, and also the reasonableness of entering into formal relations with whatever party ultimately gained the ascendancy. It was the fact of control rather than any other circumstance which appeared to be regarded by him as the decisive test. He expressed himself to the effect that "the will of the nation" was "the only thing essential to be regarded", whether a "king, convention, assembly, committee, president, or anything else" were chosen as the organ through which intercourse with foreign nations was to be had.[2] Jefferson did not, however, seem to be concerned with what should be deemed to be requisite proof of "the will of the nation" when a monarchy succeeded a republic.

During the first half of the nineteenth century and until the Civil War, the theory of Jefferson seems to have been simply applied. Thus when a monarchical government overthrew a republican, the result was accepted without regard to the domestic legitimacy of the transaction, and recognition duly accorded without serious reluctance.[3] Irrespective of the nature or method of the change, the United States was not disposed to concern itself with more than the fact that a particular party was in actual control.[4] Possibly as a consequence of the nature of his

[1] See communication to Mr. Morris, Nov. 7, 1792, Jefferson's Works, ed. by H. A. Washington, III, 488, 489, Moore, Dig., I, 120.

[2] Communication to Mr. Morris, March 12, 1793, Jefferson's Works, ed. by Ford, VI, 199, Moore, Dig., I, 120.

[3] Thus concerning the recognition by the United States of the pretender Dom Miguel as King of Portugal in 1829, Mr. Van Buren, Secy. of State, declared: "But, even apart from the foregoing considerations, the course which had ever before been pursued by the United States of always recognizing the government existing *de facto*, and which had but recently led to the acknowledgment of that of Brazil, left them no choice in the instance under consideration." Communication to Mr. Brown, Chargé d'Affaires to Brazil, Oct. 20, 1830, MS. Inst. to American States, XIV, 101, Moore, Dig., I, 137.

[4] "In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and re-form their political institutions according to their own will and pleasure. We do not go behind the existing Government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows. This principle of action, resulting from our sacred regard for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal." Mr. Buchanan, Secy. of State, to Mr. Rush, March 31, 1848, Senate Ex. Doc. 53, 30 Cong., 1 Sess., 3, Moore, Dig., I, 124.

See, also, President Pierce, special message, May 15, 1856, House Ex. Doc.

objections to the British recognition of the Confederate States as belligerents in 1861,[1] Secretary Seward, and his successors for some years following, pursued a somewhat different course. They announced in substance that a revolutionary government in a republican State, and defiant of an existing constitution, and also gaining control by sheer force of arms, ought not to be recognized by the United States until it was assured that the change was adopted by the people rather than imposed upon them against their will.[2] Thus the will of the nation was deemed to be inseparable from or identical with that of the people. This idea found expression in American state papers for several decades, although the forms of utterance lacked uniformity.[3] In the meantime American instructions gradually began to emphasize the signifi-

103, 34 Cong., 1 Sess., 5–6, Moore, Dig., I, 142; Mr. Cass, Secy. of State, to Mr. McLane, Minister to Mexico, March 7, 1859, MS. Inst. Mexico, XVII, 213, Moore, Dig., I, 147.

[1] Recognition of Belligerency, *infra*, §§ 47–48.

[2] Thus Mr. Seward declared in an instruction to Mr. Hovey, American Minister to Peru, March 8, 1868: "The policy of the United States is settled upon the principle that revolutions in republican States ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own." Dip. Cor. 1866, II, 630.

See, also, Same to Same, May 7, 1868, where it was said: "What we do require, and all that we do require, is when a change of administration has been made, not by peaceful constitutional processes, but by force, that then the new administration shall be sanctioned by the formal acquiescence and acceptance of the people." Dip. Cor. 1868, II, 863.

Also Mr. Seward, Secy. of State, to Mr. Blair, Dec. 1, 1868, Dip. Cor. 1868, II, 337, Moore, Dig., I, 144; Mr. Seward, Secy. of State, to Mr. Culver, March 9, 1863, MS. Inst. Venezuela, I, 266, Moore, Dig., I, 149; Mr. Seward, Secy. of State, to Mr. Hall, Minister to Bolivia, Sept. 28, 1865, MS. Inst. Bolivia, I, 80, Moore, Dig., I, 154; Same to Same, April 21, 1866, Dip. Cor. 1866, II, 330.

[3] See for example, President Grant, second Annual Message, Dec. 5, 1870, Moore, Dig., I, 127; Mr. Fish, Secy. of State, to Mr. Sickles, Dec. 16, 1870, For. Rel. 1871, 742, Moore, Dig., I, 133; Mr. Evarts, Secy. of State, to Mr. Baker, June 14, 1879, MS. Inst. Venezuela, III, 67, Moore, Dig., I, 151; Mr. Foster, Secy. of State, to Mr. Scruggs, telegram, Oct. 12, 1892, For. Rel. 1892, 635, Moore, Dig., I, 153; Mr. F. W. Seward, Acting Secy. of State, to Mr. Foster, May 16, 1877, For. Rel. 1877, 403, 404, Moore, Dig., I, 148; Mr. Blaine, Secy. of State, to Mr. Christiancy, American Minister at Lima, May 9, 1881, For. Rel. 1881, 909, Moore, Dig., I, 157; Mr. Frelinghuysen, Secy. of State, to Mr. Phelps, American Minister to Peru, July 26, 1883, For. Rel. 1883, 709, Moore, Dig., I, 157; President Arthur, third Annual Message, Dec. 4, 1883, For. Rel. 1883, vi–vii, Moore, Dig., I, 158; Mr. Bayard, Secy. of State, to Mr. Buck, Dec. 16, 1885, MS. Inst. Peru, XVII, 192, Moore, Dig., I, 159; Mr. Blaine, Secy. of State, to Mr. Adams, Nov. 30, 1889, For. Rel. 1889, 66, Moore, Dig., I, 160; President Harrison, Annual Message, Dec. 1, 1890, For. Rel. 1890, iv, Moore, Dig., I, 162; Mr. Olney, Secy. of State, to Mr. Tillman, Minister to Ecuador, Nov. 6, 1895, For. Rel. 1895, I, 248, 249, Moore, Dig., I, 156.

Compare Mr. Hunter, Acting Secy. of State, to Mr. Baker, Oct. 3, 1879, MS. Inst. Venezuela, III, 79, Moore, Dig., I, 150, note.

cance of another consideration—the ability of any new government to respect the foreign obligations of the State.[1] In 1899, Secretary Hay evinced a readiness to authorize the recognition of a new government merely when it appeared "to be established in control of the machinery of administration and in a position to fulfill its international obligations."[2] Under such circumstances recognition was speedily accorded, and without apparent concern as to any other consideration.[3]

In more recent years, however, there appears to have been a reversion to a position somewhat like that taken by Mr. Seward and his immediate successors. Without failing to require assurance of the competency of a new government to perform international obligations, importance has been attached to its respect for the constitutional régime.[4]

At the present time the United States is believed to be reluctant to recognize as a *de jure* government one which has attained the ascendancy by force and in defiance of a local constitution, in the absence of convincing proof that the change is supported by popu-

[1] Mr. Evarts, Secy. of State, to Mr. Baker, June 14, 1879, MS. Inst., Venezuela, III, 67, Moore, Dig., I. 151.

[2] Communication to Lord Pauncefote, British Ambassador at Washington, Nov. 16, 1899, For. Rel. 1899, 344, Moore, Dig., I, 155; Mr. Hay to Mr. Loomis, American Minister to Venezuela, telegram, Nov. 8, 1899, For. Rel. 1899, 809, Moore, Dig., I, 153; Mr. Adee, Second Assist. Secy. of State, to Mr. Maxwell, American Consul-General at San Domingo City, Oct. 19, 1899, 169 MS. Inst. to Consuls, 506, Moore, Dig., I, 163, note.

Declared Mr. Hill, Acting Secy. of State, in an instruction to Mr. Hart, American Minister at Bogota, Sept. 8, 1900: "The policy of the United States, announced and practised upon occasion for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power. When, by reason of revolution or other internal change not wrought by regular constitutional methods, a conflict of authority exists in another country whereby the titular government to which our representatives are accredited is reduced from power and authority, the rule of the United States is to defer recognition of another executive in its place until it shall appear that it is in possession of the machinery of the state, administering government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfill all the international obligations and responsibilities incumbent upon a sovereign state under treaties and international law." For. Rel. 1900, 410, Moore, Dig., I, 138.

[3] For. Rel. 1899, 793–812, concerning the revolution in Venezuela in 1899, and the recognition of the Government of Gen. Castro.

[4] Mr. Adee, Acting Secy. of State, to the Provisional Minister for Foreign Affairs of Honduras, Aug. 23, 1907, For. Rel. 1907, II, 605; Mr. Knox, Secy. of State, to Mr. Furniss, American Minister to Haiti, telegram, Aug. 18, 1911, For. Rel. 1911, 290; same, to the American Minister to the Dominican Republic, telegram, Jan. 23, 1912, For. Rel. 1912, 341, in which it was said: "It is the practice of the Government of the United States to refuse to recognize any Government resulting from a revolution unless it appears to represent the will of the people and to be able and willing to respond to its international obligations."

lar approval. Such was the position taken by President Wilson in withholding recognition from the government of General Huerta in Mexico in 1913 and 1914,[1] and from the Tinoco govern-

[1] The withholding of recognition from the government of General Huerta in Mexico deserves attention. Francisco I. Madero had been elected to the Presidency of Mexico in October, 1911, and entered upon the duties of his office the following month. For. Rel. 1911, 519–521. In February, 1913, he was captured and his resignation secured through the revolt of the army at Mexico City under the leadership of Felix Diaz. General Huerta thereupon assumed the provisional presidency. On Feb. 22, 1913, Madero, while in the custody of the authorities, was killed. During the months of March, April and May, 1913, the Huerta government was recognized by a number of European powers. In August, 1913, having declined to recognize Huerta, President Wilson sent to Mexico City as his special representative, Mr. John Lind, formerly Governor of Minnesota. He was instructed to endeavor to obtain a settlement of distressing conditions in Mexico, and to offer the good offices of the United States in order to effect it. In the judgment of President Wilson a satisfactory settlement seemed to be conditioned on "(*a*) An immediate cessation of fighting throughout Mexico, a definite armistice solemnly entered into and scrupulously observed;

"(*b*) Security given for an early and free election in which all will agree to take part;

"(*c*) The consent of Gen. Huerta to bind himself not to be a candidate for election as President of the Republic at this election; and

"(*d*) The agreement of all parties to abide by the results of the election and coöperate in the most loyal way in organizing and supporting the new administration."

The Lind mission proved abortive, and the terms proposed were formally declined by Huerta. On Aug. 27, 1913, President Wilson brought the matter to the attention of Congress, declaring that the United States could not be the partisan of either party to the contest distracting Mexico, or constitute itself the virtual umpire. He announced that "neither side to the struggle" taking place in Mexico should receive any assistance from the United States, and simultaneously prohibited the exportation of arms to any portion of Mexico or to any parties therein. See Address of the President to Congress, on Mexican Affairs, Aug. 27, 1913, *Am. J.*, VII, Supp., 279; Reply of Secy. of Foreign Affairs of Mexico to proposals conveyed through Mr. Lind, Aug. 16, 1913, *id.*, 284.

In October, 1913, Huerta, who had announced a general election to be held later during that month, caused the arrest of numerous deputies attending the session of the National Congress, dissolved that body, and assumed the rôle of a dictator. See text of Huerta's decree of Oct. 10, 1913, in New York *Sun*, Oct. 17, 1913. The election was duly held, and the results were declared to show that Huerta was the choice of the electors.

On Nov. 7, 1913, Secretary Bryan announced by telegram to certain American diplomatic officers the fact (for communication to the governments to which they were accredited) that the President deemed it to be "his immediate duty to require Huerta's retirement from the Mexican Government, and that the Government of the United States must now proceed to employ such means as may be necessary to secure this result." For. Rel. 1913, 856.

In his Annual Message of Dec. 2, 1913, President Wilson declared that there could be no certain prospect of peace in America until Huerta had surrendered "his usurped authority in Mexico; until it is understood on all hands, indeed, that such pretended governments will not be countenanced or dealt with by the Government of the United States." He added that Mexico had no government, that the attempt to maintain one at the City of Mexico had broken down, and that a mere military despotism had been set up which had hardly more than the semblance of national authority. This, he stated, had originated in the usurpation of Huerta who, he declared, had, after a brief attempt to play the part of constitutional President, "at last cast aside even the pre-

ment in Costa Rica in 1917, and thereafter.[1] Doubtless American recognition must be ultimately given where a government, however obnoxious to the people compelled to yield obedience, maintains itself indefinitely and enforces locally complete submission

tense of legal right and declared himself dictator." It was said that in consequence, there existed in Mexico a condition of affairs which rendered it doubtful whether even the most elementary and fundamental rights "either of her own people or of the citizens of other countries resident within her territory" could long be successfully safeguarded. He declared that Huerta had failed in his purposes, that he had forfeited the respect and moral support of those who were at one time willing to see him succeed, and that little by little he had become completely isolated. He predicted that his collapse was not far away.

On Feb. 3, 1914, President Wilson withdrew the embargo on the exportation of arms and ammunition to Mexico, thus technically placing the opposing factions of Huerta and Carranza upon an equality, although giving thereby actual advantage to the latter by reason of the superior opportunities which it possessed to effect importations. Later, however, the embargo was reëstablished. The Tampico flag incident in April, 1914, and the resulting occupation of Vera Cruz by American forces doubtless served to increase the reluctance of President Wilson to accord recognition to the Huerta government. *Cf.* Retorsion, *infra*, § 588. It should be observed, however, that in consequence of the mediation of Argentina, Brazil and Chile, negotiations at Niagara Falls, Ontario, resulted in practical agreement between the United States and Huerta as to the mode of reëstablishing constitutional government in Mexico which should be recognized by the United States, and should cause the restoration of diplomatic relations which had been severed. *Am. J.*, VIII, 579–585. The unwillingness, however, of General Carranza to participate in these negotiations served to render them abortive. The constitutionalist authorities preferred force to negotiation in their opposition to Huerta. Following his election in July, 1914, Huerta resigned from the presidency in the course of a few days, and left the country. On August 15, the constitutionalist army entered Mexico City, and a few days later, General Carranza himself there assumed the reins of government. The following month witnessed the withdrawal of the American troops from Vera Cruz. *Am. J.*, VIII, 860–864.

After July, 1914, the revolutionary party became divided into factions, and General Carranza found himself opposed by some of his former lieutenants. The pacification of the country was thus greatly delayed. On June 2, 1915, President Wilson urged in vain the leaders of the several factions to act together for the "relief and redemption of their prostrate country." Senate Doc. 324, 64 Cong., 1 Sess., 14. On Aug. 15, 1915, Secretary Lansing, together with diplomatic representatives at Washington of Brazil, Chile, Argentina, Bolivia, Uruguay and Guatemala, made a vain appeal to the leaders of the revolutionary factions suggesting the convening of a conference for the peaceful settlement of their differences, and offering to act as intermediaries. *Id.*, 10 and 15. Gen. Carranza having gained control of about 75 per cent of Mexican territory, his government was recognized by the United States on Oct. 19, 1915, as the *de facto* Government of Mexico, in view of assurances given by it to hold popular elections upon the restoration of domestic peace, and to protect the lives and property of foreigners. This *de facto* Government was not a constitutional government, but rather one of a military character which was expected by the United States to be within a reasonable time "merged in or succeeded by a government organized under the Constitution and laws of Mexico." See Mr. Lansing, Secy. of State, to the President, Feb. 12, 1916, *id.*, 9–11. Concerning the failure of the Carranza government in 1916 to pacify the country and to overcome the operations of Villa, see Mr. Lansing, June 20, 1916, to the Secy. of Foreign Relations of the *de facto* Mexican Government, *Am. J.*, X, Supp., 211.

[1] Dept. of State, *communiqué* for the Press, No. 2, Aug. 2, 1920, with respect to the refusal of the United States to recognize the Tinoco Government and its subsequent downfall.

to its will. The United States now appears to take the stand that normally a government, which by force has won the ascendancy in opposition to the will of the people and with contempt for rights created under a local constitution, is internationally a menace because its very supremacy sows seeds of discord bound to ripen into a conflict which, however localized, may fairly be deemed hurtful to the maintenance of the general peace. It is doubtless also believed that a government of such character will lack those moral qualifications which are found to be essential to enable the agencies of a State to perform scrupulously its obligations to the outside world.

It may be observed that conversely, the United States appears to be disposed to emphasize the popular approval of a new government as a ground for action in the according of recognition.[1] This was true, with respect, for example, to the recognition of the Acosta Government of Costa Rica in 1920.[2]

§ 45. The Same.

In response to an intimation that the Government of Italy would welcome a statement of the views of that of the United States on the situation presented by the Russian advance into Poland in the summer of 1920, Mr. Colby, Secretary of State, found occasion to make clear the grounds forbidding recognition of the soviet *régime* in Russia.[3] These were in brief, that the existing rulers of that country were not in power by the will or consent of any considerable portion of the Russian people, but represented a small minority thereof, and by means of savage oppression

[1] Mr. Knox, Secy. of State, to Mr. Furniss, American Minister to Haiti, telegram, Aug. 18, 1911, For. Rel. 1911, 290; Same to Mr. Lorillard, American Chargé d'Affaires at Lisbon, June 6, 1911, concerning the recognition of the Republic of Portugal, *id.*, 690; Mr. Adee, Acting Secy. of State, to Mr. Dawson, Special Agent near the Provisional Government of Nicaragua, telegram, Oct. 11, 1910, For. Rel. 1910, 763; Mr. Knox, Secy. of State, to Mr. Northcott, American Minister to Nicaragua, Jan. 20, 1911, concerning the previous recognition of the Government of Gen. Estrada, For. Rel. 1911, 649.

See, also, Mr. Bryan, Secy. of State, to Mr. Williams, American Chargé d'Affaires at Peking, April 6, 1913, with respect to the recognition of the Republic of China. See communication of President Wilson to the Provisional Government of Russia, Official Bulletin, June 9, 1917, Vol. I, No. 26.

[2] Dept. of State, *communiqué* for the Press, Aug. 2, 1920, No. 2, announcing instructions given the American representative at San José, Costa Rica.

The United States recognized the Republican Government of Russia on March 22, 1917, shortly after the abdication of the Czar for himself and his son. See statement of Mr. Francis, American Ambassador to Russia, to the Russian Foreign Minister, March 22, 1917, Naval War College, Int. Law Documents, 1918, 208.

[3] See communication to Baron Avezzana, Italian Ambassador at Washington, Dept. of State, *communiqué* for the Press, Aug. 10, 1920.

retained control. Secondly, it was pointed out that the existing *régime* was "based upon the negation of every principle of honor and good faith, and every usage and convention underlying the whole structure of international law; the negation, in short, of every principle upon which it is possible to base harmonious and trustful relations, whether of nations or individuals." [1] It was declared that in the opinion of the Government, there could not be any common ground upon which it could stand with a power whose conceptions of international relations were so entirely alien to its own, and so utterly repugnant to its moral sense; and that there could be no mutual confidence or trust or even respect, if pledges were to be given and agreements made with a cynical repudiation of their obligations already in the mind of one of the parties. "We cannot recognize," he said, "hold official relations with, or give friendly reception to, the agents of a Government which is determined and bound to conspire against our institutions; whose diplomats will be the agitators of dangerous revolt; whose spokesmen say that they sign agreements with no intention of keeping them." [2] Shortly thereafter the French Government announced hearty acquiescence in the principles so enunciated.[3]

The importance of the views announced by Secretary Colby is believed to be due in large degree to the emphasis laid upon the impossibility of according recognition to a new government essentially incapable of responding to the international obligations of the State which it purports to represent.

[1] In this connection he said: "The responsible leaders of the *régime* have frequently and openly boasted that they are willing to sign agreements and undertakings with foreign powers, while not having the slightest intention of observing such undertakings or carrying out such agreements. This attitude of disregard of obligations voluntarily entered into, they base upon the theory that no compact or agreement made with a non-Bolshevist government can have any moral force for them. They have not only avowed this as a doctrine, but have exemplified it in practice. . . .

"Moreover, it is within the knowledge of the Government of the United States that the Bolshevist government is itself subject to the control of a political faction, with extensive ramifications through the Third Internationale, and that this body, which is heavily subsidized by the Bolshevist government from the public revenues of Russia, has for its openly avowed aim the promotion of Bolshevist revolutions throughout the world. . . .

"Inevitably, therefore, the diplomatic service of the Bolshevist government would become a channel for intrigues and the propaganda of revolt against the institutions and laws of the countries with which it was at peace, which would be an abuse of friendship to which enlightened governments cannot subject themselves."

[2] For evidence in support of these charges, see statement of Mr. Colby, Dept. of State, statement for the Press, No. 4, Aug. 18, 1920.

[3] See communication from the French Embassy, Aug. 14, 1918, of which an English translation of the French text was given in Dept. of State, statement for the Press, No. 3, Aug. 18, 1920, together with statement of Secretary Colby concerning it.

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§ 46. Acts Falling Short of Recognition of New Governments.

Throughout the life of a State there must exist, in theory, a government exercising supremacy over its territory and competent to deal with foreign affairs. In spite of internal conflicts for the reins of government, there must always be, in legal contemplation, a *de facto* authority with which foreign States may hold informal intercourse. The latter are obliged to apprise themselves as to what party or claimant is in actual control of various portions of the national domain.

During the conflict such States frequently have occasion to demand that special protection be accorded the persons and property of their respective nationals. Thus the United States reasonably asserts the right to call upon any local authority assuming to exercise actual control over a territorial area, to protect the persons and property of American citizens therein, and to respect rights accorded them by treaty, and that without prejudice to the determination of the ultimate question concerning recognition.[1]

After a State has come into being and has been accorded recognition, foreign powers which have entered into diplomatic relations with it may be said to retain the right to continue such inter-

[1] "Pending such *de facto* entrance into relations, the agents of the United States have the right to demand of any local authority assuming to exercise power and control, protection of American life and property from injury or damage and respect for all American rights secured by treaty and international law, and their so doing is to be held an act of necessity, without prejudice to the ulterior question of international relations as between one sovereign government and another, and equally without prejudice to our sovereign right to exact reparation from the responsible perpetrators of any wrong toward this Government, its citizens, and their interests." Mr. Hill, Acting Secy. of State, to Mr. Hart, American Minister at Bogota, Sept. 8, 1900, For. Rel. 1900, 410, Moore, Dig., I, 138.

See, also, Mr. Hay, Secy. of State, to Mr. Loomis, American Minister to Venezuela, telegram Oct. 23, 1899, For. Rel. 1899, 802, Moore, Dig., I, 153; Same, to Mr. Bridgman, Minister to Bolivia, March 14, 1899, MS. Inst. Bolivia, II, 113, Moore, Dig., I, 155, note; Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Nicaragua, Aug. 15, 1893, For. Rel. 1893, 212, Moore, Dig., I, 239; Mr. Hay, Secy. of State, to the Secy. of the Navy, Oct. 2, 1899, 240 MS. Dom. Let. 353, Moore, Dig., I, 240; Mr. Knox, Secy. of State, to the Nicaraguan Chargé d'Affaires at Washington, Dec. 1, 1909, For. Rel. 1909, 455, 456; Mr. Knox, Secy. of State, to Mr. Furniss, Minister to Haiti, telegram, Aug. 10, 1911, For. Rel. 1911, 288; Mr. Knox, Secy. of State, to Mr. Wilson, Ambassador to Mexico, Feb. 28, 1913, For. Rel. 1913, 747.

The message of President Wilson to the people of Russia through the Soviet Congress, and telegraphed in March, 1918, to the American Consul-General at Moscow for delivery, did not constitute recognition of the Soviet Government. Official Bulletin, II, No. 255, March 12, 1918. For the response of the Soviet Congress, March 14, 1918, see Official Bulletin, II, No. 262, March 20, 1918.

course through their existing agencies within its territory in spite of disturbances therein incidental to a contest for governmental control. The United States has frequently availed itself of this right which it has been able to exercise without expressly or impliedly recognizing as a government the parties with which communications have been held. What has prevented such a consequence has been the care taken to refrain from acts stamping communications with an official character.[1] Thus there has been no formal presentation of credentials.

Conversely, the attempt to overthrow a *de jure* government, regardless of the success of the endeavor, does not necessarily prevent the existing agencies of the State established in foreign countries from continuing to exercise their diplomatic or other functions.[2] The United States generally takes the position that continued and even official intercourse through such channels does not imply recognition of the particular government which

[1] "In the case of new governments, however, a situation usually exists which does not arise in the case of new States. In the latter case special agents are, where there is occasion for them, employed, since the dispatch of a minister to a new State is one of the acts from which its recognition is necessarily implied; but, in the case of a new government, the question of recognition as a rule practically concerns only the powers that have already recognized the State and established regular diplomatic relations with it. There has thus arisen a certain right of diplomatic representation; and the sending of a new minister or the retention of an old one, while it implies continued recognition of the State, does not constitute a recognition of the new government, so long as there is no formal presentation of credentials and communications bear only an unofficial character." J. B. Moore, I, 235.

See, also, Mr. Seward, Secy. of State, to Mr. Culver, March 9, 1863, MS. Inst. Venezuela, I. 266, Moore, Dig., I, 235; Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Nicaragua, Aug. 15, 1893, For. Rel. 1893, 212, Moore, Dig., I, 239; Mr. Hay, Secy. of State, to the Secy. of the Navy, Oct. 2, 1899, 240 MS. Dom. Let. 353, Moore, Dig., I, 240.

[2] Mr. Hay, Secy. of State, to Mr. Loomis, Minister to Venezuela, Nov. 18, 1899, For. Rel. 1899, 809, Moore, Dig., I, 236.

Mr. Seward, Secretary of State, was persistent in his refusal to hold even unofficial intercourse with emissaries of governments not recognized by the United States. See Mr. Seward, Secy. of State, to Mr. Partridge, Minister to Salvador, Jan. 2, 1864, MS. Inst. American States, XVI. 399, Moore, Dig., I, 237; Same to Same, No. 34, Jan. 29, 1864, MS. Inst. American States, XVI, 415, Moore, Dig., I, 237. Nevertheless, Mr. Seward permitted Mr. Arroyo, described as "consul, acting as commercial agent, New York", appointed by the government of Maximilian in Mexico, which was not recognized by the United States, to attest invoices and manifests of vessels bound to Mexican ports from New York. "Such a commercial agent," Mr. Seward said, "can perform no consular act relating to the affairs of his countrymen in the United States." Communication to Mr. Romero, Mexican Minister, Aug. 9, 1865, Dip. Cor., 1865, III, 486–488, Moore, Dig., I, 238. See, also, Mr. Adams, Secy. of State, to the President, Jan. 28, 1819, Am. St. Pap. For. Rel. IV, 413. Moore, Dig., I, 132.

The attitude of the Navy Department on the question of salutes, pending an insurrection, is instructively set forth in Moore, Dig., I, 240, note, with respect to the action of Commodore O. F. Stanton, U. S. N., during a revolt in Brazil, October, 1893.

may utilize those agencies as its own. Obviously no new credentials emanating from an unrecognized government would be received from individuals already in the diplomatic or consular service and who were disposed to accept the authority of the unrecognized *régime*.[1]

i

Recognition of Belligerency

(1)

§ 47. In General.

In case an insurrection has attained a magnitude such that the mode and extent of operations by sea or land, and by whomsoever committed, are deemed sufficiently to concern the interests of a foreign State, it may in fact accord to the insurgents the rights of belligerents.[2] Recognition of belligerency emanates from the political department of the State which yields it,[3] and is commonly announced in a formal proclamation.[4]

By such action, the foreign State undertakes to treat both parties to the conflict as belligerents, and also to assume itself in relation to them the position of a neutral with the burdens and rights incidental to such a status.[5]

[1] A diplomatic officer may prove to be unwilling to exercise his functions as such in behalf of a new government to whose methods and purposes he is opposed. See, for example, documents in Moore, Dig., I, 134–135, concerning the attitude of Mr. Barrozo, Portuguese Chargé d'Affaires at Washington, 1828, with respect to the government of Dom Miguel.

Upon the overthrow of the Pardo Government of Peru in July, 1919, through the occurrence of events which he deemed to be a violation of the constitution of that country, Dr. Tudela, the Peruvian Ambassador at Washington, handed over the archives of his embassy to the First Secretary thereof, and duly advised the Department of State. See Statement from Peruvian Embassy, New York *Times*, July 18, 1919.

[2] Fuller, C. J., in the opinion of the Court in the case of The Three Friends, 166 U. S. 1, 63; also Dana's Wheaton, Dana's Note No. 15, Moore, Dig., I, 165; Lawrence B. Evans, Cases on Int. Law, 38, note.

[3] The courts regard themselves as bound by the attitude of the political department in according recognition. United States *v.* Palmer, 3 Wheat. 610, 643; The Divina Pastora, 4 Wheat. 52, 63; The Nueva Anna, 6 Wheat. 193.

[4] Mr. Blaine, Secy. of State, to the Atty.-Gen., March 18, 1889, 172 MS. Dom. Let. 228, Moore, Dig., I, 201; Benedict, J., in The Conserva, 38 Fed. 431, 437, Moore, Dig., I, 201.

[5] "The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring State. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all citizens and others within the jurisdiction of the proclaimant that they violate those rigorous obligations at their own peril and cannot expect to be shielded from the consequences. The right of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good

Recognition thus presupposes the existence of what is equivalent to war between the parties in opposition, and serves to clothe each with such rights with respect to the outside State as might be fairly claimed were the conflict being waged between two independent powers. These consequences are such as to confer commonly a distinct benefit upon the insurgents obtaining recognition, increasing proportionally the burden of the government opposing them.[1] For that reason it is constantly maintained that a foreign State is not free thus to aid an insurgent cause, save under special conditions which relieve the former from a normal duty of restraint. Diplomatic discussions have, however, revealed a divergence of opinion as to what conditions so operate. American statesmen have been reluctant to admit that such action is legitimate save when necessity confronts the State making the concession.[2] The United States has itself been cautious to avoid precipitation in according recognition,[3] and has withheld such a concession whenever its own domestic policies were deemed to oppose such action.[4]

It may be doubted whether the precise conditions when recognition may be justly accorded by a foreign State are capable of nice statement. The bearing, however, of certain considerations, whether favorable or unfavorable to such action, ought not to remain obscure.

prize under admiralty law must under international law be admitted as a legitimate consequence of a proclamation of belligerency." President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVII.

[1] The benefit consists in placing the insurgents on an equal footing as belligerents with the parent State, and in thus conferring upon them a status of political and moral value.

[2] "Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government." Dana's Wheaton, Dana's Note No. 15. See, also, President Grant, special message, June 13, 1870, Moore, Dig., I, 194; President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, I, ix, Moore, Dig., I, 196.

[3] Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Senate Ex. Doc. 69, 35 Cong., 1 Sess., 17, Moore, Dig., I, 182; Mr. Adams, American Minister at London, to Lord Russell, Sept. 16, 1865, Dip. Cor. 1865, I, 554, 557, in relation to the action of the United States with respect to the issue between Spain and its American colonies, Moore, Dig., I, 172; Mr. Gresham, Secy. of State, to Mr. Thompson, Minister to Brazil, Jan. 11, 1893, For. Rel. 1893, 99, Moore, Dig., I, 204.

[4] See, for example, President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, X; President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, XXXII; President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVIII. The foregoing messages, in relation to the point here considered, are contained in Moore, Dig., I, 196–200.

(2)

§ 48. Where Parent State Has Recognized Belligerency.

When in its work of repression the parent State treats the insurrection as though it were productive of a state of war, as, for example, by proclaiming a blockade of ports held by the insurgents, it appears thereby to forfeit the right to claim that any subsequent act of external recognition is premature or inequitable.[1] Thus Great Britain found a sufficient answer to the complaints of the United States concerning the Queen's proclamation of May 13, 1861, recognizing the Confederate States as insurgents, in the President's proclamation of a blockade during the previous month.[2]

(3)

§ 49. Where Parent State Has Not Recognized Belligerency.

Doubtless the foreign State need not show that at the time of according recognition there was a probability that eventual suc-

[1] "The parent State may recognize the belligerency of a revolting community by acts which imply the existence of war or by formal declaration. Either course may justify recognition by foreign States." G. G. Wilson, Int. Law, 1910, 43.

[2] Lord Russell, British Foreign Secy., to Mr. Adams, American Minister at London, May 4, 1865, Dip. Cor. 1865, I, 356; Same to Same, Aug. 30, 1865, *id.*, 536.

See, also, The Prize Cases, 2 Black, 635, 666–667, 669–670, Moore, Dig., I, 190; Williams *v.* Bruffy, 96 U. S., 176, 189–190, Moore, Dig., I, 191.

"It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued." United States *v.* Pacific Railroad, 120 U. S. 227, 233, Moore, Dig., I, 191.

"It is to be observed that the rights and obligations of a belligerent were conceded to it [the Confederacy] in its military character, very soon after the war began, from motives of humanity and expediency by the United States." Chief Justice Chase, in Thorington *v.* Smith, 8 Wall. 10–11, quoted by Harlan, J., in Baldy *v.* Hunter, 171 U. S., 388, 393–394; also Moore, Dig., I, 192.

It may be noted that on May 15, 1869, Mr. Fish, Secy. of State, in a communication to Mr. Motley, American Minister at London, declared that the President recognized the right of every power when a civil conflict had arisen within another State, and had attained a sufficient complexity, magnitude and completeness, to define its own relations and those of its citizens and subjects towards the parties to the conflict, so far as their rights and interests were necessarily affected by it. He added that "the necessity and the propriety of the original concession of belligerency by Great Britain at the time it was made have been contested and are not admitted. They certainly are questionable, but the President regards that concession as a part of the case only so far as it shows the beginning and the animus of that course of conduct which resulted so disastrously to the United States. It is important in that it foreshadows subsequent events." Moore, Dig., I, 192.

See, also, Case of the United States, Part II, Geneva Arbitration, Papers

cess would attend the insurgent movement.[1] It would appear, however, reasonable to demand on principle that the contest amount, at that time, to what may be fairly regarded as actual war, and as such, something more than "a mere contest of physical force, on however large a scale."[2] As has been well said:

> It must be an armed struggle, carried on between two political bodies, each of which exercises *de facto* authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war. It requires, then, on the part of the insurgents an organization purporting to have the characteristics of a State, though not yet recognized as such. The armed insurgents must act under the direction of this organized civil authority. An organized army is not enough. And all this, of course, must take place within the territorial limits recognized by foreign States as part of the parent country.[3]

To accord recognition to insurgents who have not achieved such a degree of success, and who are not so organized, manifests the giving of aid to a cause or movement which, at the time, is incapable of assuming those responsibilities of a belligerent which such action shifts automatically from the parent State to the shoulders of its opponents.[4] Under such circumstances that State may not unreasonably complain that recognition is designed primarily to aid the insurrection rather than to satisfy the legitimate needs of a foreign power, and so constitutes action resembling in theory intervention in the domestic affairs of the complaining State.

It may be doubted whether recognition of belligerency can generally be safeguarded so as not to influence in some degree the duration or result of the conflict. It should not be admitted, therefore,

Relating to the Treaty of Washington, I, 19–46. *Cf.* Geo. Bemis, Hasty Recognition of Rebel Belligerency, and Our Right to Complain of It, Boston, 1865.

[1] Mr. Forsyth, Secy. of State, to Mr. Gorostiza, Mexican Minister, Sept. 20, 1836, Senate Ex. Doc. 1, 24 Cong., 2 Sess., 81, Moore, Dig., I, 176. *Compare* message of President Monroe, March 8, 1822, Am. State Pap. For. Rel., IV, 818, Moore, Dig. I, 174.

[2] Jos. H. Beale, Jr., "The Recognition of Cuban Belligerency," *Harv. Law Rev.*, IX, 406, 407.

[3] *Id.*, 407, where Walker, Science of Int. Law, 115, is referred to as the basis of the first sentence quoted.

[4] "We must have some political organization responsible for what takes place in all the territory of the civilized world. By recognizing the belligerency of insurgents, we free the parent country from all responsibility for what takes place within the insurgent lines." Jos. H. Beale, Jr., in *Harv. Law Rev.*, IX, 407, note 3, *citing* Dana's Wheaton, Dana's Note No. 15.

that the absence of the probability of exerting such an influence is essential to the propriety of such action.

According to the trend of American opinion, the extent of the privileges accorded the insurgents should be measured closely by the needs of the foreign State which makes the concession. There must, however, be encountered in each case difficulty in ascertaining and measuring the extent of those needs. Possibly, where an insurrection involves no maritime operations, there may be slight reason for the granting of recognition by a foreign State of another continent; for it becomes difficult in such case to point to any vital interest of the latter which is likely to be adversely affected by restraint from such action.

It is believed, however, that when an insurgent movement has attained such a degree of success and has perfected an organization such as to justify the conclusion that a condition of war in fact exists, the parent State ceases, by reason of its very inability to prevent the coming into being of such a state of affairs, to retain any right to influence or restrain the relationship which foreign States thereupon see fit to establish with the insurgents as belligerents. It thus appears to be the nature and extent of the insurrectionary achievement, rather than any other consideration, which offers in the particular case the fairest test of the propriety of recognition.

j

§ 50. Acts Falling Short of Recognition of Belligerency. Insurgency.

In case of an insurrection, a foreign State may, without recognizing the insurgents as belligerents, formally acknowledge that a condition of political revolt exists, and thus recognize the fact of insurgency.[1] The United States has not infrequently pursued

[1] "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred." Chief Justice Fuller, in the opinion of the Court in The Three Friends, 166 U. S. 1, 63–64.

See, in this connection, George G. Wilson, Insurgency, Lectures, Naval War College, 1900; same author, Int. Law, 1910, § 18; same author, "Insurgency and International Maritime Law", *Am. J.*, I, 46; Moore, Dig., I, 242–243.

Concerning the acts of unrecognized insurgents in relation to the establishment of blockades, *cf.* Blockade, Acts of Unrecognized Insurgents, *infra*, § 826.

Concerning the treatment of unrecognized insurgents as pirates, see Piracy, *infra*, § 233.

such a course, thereby announcing its attitude to the courts and obliging them to respect it.[1] The pronouncements of President Cleveland in 1896, with respect to the Cuban insurrection, are illustrative.[2]

Recognition of a condition of insurgency in a foreign country is merely a reckoning with a state of facts. It confers no special rights on the insurgents; it manifests no design to aid them; it affords no ground of complaint to the parent State; it imposes on the foreign State none of the burdens of a neutral.[3]

Such action indicates, however, that the outside State is conscious of the existence of conditions sufficing to place it on its guard lest it fail to meet those special requirements of international law constraining a State to endeavor to prevent the use of its domain as a base of hostile operations against the government of a country with which it is at peace.[4] That task is likely to be burdensome to a State whose territory is contiguous or in close proximity to the domain of a country in which the insurrection occurs. Nevertheless, the bare recognition of insurgency does not itself create the burden or affect its weight.[5]

[1] "We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable." The Three Friends, 166 U. S. 1, 65–66.

[2] See, for example, President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, XXXII, Moore, Dig., I, 198; President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, XXIX, Moore, Dig., I, 198; also President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVI, Moore, Dig., I, 198. Also documents in Moore, Dig., I, 193–197, with respect to the attitude of the United States during the insurrection in Cuba, 1868–1878.

President Taft, Annual Message, Dec. 7, 1911, with respect to the existing armed conflict in Mexico, For. Rel. 1911, XI–XVI; President Taft, Annual Message, Dec. 3, 1912, For. Rel. 1912, XIV; President Wilson, address to the Congress concerning Mexico, Aug. 27, 1913.

[3] "In this connection I am constrained to call to your attention the obvious fact that since there is now no recognized state of belligerency in Mexico the rules and laws governing warfare and the conduct of neutrals are not involved." Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador at Washington, March 8, 1912, For. Rel. 1912, 740, 741.

[4] See, for example, proclamation of President Van Buren Jan. 5, 1838, with respect to the existing insurrection in Canada, Brit. and For. State Pap., XXXVIII, 1074, quoted by Joseph H. Beale, Jr., in *Harv. Law Rev.*, IX, 410.

[5] See, in this connection, joint resolution of the Congress, approved March 14, 1912, providing that whenever the President should find that in any American country conditions of domestic violence existed which were promoted by the use of arms or munitions of war procured from the United States and should make proclamation thereof, it should be unlawful to export, except under such limitations and exceptions as the President should prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. For. Rel. 1912, 745.

3

THE RIGHT TO CONTINUE EXISTENCE

§ 51. The Same.

The continuance of the right of a State to membership for all purposes in the family of nations may be said to depend in a strict sense upon the effect of its conduct upon the international society. The welfare of that society may not require the maintenance of a particular State; its very extinction as such may be for the general good.[1] When the acts of a State have caused the family of nations, or those members of it which unite to express the will of all, to reach such a conclusion, it forfeits the right to retain its place therein or to continue existence as a full-fledged member thereof. Various considerations may be productive of this result. These may be commonly assigned to the failure of a State either through incompetency or political aggressiveness, to respond generally to its primary obligations to the outside world. When the injury to the international society is attributable to incompetency, the delinquent State is likely to forfeit its position of independence and find itself compelled to accept the protection of a stronger neighbor, or to permit the creation of one or more new States out of portions of its territory within which it was incapable of administering justice.[2] Such are the natural consequences of chronic delinquency, and may be expected to follow it automatically.

When the political designs of a State cause it not only to marshal its forces for purposes of external aggression, but also to employ them for such an end whenever favorable opportunity arises, it proves itself to be a menace to the general peace, and so justifies the united demand of enlightened countries that it be shorn of power and deprived of opportunity of abusing the customary privileges of statehoood.

While the conduct of a State may be regarded as so detrimental to the welfare of the international society that the latter may decree the extinction of it, a simpler procedure is, however, likely to prevail. In practice, a State whose very life has proven a detriment to the common weal, either loses its position of independence and is thus demoted in rank, or is compelled to give up

[1] See, in this connection, Westlake, 2 ed., I, 321–324.

[2] The incapacity of a State to exercise its supremacy over the outlying districts of its territory, especially if it is manifested in a failure to administer justice, tends to arouse special interest on the part of outside States in the endeavors of the inhabitants of such areas to revolt and establish an independent State therein.

the possession of those things, moveable or immoveable, which are believed to render it hostile to the welfare of all.

Normally, after a State has come into being, it is deemed to enjoy the right to live and develop.[1] In order to preserve its existence it is accorded large freedom; and to defend itself from attack it may even disregard the independence of its adversary. The rights of a State with respect to the outside world are not, however, to be ordinarily measured by what, under extraordinary circumstances, it may not unlawfully do in order to prevent its own destruction. Because a man may, in self-defense, be justified in killing another individual, he is not deemed to possess the right of homicide. Such an act is generally forbidden. Likewise, in the society of nations, the rights of the individual member are neither derived from nor manifested by conduct which is commonly prohibited and never excusable save on grounds of self-defense.[2]

The privileges and duties of a State which result from its right to live and develop as a member of the family of nations may be fairly observed in connection with problems pertaining, respectively, to political independence, property and control, and matters of jurisdiction.

4

RIGHTS OF INDEPENDENCE DURING EXISTENCE

a

§ 52. In General.

An independent State as a full-fledged member of the society of nations has generally the right, as Hall expressed it:

> to live its life in its own way, so long as it keeps itself rigidly to itself, and refrains from interfering with the equal right of other States to live their life in the manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established.[3]

The practice of States has not thus far reflected a general opinion that international necessity demands the further restriction

[1] "Since States exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others." Hall, Higgins' 7 ed., 44.

[2] Certain Non-Political Acts of Self-Defense, in General, *infra*, § 65.

[3] Higgins' 7 ed., 45.

of the individual State which observes the conditions thus prescribed. It must, however, be recognized, that the society of nations may at any time conclude that acts which the individual State was previously deemed to possess the right to commit without external interference, are so injurious to the world at large as to justify the imposition of fresh restrictions.[1] The singleness of the interest of all enlightened States, increasing in intensity according to the growth of international intercourse and the development of international trade, quickens the perception of this fundamental principle, and also tends to produce a changing view of what it requires. For that reason, in the endeavor to enunciate sound applications of it, care must be taken to distinguish between forms of State conduct which, although theoretically adverse to the general welfare, are not in practice regarded as having attained international significance, from those which foreign offices commonly treat as sufficiently injurious to the family of nations to justify interference. The trend of international law must not be mistaken for what in the light of practice that law may at any particular time be fairly deemed to proscribe.

The extent of the freedom from external control which, according to American opinion, the individual State is believed to possess, will be examined with reference to what are commonly described as domestic affairs, as distinct from those designated as foreign affairs. In the course of such an examination it needs to be borne in mind that the revolutionary origin of the United States together with the intolerance of external control characteristic of the race to which the people who overcame British domination in the eighteenth century belonged, bred a devotion to principles of independence which there has happily been no disposition on the part of the Republic to relinquish. This circumstance accounts for the caution with which American opinion still greets any proposal for the restriction by general convention of rights long acknowledged to be the usual and common incidents of political independence. It is only when the sacrifice demanded in behalf of the international society is deemed to enhance the safety of each member thereof by processes which, having regard for the requirements of justice, appear to be conducive to the preservation of the general peace, that any yielding on the part of the United States is to be anticipated.

[1] The International Organization of States, *supra*, § 34.

b

In Domestic Affairs

(1)

§ 53. Form of Government.

A State is acknowledged to possess, as has been observed, the right to adopt whatever form of government or constitution it may see fit, and incidentally the right to change either at will.[1] The exercise of freedom of choice does not endanger the existence of the State as such. The international society is not concerned unless the form of government adopted be of a kind notoriously opposed to the existing order of affairs in that society, and calculated, therefore, to render the State impotent to perform its common foreign obligations as a member thereof.

(2)

§ 54. Legislation.

A State enjoys the right generally to enact such laws as it may see fit. The exercise of the legislative function may, however, be productive of the violation of international obligations imposed either by the law of nations or by treaty. The circumstance that an aggrieved State may with reason demand the repeal of laws serving directly to cause the breach of an international duty merely indicates that there may be an abuse of legislative power. Because the legislative department of a government may prove to be the particular means by which a State violates its duty toward another, it is not to be inferred that that department is subject to special restraint. The law of nations is concerned with the State itself rather than with the instrumentality through which it operates, and so simply demands that no act of the former partake of an internationally illegal character. Thus it always behooves the legislature as well as the executive and the courts to take no steps which expose the State to the charge of faithlessness to an international duty.

A State may by various methods restrict its own freedom with respect to legislation. Thus it may agree to adopt the legislation

[1] Mr. Webster, Secy. of State, to Mr. Rives, Minister to France, Jan. 12, 1852, Senate Ex. Doc. 19, 32 Cong., 1 Sess., 19, Moore, Dig., I, 126; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Feb. 21, 1877, MS. Inst. Haiti, II, 91, Moore, Dig., I, 250; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 97, Sept. 23, 1886, For. Rel. 1887, 921, Moore, Dig., I, 251; Mr. Seward, Secy. of State, to Mr. Burton, Oct. 25, 1862, MS. Inst. Colombia, XVI, 47, Moore, Dig., VI, 20.

of another State,[1] or to commit an act requiring legislation for its accomplishment.[2] In fact the whole body of treaties to which a State is a party marks the limits of legislative freedom. The United States has oftentimes felt restrictions so established, and has experienced embarrassment through the tardiness of the legislatures of the various States of the Union to perceive the nature or scope of the restraint imposed by particular conventions upon every lawmaking body within the country. The check similarly placed upon Congress has also been acknowledged. The limitation said to be fixed by the Hay-Pauncefote Treaty of November 18, 1901, upon the right to exempt by law vessels engaged in the coastwise trade of the United States from payment of tolls through the Panama Canal, is illustrative.[3]

(3)

§ 55. Treatment of Nationals.

A State enjoys the right normally to accord such treatment as it may see fit to its own nationals within places subject to its control, such as its own territory. The matter has been commonly regarded as one of an essentially internal character because of the unlikelihood that even harsh measures locally applied would

[1] See, for example, Art. XXIX of Treaty of Berlin, July 13, 1878, concerning adoption by Montenegro of the maritime law in force in Dalmatia, *Nouv. Rec. Gén.*, 2 ser., III, 449.

[2] See, for example, Art. VI of the treaty between the United States and Russia of March 30, 1867, concerning the purchase of Alaska, and contemplating the payment of money to the grantor. Malloy's Treaties, II, 1523. Also Art. VI of convention concluded by the United States with Great Britain, Russia and Japan, for the preservation and protection of fur seals frequenting the waters of the North Pacific Ocean, July 7, 1911, Charles' Treaties, 60, 62.

[3] The Panama Canal Act of Aug. 24, 1912, provided in Section 5, that "no tolls shall be levied upon vessels engaged in the coastwise trade of the United States." 37 Stat., Part I, 560, 562. President Wilson was of opinion that this exemption was at variance with the spirit of the Hay-Pauncefote Treaty. See address to the Congress, March 5, 1914. He, therefore, urged the repeal of the exemption. It was repealed by an Act of Congress of June 15, 1914. This Act contained a proviso to the effect that it should not be construed as a waiver or relinquishment of any right which the United States might have under the Hay-Pauncefote Treaty, or under its treaty with Panama, ratified Feb. 26, 1904 (concluded Nov. 18, 1903), or otherwise, "to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said canal and the regulation of the conditions or charges of traffic through the same." 38 Stat., Part I, 385–386.

See, also, correspondence with Great Britain in 1912 and 1913, contained in Diplomatic History of the Panama Canal, Senate Doc. 474, 63 Cong., 2 Sess., 82–102; speech of Hon. Elihu Root in the Senate, Jan. 21, 1913, on the obligations of the United States as to Panama Canal tolls.

produce international controversy or necessarily unfit a State to fulfill its obligations towards the outside world. A different practice would tend to impair the actual value of political independence and also to foment disputes.[1] Thus the United States would doubtless resent foreign complaints respecting the existence of conditions within its territory resulting in or permitting the frequent lynching of American citizens of the African race, or relating to the political status of American Indians.

The treatment by a State of its own nationals according to methods which, by the standards prevailing in enlightened countries, appear to be cruel or otherwise at variance with the dictates of humanity, always shocks the sensibilities of foreign States which not infrequently utter expressions of regret or indignation. Even in such cases, however, it has been perceived in the United States and elsewhere that the matter is primarily not one for diplomatic protest. For that reason, foreign efforts to dissuade a State from pursuing a ruthless policy deemed to be subversive of the requirements of justice have oftentimes been confined to appeals of an intercessory character, and have not taken the form of legal demands expressive of any right of interposition.[2]

If, however, the acts complained of directly involve or affect the special or well defined interests of outside States, there may exist the basis of a right to interfere. The United States appears on occasions to have acted on this principle. Thus Secretaries Blaine, Gresham and Hay declared that rigorous measures adopted against the Hebrew nationals of Russia and Roumania, and which forced a numerous class of destitute persons to emigrate to the

[1] Declared President Buchanan, Jan. 4, 1859, with reference to the case of Edgar Mortara: "I have long been convinced that it is neither the right nor the duty of this government to exercise a moral censorship over the conduct of other independent governments and to rebuke them for acts which we may deem arbitrary and unjust towards their own citizens or subjects. Such a practice would tend to embroil us with all nations. We ourselves would not permit any foreign power thus to interfere with our domestic concerns and enter protests against the legislation or the action of our government towards our own citizens. If such an attempt were made we should promptly advise such a government in return to confine themselves to their own affairs and not intermeddle with our concerns." Communication to Mr. Hart, 49 MS. Dom. Let. 474, Moore, Dig., VI, 350.

See, also, Mr. Fish, Secy. of State, to Mr. Brown, Minister to Turkey, No. 24, Dec. 5, 1871, For. Rel. 1872, 669, Moore, Dig., VI, 334, 335; Mr. Cass, Secy. of State, to Mr. Hart, Dec. 8, 1858, 49 MS. Dom. Let. 415, Moore, Dig., VI, 348, note.

[2] See, for example, Mr. Fælinghuysen, Secy. of State, to Mr. Hoffman, American Chargé d'Affaires at St. Petersburg, No. 123, April 15, 1882, House Ex. Doc. 470, 51 Cong., 1 Sess., 65, Moore, Dig., VI, 353.

United States, directly and injuriously affected the interests of the latter, to a degree which justified its protest.[1]

Again, the United States has been disposed to contend that in certain countries not accepted as full-fledged members of the family of nations, where American missionary enterprises were permitted to operate, native nationals associated therewith by religious profession or otherwise should not be subjected to molestation or persecution.[2]

It should be observed that circumstances may at any time create a general international interest in the treatment accorded certain classes or groups of the nationals of a State. Such an interest was reflected in the Covenant of the League of Nations which declares that the members thereof "undertake to secure just treatment of the native inhabitants of territories under their control."[3] It was also manifested in the treaty between the Allied and Associated Powers, on the one hand, and Poland, on the other, concluded June 28, 1919, and in which it was agreed that certain stipulations affecting Polish nationals belonging to racial, religious or linguistic minorities, constituted obligations of international concern, and should be placed under the guarantee of the League of Nations.[4]

The German Treaty of Versailles of June 28, 1919, announced

[1] Thus Secretary Hay declared: "The right of remonstrance against the acts of the Roumanian government is clearly established in favor of this government. Whether consciously and of purpose or not, these helpless people, burdened and spurned by their native land, are forced by the sovereign power of Roumania upon the charity of the United States. This government cannot be tacit party to such an international wrong. It is constrained to protest against the treatment to which the Jews of Roumania are subjected, not alone because it has unimpeachable ground to remonstrate against the resultant injury to itself, but in the name of humanity." Communication to Mr. Wilson, American Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, Moore, Dig., VI, 364.

See, also, Mr. Blaine, Secy. of State, to Mr. Smith, Minister to Russia, No. 78, Feb. 18, 1891, For. Rel. 1891, 737, Moore, Dig., VI, 354; Mr. Gresham, Secy. of State, to Mr. Webb, Chargé d'Affaires, at St. Petersburg, No. 119, Aug. 28, 1893, For. Rel. 1894, 535, Moore, Dig., VI, 356, note; President Harrison, Annual Message, Dec. 9, 1891, For. Rel. 1891, xii, Moore, Dig., VI, 358; Mr. Hay, Secy. of State, to American diplomatic representatives at London, Paris, Berlin, St. Petersburg, Vienna, Rome and Constantinople, Aug. 11, 1902, For. Rel. 1902, 42, Moore, Dig., VI, 365.

[2] According to Art. XIV of the treaty between the United States and China, of Oct. 8, 1903: "Any person, whether citizen of the United States or Chinese convert, who, according to these tenets, peaceably teaches and practices the principles of Christianity shall in no case be interfered with or molested therefor. No restrictions shall be placed on Chinese joining Christian churches." Malloy's Treaties, I, 268.

See, also, Mr. Hay, Secy. of State, to Mr. Conger, American Minister to China, telegram Oct. 30, 1900, For. Rel. 1901, Appendix, Affairs in China, 346.

[3] Art. XXIII.

[4] Art. XII. See, also, Conditional Recognition, *supra*, § 38.

that the failure of any State to adopt humane conditions of labor was an obstacle in the way of other States which desired to improve conditions within their own territories, and, by implication, a token of disregard of that social justice on which the maintenance of universal peace was acknowledged to depend.[1] That treaty established, accordingly, a permanent organization in coöperation with the League of Nations, with the design of securing and maintaining fair and humane conditions of labor for men, women and children within each State, and necessarily for the benefits of nationals and aliens alike.[2] There was thus revealed a fresh endeavor to check through an international agency the power of the individual State, within certain bounds, to deal harshly with its own nationals inhabiting its own domain.[3]

c

Foreign Affairs

(1)

§ 56. In General.

An independent State doubtless still enjoys the right to determine, as Hall has expressed it, "what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed."[4] It should be observed, however, that these social duties are closely entwined with legal duties. The latter embrace the obligation to maintain diplomatic intercourse with foreign States generally.[5] The practice of so doing is universal. This

[1] Part XIII, and particularly the preamble thereof; also Art. XXIII of the Covenant of the League of Nations.

[2] To that end the organization acting through a general conference, and with the aid of an International Labor Office, is to propose recommendations for national legislation, or the drafts of international conventions for ratification. Elaborate provisions designed to render effective the observance of conventions which shall have been accepted are also incorporated in the treaty.

[3] A reason for urging a State to refrain from inhumane treatment of its own nationals is to be found in the circumstance that when charged with the denial of justice to resident aliens, the territorial sovereign may endeavor to rely in defense on the fact (if it be one) that such individuals were accorded treatment no more severe than that applied to nationals, and were not, in its judgment, so dealt with as to justify interposition in their behalf. See, in this connection, Duties of Jurisdiction, *infra*, § 266–267.

[4] Higgins' 7 ed., 49.

[5] Thus in 1852 the United States believed that it had the right to insist that Japan enter into such treaty relations "as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels into Japanese ports." Moore, Dig., V, 740, *citing* Mr. Conrad, Assist. Secy. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions,

fact, together with the circumstance that the isolation of a State would be wholly incompatible with its health and growth, serve to obscure the obligatory aspect of its conduct. Thus what takes place is more frequently described as indicative of a right of legation than as the performance of a duty towards the outside world; for the maintenance of diplomatic intercourse is looked upon as a privilege rather than a burden.[1]

While a particular State may sever diplomatic relations with another, such conduct always betokens the existence of an international controversy, and marks an essentially abnormal situation between the powers at variance.

The right of a State not only to hold official intercourse with the outside world, but also to retain its own independence while so doing, must be acknowledged. In theory, States which are not in a condition of dependence deal with each other as equals. Their freedom of action is not, therefore, hampered by lack of extensive territorial possessions or of vast military power. Moreover, in all of the technical methods of negotiation, each State enjoys widest latitude, and on the same basis as every other.

(2)

§ 57. The Conclusion of Special Relationships.

A State enjoys the right to enter into special relationships with foreign powers, and that by appropriate means. Those actually employed are formal agreements which oftentimes take the form of treaties. Such compacts merely register the endeavor of the parties thereto to establish definite relationships between them. Thus the act of contracting is simply the method by which a State exercises the broader right attributable to its political independence. From recourse to that method — that is, from the concluding of agreements — no independent State finds itself debarred.[2]

Treaties or other agreements may, however, be declaratory of special relationships deemed offensive to the welfare of the international society, and even forbidden by it. If, in such case,

III, 1. See, also, attitude of Mr. Cushing, Minister Plenipotentiary and Commissioner, to the Chinese authorities in 1844, asserting the right of legation in China. Moore, Dig., V, 417, 419; also report on Expulsion by M. Rolin-Jacquemyns, to the Institute of International Law, 1888, *Annuaire*, X, 229, 231–232.

[1] Oppenheim, 2 ed., I, 360–362.

[2] "The full power to enter into treaties is an attribute of every such [sovereign] State, as likewise a limitation on its exercise is a first mark of dependence." Crandall, Treaties, Their Making and Enforcement, 2 ed., § 2.

the compacts are to be regarded as void, it signifies that no instrumentality of a contractual nature may be lawfully utilized to establish a relationship which the law of nations definitely denounces. It is the illegality of the end rather than of the means which is of international significance. Inasmuch, however, as the essence of the relationship is a contractual undertaking binding the parties to do or not to do certain acts, it is a reasonable and not unscientific conclusion which imputes to the law of nations the imposition of restraints upon the exercise of the contracting power of the individual State.

The international society has been slow to evince sufficient interest in the special relationships between friendly States to establish rules declaratory of the principle involved. Thus, independent States have been acknowledged to possess the right to enter into political relationships such as alliances, binding the parties to assist each other in the event of war, as well as commercial and economic unions of great variety. In view of current practices, it was not contrary to international law for the United States to enter into an alliance with France in 1778,[1] or in later years to join with Great Britain in a project to neutralize a projected interoceanic canal,[2] or to assume the burdens of a protector over Cuba,[3] or to become the guarantor of the independence of Panama.[4]

It must be obvious, however, that special relationships and undertakings incidental to them are essentially hostile to the general interest of the family of nations, when they serve to commit the contracting States to unite in the invasion of the territory of a third State guilty of no wrong, or otherwise to interfere with its political independence. Any relationship designed to cause injury to an unoffending State must be regarded as a menace to the general peace, and, therefore, one which the society of nations may fairly denounce as internationally illegal.

It may here be observed that the Covenant of the League contains the declaration that it shall not be deemed to affect the validity of international engagements such as treaties of arbitration, or regional understandings like the Monroe Doctrine for securing the maintenance of peace.[5]

[1] Malloy's Treaties, I, 449.
[2] Clayton-Bulwer Treaty, of April 19, 1850, Malloy's Treaties, I, 659.
[3] Art. III of treaty with Cuba of May 22, 1903, Malloy's Treaties, I, 364.
[4] Art. I of treaty with Panama, Nov. 18, 1903, Malloy's Treaties, II, 1349.
[5] Art. XXI. Concerning the Monroe Doctrine, see *infra*, § 97. The Monroe Doctrine is not a regional understanding.
The United States has entered into regional understandings on more than

While as yet there is apparent no general solicitude on the part of enlightened States with respect to the establishment of special relationships not regarded as conducive to war, the international interest may in fact broaden, and gradually tend to check the freedom of action of individual States in uniting for essentially economic or commercial purposes, especially if the end contemplated

one occasion with respect to the preservation of the territorial integrity of China and the so-called "open-door policy" in relation to that country. Thus Mr. Hay, Secretary of State, in 1899 and 1900, was successful in concluding arrangements with Great Britain, France, Germany, Russia, Italy and Japan, by which those powers agreed to recognize the open-door policy with respect to foreign trade in Chinese territory over which they had claimed spheres of influence or the rights of lessees. For. Rel. 1899, 128–141, Moore, Dig., V, 534–546. These agreements also purported to recognize the sovereign rights of China in the territory concerned. See in this connection memorandum of Mr. Hay, Secretary of State, Feb. 1, 1902, For. Rel. 1902, 275, 926, Moore, Dig., V, 546. By an exchange of notes Nov. 30, 1908, between Mr. Root, Secretary of State, and Baron Takahira, Japanese Ambassador at Washington, it was agreed in behalf of the United States and Japan, (1) to be the wish of the two governments to encourage the free and peaceful development of their commerce on the Pacific Ocean; (2) that the policy of both governments, uninfluenced by any aggressive tendencies, was directed to the maintenance of the existing *status quo* in the region mentioned, and to the defense of the principle of equal opportunity for commerce and industry in China; (3) to respect reciprocally the territorial possessions belonging to each other in that region; (4) to preserve the common interest of all powers in China by supporting by all pacific means at their disposal "the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire;" and (5) in the event of an occurrence threatening the *status quo* as thus described, or the principle of equal opportunity as so defined, to communicate with each other in order to arrive at an understanding as to what measures it might be considered useful to take. See Malloy's Treaties, I, 1045–1047. By an exchange of notes Nov. 2, 1917, between Mr. Lansing, Secretary of State, and Viscount Ishii, Japanese Ambassador on Special Mission, it was declared that the governments of the United States and Japan recognized that "territorial propinquity creates special relations between countries," and that consequently the United States recognized that Japan had special interests in China, particularly in the part to which her possessions were contiguous. It was announced that the territorial sovereignty of China remained, nevertheless, unimpaired, and it was denied that the governments of the contracting parties had any purpose to infringe in any way the independence or territorial integrity of that country. It was further declared that those governments would always adhere to the principle of the open-door or equal opportunity for commerce and industry in China, and it was announced also that they were opposed to the acquisition by any government of any special rights or privileges which would affect the independence or integrity of China, or which would deny to the nationals of any country full enjoyment of equal opportunity in commerce and industry in China. Official Bulletin, No. 152, Nov. 6, 1917; also explanatory statement of Secretary Lansing, *id.*, Treaty Series No. 630. See, also, in this connection, Shutaro Tomimas, The Open-Door Policy and The Territorial Integrity of China, New York, 1919, 133–145.

The United States has on occasion entered into regional understandings of a non-political character, such as, for example, the treaty with Great Britain for the suppression of the African slave trade, within two hundred miles of the African coast, concluded April 7, 1862, Malloy's Treaties, I, 674, and the convention for the preservation and protection of fur seals frequenting the waters of the North Pacific Ocean, concluded with Great Britain, Russia and Japan, July 7, 1911, Charles' Treaties, 60.

is deemed to be sufficiently detrimental to the welfare of other States.[1]

(3)

§ 58. The Right to Acquire Territory.

An independent State is deemed to possess the right to acquire territory, and thus by normal processes to increase the area of its national domain.[2] At the present time, these commonly involve a transaction between States or countries deemed to be capable of exercising rights of property and control. Therefore, the acquisition of territory is a form of conduct intimately connected with the foreign relations of the power which adds to its territorial possessions.

A neutralized State, by reason of the nature of its status, may encounter difficulty in lawfully acquiring territory the control of which requires the sovereign to commit acts which are inconsistent with the character of such a State.

(4)

The Admission and Expulsion of Aliens

(a)

§ 59. Admission.

A State is acknowledged to enjoy the broadest right to regulate the admission of aliens to its territory. Declared Mr. Justice Gray in the course of the opinion of the Supreme Court in the case of Nishimura Ekiu *v.* United States:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[3]

[1] The inquiry suggests itself whether, for example, a provision such as that contained in Art. IV of the treaty of reciprocity between the United States and the Hawaiian Islands of Jan. 30, 1875, Malloy's Treaties, I, 917, declaring in part that His Hawaiian Majesty would not "make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States", may ultimately be deemed sufficiently adverse to the family of nations to justify a rule of prohibition.

[2] Declared Mr. Justice White in Downes *v.* Bidwell, 182 U. S. 244, 300: "It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest." *Cf.* Fuller, C. J., *id.*, 369.

[3] 142 U. S. 651, 659, *citing* Vattel, lib. 2, §§ 94, 100; 1 Phillimore, 3 ed., c.

The law of nations has not as yet forbidden a State to exercise largest discretion in establishing tests of the undesirability of aliens, and to that end, to enforce discriminations of its own devising. There is thus apparent a sharp distinction between the legal propriety and ultimate expediency of exclusion laws. A State may unwisely, although not unlawfully, exercise the full measure of its privilege.

§ 60. The Same.

The United States permits no other power, as Secretary Gresham stated in 1894, to question its authority to determine what aliens or classes of aliens are undesirable or dangerous.[1] Its immigration laws exclude a variety of classes embracing all idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polyga-

10, § 220. *Cf.*, also, Fong Yue Ting *v.* United States, 149 U. S. 698, 705–707; The Chinese Exclusion Case, 130 U. S. 581, 606–611; Lem Moon Sing *v.* United States, 158 U. S. 538; Turner *v.* Williams, 194 U. S. 279. See Mr. Marcy, Secy. of State, to Mr. Gadsden, Minister to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII, 54, Moore, Dig., IV, 71; Mr. Marcy, Secy. of State, to Mr. Fay, Minister to Switzerland, No. 37, Mar. 22, 1856, MS. Inst. Switzerland, I, 47, Moore, Dig., IV, 72; Mr. Fish, Secy. of State, to Washburne, Sept. 17, 1869, MS. Inst. France, XVIII, 297, Moore, Dig., IV, 74; Mr. Fish, Secy. of State, to Mr. Weile, Dec. 4, 1869, 57 MS. Inst. Consuls, 35, Moore, Dig., IV, 74; Mr. Frelinghuysen, Secy. of State, to Mr. Stillman, Aug. 3, 1882, 143 MS. Dom. Let. 238, Moore, Dig., IV, 76; Mr. Pendleton, Minister to Germany, to Mr. Bayard, Secy. of State, Nov. 16, 1885, concerning admission by Count Kalnoky, Austrian Premier, of right of Germany to refuse sojourn to foreigners with or without cause, For. Rel. 1886, 309, Moore, Dig., IV, 79, also note, *id.*, IV, 79; Mr. Bayard, Secy. of State, to Mr. Lothrop, Minister to Russia, No. 95, July 1, 1887, MS. Inst. Russia, XVI, 518, Moore, Dig., IV, 80.

[1] See communication to Mr. Lamont, Dec. 22, 1894, 200 MS. Dom. Let. 703, Moore, Dig., IV, 137; Count Welsersheimb, Austro-Hungarian Minister of Foreign Affairs, to Mr. Grant, Sept. 5, 1891, For. Rel., 1891, 30, Moore, Dig., IV, 149, note; President Cleveland, special message, Oct. 1, 1888, Senate Ex. Doc. 273, 50 Cong., 1 Sess., Moore, Dig., IV, 199–200; Swayne, J., in the Passenger Cases, 7 How. 283, 423; Lapina *v.* Williams, 232 U. S., 78, 88; Clement L. Bouvé, Exclusion and Expulsion of Aliens in the United States, Washington, 1912, 3–14.

mists, or persons who practice polygamy or believe in or advocate the practice of polygamy.[1]

There are also excluded prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who directly or indirectly procure or attempt to procure or import prostitutes or persons for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons described as contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to the United States by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor therein of any kind, skilled or unskilled; persons who have come in consequence of advertisements for laborers printed, published or distributed in a foreign country; persons likely to become a public charge; persons who have been deported under any of the provisions of the immigration act, and who may again seek admission within one year from the date of such deportation, unless prior to their reëmbarkation at a foreign port or their attempt to be admitted from foreign contiguous territory the Secretary of Labor shall have consented to their re-applying for admission; persons whose ticket or passage is paid for with the money of another, or who are assisted by others to come, unless it is affirmatively and satisfactorily shown that such persons do not belong to one of the foregoing classes. There are further excluded persons whose ticket or passage is paid for by any corporation, association, society, municipality or foreign government, either directly or indirectly; also stowaways (except that a stowaway, if otherwise admissible, may be admitted in the discretion of the Secretary of Labor), as well as all children under sixteen years of age, unaccompanied by or not coming to one or both of their parents, subject, however, to a limited discretionary right of admission given the Secretary of Labor.[2]

[1] Act of Feb. 5, 1917, Chap. 29, § 3, 39 Stat. 875, U. S. Comp. Stat. 1918 ed., § 4289¼ *b*.

[2] § 3 of Act of Feb. 5, 1917, 39 Stat. 875. This Act repealed the Acts of Feb. 20, 1907, 34 Stat. 898, and of March 3, 1903, 32 Stat. 1213. See, in this connection, Ex parte Bernat, 255 Fed. 429; Department of Labor, Bureau of Immigration, Immigration Laws and Rules of May 1, 1917, 4 ed., Feb., 1920; also joint resolution approved Oct. 19, 1918, authorizing the readmission to the United States of certain aliens who were conscripted or who volunteered for service with the military forces of the United States or co-belligerent forces.

Concerning earlier legislation of the United States from the enactment of the Act of March 3, 1875 (18 Stat. Part 3, p. 477) until that of March 22, 1904

The Act of June 5, 1920, amendatory of the Act of October 16, 1918, excluded the following aliens from admission into the United States:

(*a*) Aliens who are anarchists;

(*b*) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group that advises, advocates, or teaches, opposition to all organized government;

(*c*) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property or (4) sabotage;

(*d*) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

(*e*) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published,

(33 Stat. Part 1, p. 144), see Moore, Dig., IV, 151–187, and documents there cited. Also Clement L. Bouvé, Laws Governing the Exclusion and Expulsion of Aliens in the United States, Washington, 1912. Illustrative of unconstitutional attempts of certain States of the Union to regulate immigration, *cf.* The Passenger Cases, 7 How. 283; Henderson *v.* Mayor of New York, 92 U. S. 259; Chi Lung *v.* Freeman, 92 U. S. 275; People *v.* Compagnie Générale Transatlantique, 107 U. S. 59.

or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (*d*).[1]

The laws of the United States forbid, save under specified conditions, the coming of Chinese laborers into the United States.[2] Moreover the immigration act of 1917 excludes (unless otherwise provided for by existing treaties) persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel of latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of such territory between the fiftieth and sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north.[3]

The existing law applies also an illiteracy test, excluding under certain limitations and numerous exemptions, all aliens over sixteen years of age, physically capable of reading, who cannot read the English language or some other language or dialect, including Hebrew or Yiddish.[4]

[1] The following paragraph is added: "For the purpose of this section: (1) the giving, loaning or promising of money or any other thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning, or promising of money or any thing of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." For the Act of Oct. 16, 1918, see 40 Stat. 1012.

[2] See Treaty, Laws, and Rules Governing the Admission of Chinese, Department of Labor, Bureau of Immigration, 1917. Acts of May 6, 1882, 22 Stat. 58; July 5, 1884, 23 Stat. 115; Sept. 13, 1888, 25 Stat. 476; May 5, 1892, 27 Stat. 25; Nov. 3, 1893, 28 Stat. 7; joint resolution of July 7, 1898, 30 Stat. 751; April 30, 1900, 31 Stat. 141; April 29, 1902, 32 Stat. part 1, 176; April 27, 1904, 33 Stat. 394, 428; Feb. 5, 1917, 39 Stat. Part 1, 874.

For the text of the treaty between the United States and China of Nov. 17, 1880, see Malloy's Treaties, I, 239; for that of the convention regulating Chinese immigration of March 17, 1894, and terminated Dec. 7, 1904, *id.*, 241. Concerning the operation of the Chinese exclusion laws and their relation to existing treaties between the United States and China, *cf.* Moore, Dig., IV, 187–238, and documents there cited; also Clement L. Bouvé, Exclusion and Expulsion of Aliens in the United States, 85–111.

[3] § 3, Act of Feb. 5, 1917, 39 Stat. 875.

[4] § 3 of Act of Feb. 5, 1917, 39 Stat. 875; also amendment of June 5, 1920,

An enlightened State may be unwilling to incorporate in a treaty of commerce a definite restriction designed to prevent the immigration of its nationals (other than persons of specially favored classes, such as officials, teachers, students, merchants or travelers for curiosity or pleasure) by the other contracting party. A discrimination based upon race or nationality may be deemed improper for formal acknowledgment in such a compact. On the other hand, with full appreciation of the right as well as the economic problem of a particular foreign country, a State may informally yet not the less positively agree so to check the emigration of its nationals destined to the territory of the former as to eliminate the danger lest large numbers of undesired classes of its nationals seek access thereto to the embarrassment of the territorial sovereign.[1]

States not infrequently undertake to regulate by convention matters pertaining to immigration. The United States has re-

exempting from this test an alien whose admission is within five years after the enactment of the law, requested by a citizen of the United States who served in the military or naval forces of the United States during the war with the Imperial German Government, and with the approval of the Secretary of Labor, marries the alien at a United States immigration station. § 3 of the Act of Feb. 5, 1917, contains numerous provisos which serve to establish limitations in its operation, with respect, for example, to the contract-labor and reading-test provisions.

[1] In view of the broad privileges accorded the nationals of Japan to enter, travel or reside in the territories of the United States by virtue of Art. I of the treaty of commerce and navigation of Nov. 22, 1894, Malloy's Treaties, I, 1028, it was not unreasonable that the treaty which superseded it, concluded Feb. 21, 1911, Charles' Treaties, 77, should contain no specific reference to any restriction to be applied to any particular class of Japanese nationals, such as laborers. It should be observed, however, that Baron Uchida, the Japanese Plenipotentiary and Ambassador at Washington, upon proceeding to the signature of the treaty, made a declaration to the effect that "the Imperial Japanese Government are fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States." *Id.*, 82.

In 1907, the Japanese Government, pursuant to a verbal understanding between Mr. Root, Secretary of State, and Baron Takahira, Japanese Ambassador at Washington, undertook to prevent the emigration of Japanese laborers to the United States, and by that process to remove occasion for the actual exclusion by the United States of such individuals. The purport of this agreement was set forth in the Report of the Commissioner-General of Immigration for the fiscal year ending June 30, 1907, pp. 125–126. It should be observed, however, that President Roosevelt on March 14, 1907, issued an executive order declaring that passports issued by the Government of Japan to citizens of that country or Korea, and who were laborers, to go to Mexico, to Canada and to Hawaii, were being used for the purpose of enabling the holders thereof to enter the continental territory of the United States to the detriment of labor conditions therein; and he thereby ordered that such individuals, possessed of such passports, and coming from Mexico, Canada or Hawaii, be refused permission to enter the continental territory of the United States. *Am. J.*, I, 450.

peatedly done so.[1] The right of exclusion is not necessarily incapable of restriction by such process.[2]

The Supreme Court of the United States has declared it to be entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions, upon the performance of which the continued liberty of the alien to reside within the bounds of the country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments to the Constitution; that such an inquiry may be properly placed upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the Act of Congress.[3]

The attempt of a foreign State to assist or compel the emigration of its criminals, paupers, incurably diseased or otherwise undesirable nationals, will always be resisted by the country to whose territory they are directed.[4] No State is obliged or willing to bear the domestic burdens of any other. The United States, as has been observed, regards the voluntary character of the coming of aliens to its shores as essential; and hence it opposes immigra-

[1] Art. I of immigration treaty between the United States and China of Nov. 17, 1880, Malloy's Treaties, I, 239; also immigration treaty between same States of March 17, 1894, *id.*, 241. See, also, Argument of Hon. John W. Foster on Treaty Rights of Chinese Subjects concerning Admission and Residence in the United States, before Senate Committee on Immigration, Jan. 23, 1902, Senate Rep. 776, 57 Cong., 1 Sess., Part 2, p. 32.

[2] Mr. Everett, Secy. of State, to Mr. Mann, Dec. 13, 1852, 41 MS. Dom. Let. 138, Moore, Dig., IV. 70; Field, J., in The Chinese Exclusion Case, 130 U. S. 581, 609. See Report of Mr. Foster, Secy. of State, to the President, Jan. 7, 1893, expressing the opinion that a bill pending in the Senate for the absolute suspension of immigration for one year would not conflict with any existing treaties of the United States. Senate Ex. Doc. 25, 52 Cong., 2 Sess., Moore, Dig., IV, 153.

[3] Zakonaite *v.* Wolf, 226 U. S. 272, 275, *citing* Fong Yue Ting *v.* United States, 149 U. S. 698, 730; United States *v.* Zucker, 161 U. S. 475, 481; Wong Wing *v.* United States, 163 U. S. 228, 237; Turner *v.* Williams, 194 U. S. 279, 289; Chin Yow *v.* United States, 208 U. S. 8, 11; Tang Tun *v.* Edsell, 223 U. S. 673, 675; Low Wah Suey *v.* Backus, 225 U. S. 460, 468; also Bugajewitz *v.* Adams, 228 U. S. 585; Tiaco *v.* Forbes, 228 U. S. 549, 556.

[4] See correspondence between Mr. King, Minister to Great Britain, and the Duke of Portland, 1789, concerning the emigration of Irish national prisoners, 7 MS. Despatches from England, Moore, Dig., IV, 142–144; also the Duke of Portland to Lord Cornwallis, *id.*, Moore, Dig., IV, 144; Mr. Fish, Secy. of State, to Mr. Moulding, Dec. 26, 1872, 97 MS. Dom. Let. 87, Moore, Dig., IV, 145; Mr. Blaine, Secy. of State, to Mr. Cramer, Dec. 3, 1881, MS. Inst. Switzerland, II, 124, Moore, Dig., IV, 145; Mr. J. Davis, Acting Secy. of State, to Mr. Lowell, May 25, 1883, For. Rel. 1883, 422, 423, Moore, Dig., IV, 146; President Arthur, Annual Message, Dec. 4, 1883, For. Rel. 1883, iv, Moore, Dig., IV, 147; *in re* Nikolaus Bader, For. Rel. 1891, 17–30.

tion assisted or constrained by foreign agencies.[1] The existing statutory law does not, however, purport to exclude persons whose tickets or passage to the United States are paid for by another, if there be a sufficient showing that such individuals do not belong to the excluded classes, and provided also that payment is not in behalf of any organization or municipality, or foreign government.[2]

(b)

Expulsion

(i)

§ 61. In General.

A State may doubtless decide for itself whether the continued presence within its territory of a particular alien is so adverse to the national interests that the country needs to rid itself of him. That right is possessed by the United States.[3] If such be its decision, the right of expulsion must be acknowledged. Expulsion may, however, savor of an abuse of power unless the decision to expel be founded on a *bona fide* belief as to the evil effect upon the State of the continued presence of the individual within its domain. A conclusion in favor of expulsion need not necessarily coincide with one to which the State of which the alien is a national would, under like circumstances, assent. On the other hand, a decision to expel must not be one which no enlightened State could in good faith be reasonably expected to reach.[4] Thus arbitrary action, either in the choice of the individual expelled,

[1] Mr. Hay, Secy. of State, to Mr. Wilson, Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, 912, Moore, Dig., IV, 151. See extracts from correspondence between Mr. Bayard, Secy. of State, and Sir L. West, British Minister at Washington, in 1887, Moore, Dig., IV. 148; Case of John Gibbons and family, For. Rel. 1892, 266–272, Moore, Dig., IV. 149–151.

[2] § 3, Act of Feb. 5, 1917, 39 Stat. 875.

[3] Fong Yue Ting *v.* United States, 149 U. S. 698, 711–714.

[4] "The just rule would seem to be that no nation can single out for expulsion from its territory an individual citizen of a friendly nation without special and sufficient grounds therefor. And even when such grounds exist the expulsion should be effected with as little injury to the individual and his interests as may be compatible with the safety and interest of the country which expels him." Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Nov. 5, 1894, For. Rel. 1895, II, 801.

"The modern theory and practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State, and that when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled." Mr. Olney, Secy. of State, to Mr. Young, Minister to Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, Moore, Dig., IV. 102, 103. *Cf.*, also, Mr. Ralston, Umpire in the Boffolo Case, before Italian-Venezuelan Commission, under protocol of Feb. 13, 1903, Ralston's Reports, 699–700.

or in the method of expulsion, would indicate internationally illegal action.[1]

The State having recourse to expulsion must be prepared to make known the reasons for its action to the State to which the alien belongs.[2] The former does not appear, however, to be required to furnish evidence in justification of its conduct as a condition precedent to such action.[3]

(ii)

§ 62. Method of Expulsion.

Arbitrary action is frequently apparent in the method by which expulsion is effected. That applied by Guatemala in the case of one Hollander, an American citizen, is illustrative. Having been arrested February 8, 1889, on a charge of calumny and forgery, Hollander was held in custody until May 14, following, when, before the trial of the case, he was expelled from the country by executive decree, and without opportunity to see his family or make any business arrangements.[4]

[1] Report of M. Rolin-Jacquemyns on Expulsion, to the Institute of International Law, 1888, *Annuaire*, X. 229; also project of declaration, adopted by the Institute Sept. 8, 1888, *id.*, 244; also proceedings of the Institute, Hamburg Meeting, 1891, *Annuaire*, XI, 273–321; Rules for the Admission and Expulsion of Foreigners, adopted by the Institute, at Geneva, Sept. 9, 1892, *Annuaire*, XII, 218; preliminary discussion, *id.*, 185. An English translation of the rules adopted in 1892 is contained in J. B. Scott, Resolutions of the Institute, 104. *Cf.*, also, Prof. von Bar, in *Clunet*, XIII, 5; Tchernoff, *La Protection des Nationaux Résidant à L'Étranger*, 449–451; Borchard, Diplomatic Protection, §§ 27–32, bibliography, *id.*, p. 869; Clement L. Bouvé, Laws Governing the Exclusion and Expulsion of Aliens in the United States, Washington, 1912.

[2] Declared Mr. Ralston, Umpire, in the course of a well-considered opinion in the Boffolo Case, before the Italian-Venezuelan Commission, under protocol of Feb. 13, 1903: "The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an insufficient reason or none being advanced, accepts the consequences." Ralston's Reports, 696, 705.

According to Art. XXX of the regulations of the Institute of International Law, of 1892: "The act decreeing expulsion shall be notified to the expelled individual. The reasons on which it is based must be stated in fact and in law." J. B. Scott, Resolutions, 109.

[3] Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Jan. 24, 1895, For. Rel. 1895, II, 809, Moore, Dig., IV, 87. Concerning the important case of A. F. Jaurett, an American citizen expelled from Venezuela in 1904, *cf.* Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, For. Rel., I, 908, 774–778; Same to Same, June 21, 1907, *id.*, 800–801; Mr. Churion, Venezuelan Minister of Foreign Affairs, to Mr. Russell, July 24, 1907, *id.*, 806. See, also, agreement of Feb. 13, 1909, for the settlement of the claim, For. Rel. 1909, 629. See, also, Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 24, 1906, For. Rel. 1906, II, 870.

[4] In commenting on this case Mr. Olney, Secy. of State, said: "After deliberating three months and more, with Hollander absolutely in its power, the executive authority expelled him in a manner that defeated the course of

While the law of nations does not forbid a State to expel an alien who has his domicile or residence within its territory,[1] the just exercise of the right in such a case calls for special care. The method and procedure employed must be designed to afford greater indulgence to the individual concerned than where he is a transient visitor.[2]

(iii)

§ 63. Causes of Expulsion.

States differ with respect to causes which lead them to expel aliens. It may be doubted whether any general rules of classification or limitation are acknowledged to exist. In practice widest latitude is enjoyed. Thus a State may with reason expel from its territory one who commits acts deemed unlawful by its own laws, although not so regarded by those of the State of which the alien is a national.[3] It may doubtless expel the alien who persists in teaching or proselyting in behalf of a religious sect whose tenets are deemed gravely objectionable.[4] The fact that the United

justice in the courts of the country; that violated the rules of international law and the existing provisions of the treaty, and was contrary to the practice of civilized nations." Communication to Mr. Young, Minister to Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, Moore, Dig., IV, 102, 108.

See, also, Case of F. Scandella, For. Rel. 1898, 1137–1147, referred to in Moore, Dig., IV, 108; Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Nov. 5, 1894, For. Rel. 1895, II, 801; Bluefields Cases, 1894, Moore, Dig., IV, 99–101, and documents there cited; Paquet Case (expulsion, before Belgian-Venezuelan Commission under protocol of Mar. 7, 1903, Ralston's Reports, Venezuelan Arbitrations, 1903, 265; Oliva Case, before Italian-Venezuelan Commission, under protocol, Feb. 13, 1903, *id.*, 771; Boffolo Case, before same Commission, *id.*, 696; Maal Case before Netherlands-Venezuelan Commission, under protocol, Feb. 28, 1903, *id.*, 914. *Cf.*, also, decision of the Umpire, M. Desjardins, Dec. 26, 1898, in the Ben Tillet Case between Great Britain and Belgium, *Clunet*, XXVI, 203; Cases of Expulsion considered by Mexican Claims Commission under Act of Congress of March 3, 1849, Moore, Arbitrations, IV, 3334; by American-Mexican Claims Commission, convention of 1868, *id.*, 3347; by Spanish Claims Commission, 1871, *id.*, 3350; by United States and Venezuelan Claims Commission, convention of 1885, *id.*, 3354.

[1] Fong Yue Ting *v.* United States, 149 U. S. 698, 724; also dissenting opinions of Justices Brewer and Field, and Chief Justice Fuller, respectively, *id.*, 734, 757 and 761.

[2] See communication of Mr. Olney, Secy. of State, Jan. 30, 1896, in Hollander Case, Moore, Dig., IV. 102–104; Report of M. Rolin-Jacquemyns, *Annuaire*, X, 229, 233; Article XLI of Rules adopted by Institute of International Law, Sept. 9, 1892, *Annuaire*, XII, 218, 225, J. B. Scott, Resolutions, 110. Also Borchard, Diplomatic Protection, § 29.

[3] Case of Paul Edwards, expelled from Belgium on account of practicing in that country the art of healing without medicines, by the laying on of hands, hypnotic suggestion and personal magnetism, in violation of the Belgian law, For. Rel. 1900, 45–53, Moore, Dig., IV, 93.

[4] *Cf.* case of Lewis T. Cannon and Jacob Müller, expelled from Prussia, 1900, on account of their preaching and practicing the Mormon faith. For. Rel. 1901, 165, Moore, Dig., IV, 135; also For. Rel. 1898, 347–354; also

States does not inquire into the religious views of its citizens and seeks to protect all equally without regard to their opinions on such matters, is hardly indicative of the absence of a right of foreign States to proceed on a different principle.[1] The tendency of enlightened States is, however, favorable to much toleration.

It cannot be said that as yet the law of nations forbids a State, in the absence of treaty, to expel from its domain aliens on account of their belonging to particular races.[2]

It may be observed that the deportation of an alien who enters a State in violation of its immigration or exclusion laws, is merely to be regarded as incidental to their enforcement.[3]

case of expulsion of Mormon missionaries from Germany in 1908, For. Rel. 1908, 366–371. *Contra* Mr. Uhl, Asst. Secy. of State, to Mr. Doty, U. S. Consul at Tahiti, June 25, 1895, For. Rel. 1897, 124, Moore, Dig., IV, 133.

[1] The protracted controversy between the United States and Russia concerning the treatment of American Jews in Russian territory, related chiefly to the interpretation of the treaty of December 18, 1832. Malloy's Treaties, II, 1514. *Cf.* in this connection Moore, Dig., IV, 111–129, and documents there cited, and in particular, communication of Mr. Blaine, Secy. of State, to Mr. Foster, Minister to Russia, No. 87, July 29, 1881, For. Rel. 1881, 1030, Moore, Dig., IV, 119. See, also, Termination of the Treaty of 1832 between the United States and Russia, Hearing before Committee on Foreign Affairs, House of Representatives, Dec. 11, 1911, revised edition, 1911; Treaty of 1832 with Russia, Hearing before Committee on Foreign Relations, United States Senate, 62 Cong., on S. J. Res. 60, Dec. 13, 1911, Washington, 1911; President Taft, message to the Senate, Dec. 18, 1911, transmitting copy of notice forwarded by the Secretary of State to the American Ambassador at St. Petersburg, relative to the termination of the treaty of 1832, Senate Doc. No. 161, 62 Cong., 2 Sess. Concerning treatment by Turkish authorities of American Jews in Palestine, *cf.* Moore, Dig., IV, 130–132.

"The following cases, a few among many, which have occurred in international practice indicate a wide range of grounds for expulsion: for spreading socialistic propaganda, Juarès case; for promoting and organizing a strike, Ben Tillett's case: for practicing the art of healing without a license, Edwards' case; for writings or speeches derogatory to the government or the army, case of Father Forbes in France; Hottmann case in Switzerland; Kennan case in Russia; for anarchy, Kropotchine case in Switzerland; for preaching polygamy, Mormon missionaries in Germany; for spying or suspicion thereof, Hofmann and Richtofen cases in Switzerland; for giving immoral performances, Belgium; for intrigues against the State, expulsion of Spanish ambassador from England in 1584 and similar cases, or against third states, General Boulanger and Count Chambord in Belgium; and, among the cases with which the United States has had to deal, the expulsion by European countries, particularly Germany and Austria, of natives of those countries who by naturalization in the United States have evaded military service." E. M. Borchard, Diplomatic Protection, § 28. In connection with the last clause of the foregoing statement see, for example, Mr. Bacon, Acting Secy. of State, to Mr. Francis, American Ambassador at Vienna, April 13, 1907, concerning the case of Selig Fink, a naturalized American citizen of Austrian origin, For. Rel. 1908, 20.

[2] *Cf.* communication of Mr. Frelinghuysen, Secy. of State, to Mr. Hamlin, No. 74, June 19, 1882, MS. Inst. Spain, XIX, 139, Moore, Dig., IV, 109; also Sir J. Pauncefote, British Minister at Washington, to Mr. Blaine, Secy. of State, Nov. 25, 1891, For. Rel. 1892, 255, Moore, Dig., IV, 229.

[3] See provisions of §§ 19 and 20 of the Immigration Act of Feb. 5, 1917, 39 Stat. 874, 889–891; also Act of Oct. 16, 1918, to exclude and expel from the

Obviously a State which, in expelling an alien, has recourse to methods which violate its own constitution, is to be deemed guilty of a denial of justice, and is so regarded by the United States.[1]

(iv)

§ 64. Expulsion as a War Measure.

The exigencies of war may justify the action of a belligerent in expelling from its territory aliens whose presence there might not, under normal circumstances, be regarded as dangerous to the safety of the State or gravely detrimental to its welfare. The bare fact of war suffices to excuse the expulsion of aliens who are nationals of the enemy should the territorial sovereign deem it expedient to take such a step. The United States has availed itself of such a right,[2] which it has also necessarily acknowledged to be possessed by other belligerents. It has had occasion, however, to complain of the harsh methods by which other States when engaged in war have had recourse to expulsion.[3]

It may be observed that the United States, while a belligerent in the course of The World War, did not expel alien enemies *en masse*, but sought to protect itself against them by other means.[4]

United States aliens who are members of the anarchistic and similar classes, 40 Stat. 1012; Act of May 10, 1920, to deport certain undesirable aliens and to deny re-admission to those deported.

[1] See, for example, Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, concerning the case of A. F. Jaurett, For. Rel. 1908, 774, 777.

[2] See statement in Moore, Dig., IV, 138, paraphrasing early legislation of the United States, embraced in the acts of July 6, 1798, 1 Stat. 577, and July 6, 1812, 2 Stat. 781.

[3] See, for example, Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, Sept. 27, 1895, For. Rel. 1895, II, 1229, Moore, Dig., IV, 139; also Mr. Hay, Secy. of State, to Mr. Choate, American Ambassador at London, No. 494, Nov. 14, 1900, MS. Inst. Great Britain, XXXIII, 505, Moore, Dig., IV, 141.

[4] After the conclusion of the armistice Nov. 11, 1918, and prior to the establishment of peace with Germany, the United States caused the deportation of numerous alien enemies whose conduct had previously been such as to necessitate their internment during the period of hostilities. Thus a number of such individuals who had not complied with the immigration regulations were deported. "Furthermore, in accordance with an agreement entered into with the German Government, most of the interned civilians of German birth, as well as subjects of other nations, who formed part of the crews of German merchant ships, were repatriated during the summer of 1919." Mr. Adee, Second Assist. Secy. of State, to the author, Nov. 6, 1919.

See, also, Act of April 16, 1918, 40 Stat. 531, amending Rev. Statutes, sec. 4067, and authorizing the President, in the event of war, to direct the conduct to be observed by the United States toward its alien enemies. Also proclamations of President Wilson, No. 1364, April 6, 1917, No. 1408, Nov. 16, 1917, No. 1417, Dec. 11, 1917, No. 1443, April 19, 1918, and No. 1506, Dec. 23, 1918; also broad provisions of Act of May 10, 1920, "to deport certain undesirable aliens, and to deny re-admission to those deported."

A belligerent may not unreasonably expel from its territory neutral nationals who, although domiciled therein, endeavor to escape the common burdens of military service.[1]

5

CERTAIN NON-POLITICAL ACTS OF SELF-DEFENSE

a

§ 65. In General.

An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack. When acts of self-preservation on the part of a State are strictly acts of self-defense, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the normal rights of other States.[2]

Within the foregoing limits, the steps which a State may take in order to defend itself, within its own domain, are generally regarded as the mere exercise of the right of political independence. Military and naval forces may be established, and fortifications erected. Such instrumentalities may, however, by reason of their magnitude or location, be out of proportion to the legitimate defensive requirements of the State; and in such case, the circumstance that they are developed or established within places under the control of the territorial sovereign does not lessen their threatening aspect, or diminish the menace to the general peace. The international society may, therefore, not unjustly endeavor to restrain that sovereign from acquiring a military power obviously designed to enable the possessor to fulfill aggressive ambitions rather than safeguard its territories from attack.[3]

[1] *Cf.* Neutral Persons and Property in Belligerent Territory, Military Service, Theory of the Belligerent Right, *infra*, § 625.

[2] "The first interest of a society, national or international, is justice; and justice is violated when any State which has not failed in its duty is subjected to aggression intended for the preservation or perfection of another." Westlake, 2 ed., I, 312. *Compare* Rivier, I, 277.

[3] Hall, Higgins' 7 ed., 45, where it is said: "If a country offers an indirect menace through a threatening disposition of its military force, and still more through clear indications of dangerous ambition or of aggressive intentions, and if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defence, so that it would be in a position to give effect to its intentions, if it were allowed to choose its opportunity, the State or States which find themselves threatened may demand securities, or the abandonment of the measures which excite their fear, and if reasonable satisfaction be not given they may protect themselves by force of arms." The soundness of this statement has been illustrated by the treatment applied to Germany through the military, naval and aërial clauses of the Treaty of Versailles, of June 28, 1919. *Cf.* Part V thereof.

The terms of the Covenant of the League of Nations announce the recognition by the members thereof of the principle that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with the national safety and the enforcement by common action of international obligations. While the Council of the League is empowered merely to formulate plans for reduction, subject to adoption by the members, the latter, after the adoption of them, agree not to exceed the limits fixed by those plans without the concurrence of the Council.[1] This arrangement is significant proof of the international interest already evinced in the military activities of the individual State.

On grounds of self-defense a State may, as will be seen, deem itself justified in interfering with the political independence of another.[2] On similar grounds a State may employ force outside of its own domain, as in the territory of a neighboring country, or upon the high seas in restraint of a foreign vessel, without, however, contemplating such interference and frankly disclaiming any design to effect it. As such acts are, in times of peace, normally regarded as unlawful because in derogation of the rights of the State whose territory is invaded or whose ships are subjected to control, there is general unwillingness to recognize any excuse as justifying what is commonly forbidden, save under special if not extraordinary circumstances. These may arise. They are to be observed in certain enlightening cases affecting the United States. These cases illustrate what has been and what may be done without betokening interference with rights of political independence or without impairment of the territorial integrity of a State whose domain is invaded.[3]

b

Invasion of Territory

(1)

§ 66. The Case of *The Caroline*.

During an insurrection in Canada in 1837, the insurgents secured recruits and supplies from the American side of the border. There was an encampment of one thousand armed men organized

[1] Art. VIII. It is there also provided that the plans formulated by the Council shall be subject to reconsideration and revision at least every ten years.

[2] Intervention, Self-Defense, *infra*, § 70.

[3] Intervention, In General, *infra*, § 69.

at Buffalo, and located at Navy Island in Upper Canada; there was another encampment of insurgents at Black Rock, also a Canadian point. The *Caroline* was a small steamer employed by these encampments. On December 29, 1837, while moored at Schlosser, on the American side of the Niagara River, and while occupied by some thirty-three American citizens, the steamer was boarded by an armed body of men from the Canadian side, who attacked the occupants. The latter merely endeavored to escape. Several were wounded; one was killed on the dock; only twenty-one were afterwards accounted for. The attacking party fired the steamer and set her adrift over Niagara Falls. In 1841, upon the arrest and detention of one Alexander McLeod, in New York, on account of his alleged participation in the destruction of the vessel, Lord Palmerston avowed responsibility for the destruction of the *Caroline* as a public act of force in self-defense, by persons in the British service. He therefore demanded McLeod's release. McLeod was, however, tried in New York, and acquitted.[1] In 1842 the two Governments agreed on principle that the requirements of self-defense might necessitate the use of force. Mr. Webster, Secretary of State, denied, however, that the necessity existed in this particular case, while Lord Ashburton, the British Minister, apologized for the invasion of American territory.[2] Said Mr. Webster in the course of a communication to the British Minister, August 6, 1842:

> Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.[3]

The facts in the case of the *Caroline* seem to have satisfied these requirements.[4] There was a threatened attack on British territory which the sovereign thereof possessed the right to prevent and resist. In this respect that which required protection differed sharply from a mere national interest or policy.[5]

[1] *Infra*, § 249.

[2] The statement of facts concerning the *Caroline* is based on a fuller statement contained in Moore, Dig., II, 409–411. See, also, Lord Ashburton, British Minister, to Mr. Webster, Secy. of State, July 28, 1842, Moore, Dig., II, 411; Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842, *id.*, II, 412.

[3] Webster's Works, VI, 301, 302, Moore, Dig., II, 412.

[4] Hall, Higgins' 7 ed., 279–280; Westlake, 2 ed., I, 313–314; Autobiography of Lord Campbell, 2 ed., 1881, 19, quoted in Moore, Dig., II, 414.

[5] In the Case of the Fur Seal Arbitration, between the United States and

Again, the foreign State within whose territory the hostile operations were in progress, lacked the power at the time to protect its neighbor by removing the source of danger. Thus, the British force did in one sense that which the United States itself would have done, had it possessed the means and disposition to perform its duty. Finally, there was instant necessity, requiring immediate action.[1] It was the presence of all of these circumstances which combined to justify the British plea.[2]

Great Britain, 1893, the former State sought justification for its conduct in preventing the killing of seals in Bering Sea by foreign vessels, on grounds of self-defense. This contention was successfully met by British counsel by showing to the satisfaction of the Court that what the United States sought to defend was an interest rather than a right of property recognized as such by international law. See oral argument of Mr. Carter in behalf of the United States, Fur Seal Arbitration, *Proceedings*, XII, 101–102, 246–249; oral argument of Sir Charles Russell, *id.*, XIII, 298–300, 301–308.

[1] Declared Sir Charles Russell in the course of his oral argument in the Fur Seal Arbitration: "The occasions for acts of self-defence, or self-preservation, are occasions of emergency, — sudden emergency — occasions when there is no time (to use the expressive language of an eminent statesman of the United States, to which I shall refer), — for deliberation, no time for contrivance, no time for warning, no time for diplomatic expostulation. That is the only idea at the bottom of all those exceptional acts of self-defence or self-preservation." Fur Seal Arbitration, *Proceedings*, XIII, 299.

[2] Hall, Higgins' 7 ed., § 84.

On grounds of self-defense the United States, while at war with Great Britain, invaded, in 1814, West Florida, which was then Spanish territory. Moore, Dig., II, 402, and documents there cited.

In 1818, by reason of the failure of Spanish authorities to check incursions of Spanish Indians into American territory, General Jackson invaded West Florida and occupied St. Marks, Pensacola and Fort Carlos de Barançcas. See statement in Moore, Dig., II, 403–404, and documents there cited from American State Papers, For. Rel., IV, 496, 776–808; President Monroe, Annual Message, Nov. 16, 1818, *id.*, 215, Moore, Dig., II, 404; Mr. Adams, Secy. of State, to Mr. Erving, American Minister to Spain, Nov. 28, 1818, American State Papers, For. Rel., IV, 539, Moore, Dig., II, 405, in which it was declared that General Jackson took possession of the places occupied by him "not in a spirit of hostility to Spain, but as a necessary measure of self-defense; giving notice that they should be restored whenever Spain should place commanders and a force there able and willing to fulfill the engagements of Spain towards the United States, or of restraining by force the Florida Indians from hostilities against their citizens." *Cf.* also Memorandum by J. R. Clark, Jr., Solicitor, Dept. of State, on the Right to Protect Citizens in Foreign Countries by Landing Forces, Department of State, Division of Information, Oct. 1912, p. 48.

Amelia Island, Spanish territory, at the mouth of St. Mary's River near the boundary of Georgia, was taken in 1817 by adventurers, claiming to act under authority of the South American insurgent governments. Feeble effort was made by Spain to recover possession. The island was made a channel for illicit introduction of slaves into the United States, and for other purposes detrimental to the safety of the country. The United States therefore occupied the island in 1817. Said Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Jan. 27, 1818: "When an island is occupied by a nest of pirates, harassing the commerce of the United States, they may be pursued and driven from it, by authority of the United States, even though such island were nominally under the jurisdiction of Spain, Spain not exercising over it any control." MS. Notes to For. Leg., Moore, Dig., II, 408. See also Mr. Adams, Secy. of State, to Mr. Erving, Minister to Spain, Nov. 11,

(2)

§ 67. The Pursuit of Villa, 1916.

For some time prior to March, 1916, the frontier of the United States along the lower Rio Grande was thrown into a state of constant apprehension and turmoil because of frequent and sudden incursions into American territory and depredations and murders on American soil by Mexican bandits, who took the lives and destroyed the property of American citizens, sometimes carrying such individuals across the international boundary with the booty seized.[1] The bandit Francisco Villa early in March, of that year, after having been guilty of the barbarous slaughter of innocent American citizens in Mexican territory,[2] proceeded slowly with his followers towards the American frontier. The Mexican authorities appear to have been fully cognizant of his movements, which were not, however, hindered.[3] On the night of March 9, 1916, Villa and his band crossed the boundary and made an unprovoked attack on American soldiers and citizens at Columbus, New Mexico, thereby causing the death of sixteen Americans and the destruction by fire of the principal buildings of the town.[4]

1817, MS. Inst. United States Ministers, VIII, 169, Moore, Dig., II, 406; President Monroe, Annual Message, Dec. 2, 1817, American State Papers, For. Rel., IV, 130, Moore, Dig., II, 407.

[1] The language employed in the text is substantially that of Mr. Lansing, Secy. of State, in a communication to the Secy. of Foreign Relations of the *de facto* Government of Mexico, June 20, 1916, *Am. J.*, X, Supp., 211, 212, where he added: "American garrisons have been attacked at night, American soldiers killed and their equipment and horses stolen; American ranches have been raided, property stolen and destroyed, and American trains wrecked and plundered. The attacks on Brownsville, Red House Ferry, Progreso Post Office, and Las Peladas, all occurring during September last, are typical. In these attacks on American territory, Carrancista adherents, and even Carrancista soldiers took part in the looting, burning and killing. Not only were these murders characterized by ruthless brutality, but uncivilized acts of mutilation were perpetrated. Representations were made to General Carranza and he was emphatically requested to stop these reprehensible acts in a section which he has long claimed to be under the complete domination of his authority. Notwithstanding these representations and the promise of General Nafarrete to prevent attacks along the international boundary, in the following month of October a passenger train was wrecked by bandits and several persons killed seven miles north of Brownsville, and an attack was made upon United States troops at the same place several days later. Since these attacks leaders of the bandits well known both to Mexican civil and military authorities, as well as to American officers, have been enjoying with impunity the liberty of the towns of northern Mexico. So far has the indifference of the *de facto* government to these atrocities gone that some of these leaders, as I am advised, have received not only the protection of that government, but encouragement and aid as well."

[2] *Id.*, 214. [3] *Id.*

[4] See telegram of Mr. Polk, Acting Secy. of State, to all American consular officers in Mexico, and to Mr. Parker at Mexico City, March 14, 1916, *Am. J.*, X, Supp., 184.

Thereupon, the marauders were driven back across the border by American cavalry, and subsequently, as soon as a sufficient force could be collected, were pursued into Mexico by an American military force in the effort to capture or destroy them.[1]

On March 10, the Mexican authorities proposed to the Government of the United States a plan permitting Mexican forces to enter American territory in pursuit of bandits, and acknowledging a reciprocal right to American forces to cross into Mexican territory "if the raid effected at Columbus should unfortunately be repeated at any other point of the border."[2] In accepting this proposal on March 13,[3] the Department of State was under the impression that the Mexican authorities consented to the punitive expedition against Villa.[4] Those authorities denied, however, that they had yielded consent,[5] and demanded withdrawal of the American force.[6] They also thereupon suspended negotiations relative to terms of the agreement for the reciprocal passage of troops across the border.[7] In the meantime the United States

[1] *Cf.* telegram of Mr. Polk, Acting Secy. of State, to all American consular officers in Mexico, and to Mr. Parker at Mexico City, March 14, 1916, *Am. J.*, X, Supp., 184; also communication of Mr. Lansing, of June 20, above cited, *id.*, 211, 214, where it was said: "Without coöperation or assistance in the field on the part of the *de facto* government, despite repeated requests by the United States, and without apparent recognition on its part of the desirability of putting an end to the systematic raids, or of punishing the chief perpetrators of the crimes committed, because they menaced the good relations of the two countries, American forces pursued the lawless bands as far as Parral, where the pursuit was halted by the hostility of Mexicans, presumed to be loyal to the *de facto* government, who arrayed themselves on the side of outlawry and became in effect the protectors of Villa and his band."

[2] Telegram of Mr. Silliman, American Consul at Guadalajara, to Mr. Lansing, Secy. of State, March 10, 1916, *Am. J.*, X, Supp., 181.

[3] Mr. Lansing, Secy. of State, to Mr. Silliman, American Consul, telegram, March 13, 1916, *id.*, 182.

[4] Mr. Polk, Acting Secy. of State, to Mr. Arredondo, Confidential Agent of the *de facto* Mexican Government, March 19, 1916, *id.*, 186.

[5] Mr. Arredondo to Mr. Polk, March 18, 1916, *id.*, 185; same to Mr. Lansing, April 13, 1916, *id.*, 192.

In the course of his note of June 20, 1916, to the Foreign Secretary of the *de facto* Mexican Government, Mr. Lansing declared: "It is admitted that American troops have crossed the international boundary in hot pursuit of the Columbus raiders and without notice to or the consent of your Government, but the several protestations on the part of this Government by the President, by this department, and by other American authorities, that the object of the expedition was to capture, destroy, or completely disperse the Villa bands of outlaws or to turn this duty over to the Mexican authorities when assured that it would be effectively fulfilled, have been carried out in good faith by the United States." *Id.*, 211, 220–221.

[6] Mr. Arredondo to Mr. Lansing, April 13, 1916, *id.*, 192.

[7] *Id.* In the course of his note of June 20, 1916, Mr. Lansing declared: "It was General Carranza who suspended through your note of April 12th all discussions and negotiations for an agreement along the lines of the protocols between the United States and Mexico concluded during the period 1882–1896, under which the two countries had so successfully restored peaceful

had given definite assurance that the object of the punitive expedition was merely to eliminate the marauders, and that it would not trench upon the sovereignty of Mexico or ripen into intervention.[1] Conferences were, however, held between the American and Mexican military authorities at the border with a view to solving the problem. These proved abortive.[2] While they were in progress at El Paso, an attack was made on the night of May 5, by a band of Mexicans at Glen Springs, Texas, about twenty miles north of the border, resulting in the killing of American soldiers and civilians, the burning and sacking of property, and the carrying off of two Americans as prisoners.[3] On May 10, another body of American troops crossed the border, penetrating 68 miles into Mexican territory in pursuit of the marauders, but recrossing into Texas, on May 22. On that date Mr. Aguilar, the Mexican Foreign Secretary, addressed to Mr. Lansing a note which, in "discourteous tone and temper", impugned the good faith of the United States, intimated that its design was to extend its sovereignty over Mexican territory, and demanded a definition of American political intentions as well as a withdrawal of the punitive expedition.[4] In his response repudiating such designs on the part of the United States, Secretary Lansing adverted to the deplorable conditions which gave rise to the expedition and the opposition which it had encountered from Mexican authorities, and declared that in view of the increasing menace to American territory from Mexican bandits through the inactivity or encouragement of the Carranza forces, it was unreasonable to expect the United States to withdraw its troops, or to refrain from sending others into Mexico when they offered the only efficient means of protecting American life and property.[5] Moreover, he declared that the existing in-

conditions on their common boundary." *Am. J.*, X, Supp., 215. See, for example, the agreement of June 4, 1896, Malloy's Treaties, I, 1177.

[1] See, for example, statement by President Wilson, March 25, 1916, *Am. J.*, X, Supp., 191; also telegram of Mr. Lansing, to Mr. Rodgers, Special Representative, April 14, 1916, *id.*, 196; Resolution adopted by the Senate March 17, 1916, Cong. Record, LIII, 4274.

[2] It should be observed that these conferences were productive of a memorandum *ad referendum* regarding the terms of withdrawal of the American troops. Gen. Carranza refused to ratify the arrangement because he was dissatisfied with the conditions imposed upon the Mexican Government. *Cf.* note of Mr. Lansing of June 20, 1916, *Am. J.*, X, Supp., 211, 216. Gen. Carranza apparently demanded the unconditional withdrawal of the troops, objecting to the claim of the United States to suspend it if any further incident might happen which should lead it to believe that Mexico was unable to protect the frontier as agreed upon. See note of Mr. Aguilar of May 22, 1916, *id.*, 197, 200.

[3] Note of Mr. Lansing of June 20, 1916, *id.*, 211, 217–218.

[4] *Am. J.*, X, Supp., 197.

[5] See communication to the Mexican Foreign Secretary, June 20, 1916, *id.*,

ability of the Mexican Government to check marauding attacks served to make stronger the obligation of the United States to prevent them.[1] On June 21, the American expedition was in conflict with a Mexican force which attacked it.[2]

After further diplomatic negotiations in July, the problem was referred to a Joint Commission representative of the two Governments.[3] In November, 1916, the commissioners signed a protocol providing for the withdrawal of the American troops, but which was not ratified by General Carranza.[4] The Commission adjourned its meetings in January, 1917, and the same month orders were issued for the withdrawal of the troops. But Villa remained uncaptured.

It is believed that conditions justified the pursuit of Villa by an American force. The argument of Secretary Lansing was based upon facts which offered no alternative. At no time did the United States admit that it lacked the right under the circum-

211, in the course of which he said: "The United States Government cannot and will not allow bands of lawless men to establish themselves upon its borders with liberty to invade and plunder American territory with impunity and, when pursued, to seek safety across the Rio Grande, relying upon the plea of their Government that the integrity of the soil of the Mexican Republic must not be invaded," 223.

In justification of the pursuit into Mexican territory in 1836, of predatory Indians, plundering and invading American soil from the Mexican border, Mr. Forsyth, Secy. of State, in a communication to Mr. Ellis, Minister to Mexico, Dec. 10, 1836, said in part: "You will find no difficulty in showing to the Mexican Government that it [the right] rests upon principles of the law of nations, entirely distinct from those on which war is justified — upon the immutable principles of self-defense — upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to a neighboring people." Brit. and For. State Pap., XXVI, 1419, Moore, Dig., II, 420. See, also, statement in Moore, Dig., II, 418–420, *citing* Brit. and For. Pap., XXV, 1089, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099; Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, Aug. 13, 1878, For. Rel. 1878, 572, Moore, Dig., II, 425.

[1] *Am. J.*, X, Supp., 225.

[2] In this connection see "Mexico and the United States", by George A. Finch, *Am. J.*, XI, 399. It will be recalled that the President, in June, 1916, summoned the entire National Guard of the United States to the Mexican border in order to protect American territory from invasion.

[3] The American Commissioners were Messrs. George Gray, Franklin K. Lane, and John R. Mott. Prof. Leo S. Rowe was Secretary of the American Commission. The Mexican Commissioners were Messrs. Luis Cabrera, Ignacio Bonillas, and Alberto J. Pani.

[4] On signing the protocol the American Commissioners informed their Mexican colleagues that, as a matter of national necessity, the policy of the Government must be to reserve the right to pursue marauders coming from Mexico into the United States, so long as conditions in northern Mexico were in their existing abnormal state. It was added that such a pursuit should not, however, be regarded by Mexico as in any way hostile to the Carranza Government, for those marauders were the common enemies of the two countries. See Statement issued by the Commission Nov. 24, 1916, *New York Times*, Nov. 25, 1916, p. 1.

stances to penetrate Mexican territory. No political end was sought to be accomplished.[1]

C

§ 68. Acts on the High Seas. The Case of *The Virginius*.

What may be done on the high seas is illustrated by the case of the *Virginius*. That vessel, the property of Cuban insurgents, and employed in aid of an existing insurrection in Cuba, was registered in the United States, and carried its flag. Upon later investigation it appeared that such registry was fraudulently secured by imposition on the American authorities, and that the vessel was not entitled to fly the American flag. On October 31, 1873, the *Virginius* was captured on the high seas by the Spanish cruiser *Tornado*, taken to Santiago de Cuba, where fifty-three of the persons on board, American, British and Cuban, were charged with piracy, tried by court martial, and shot.[2] The case raised two distinct legal questions: first, the right to capture the vessel; and secondly, the right to deal summarily with persons found on board.[3] Concerning the right of capture the discussion between the United States and Spain proceeded on unsatisfactory lines. The latter pleaded in defense that the *Virginius* was engaged in a piratical expedition; also that her fraudulent registry deprived her of the right to claim protection of the American flag.[4] It was agreed by a protocol of November 29, 1873, that Spain

[1] Declared President Wilson in the course of an address at Long Branch, Sept. 2, 1916: "We ventured to enter Mexican territory only because there were no military forces in Mexico that could protect our border from hostile attack and our own people from violence, and we have committed there no single act of hostility or interference even with the sovereign authority of the Republic of Mexico herself. It was a plain case of the violation of our own sovereignty which could not wait to be vindicated by damages and for which there was no other remedy. The authorities of Mexico were powerless to prevent it." President Wilson's State Papers and Addresses, edited by Albert Shaw, New York, 1917, 311. Concerning the brief movement of American troops into Mexico June 15, 1919, in consequence of the wounding of persons in El Paso, Texas, by forces of Villa in conflict with the troops of Gen. Carranza at Juarez, *cf.* New York *Times*, June 16, June 17 and June 18, 1919.

[2] Concerning the *Virginius* see statement in Moore, Dig., II, 895, *citing* H. Ex. Doc. 30, 43 Cong., 1 Sess., 29, and 73, For. Rel. 1874, 923–1117; President Grant, special message, Jan. 5, 1874, H. Ex. Doc. 30, 43 Cong., 1 Sess., 1, Moore, Dig., II, 900; For. Rel. 1875, II, 1250; Mr. Fish, Secy. of State, to the Spanish Minister, April 18, 1874, For. Rel. 1875, II, 1178, 1192, Moore, Dig., II, 980.

[3] Concerning this question, *cf. infra*, § 232. It is to be observed that the British Government made no objection to the seizure of the vessel or to the detention of British persons on board. It did protest, however, against the treatment to which they were subjected.

[4] For. Rel. 1874, 923–1117. See, also, Moore, Dig., II, 967–968.

should restore the vessel, and the survivors of the passengers and crew, and salute the American flag on a specified date, unless Spain could prove to the satisfaction of the United States that the *Virginius*, at the time of her capture, was not entitled to carry the flag of the latter. In such case the salute was to be dispensed with, although a disclaimer of intent of indignity to its flag was to be expected by the United States.[1] Mr. Williams, Attorney-General, in an opinion of December 19, 1873, found that the vessel had no right to carry the American flag, by reason of her unlawful registry in the United States. He was of opinion, however, that the fact that she had violated the municipal laws of the United States did not in itself give to Spain the right to capture the *Virginius* on the high seas.[2] On the other hand, President Woolsey of Yale took what Mr. Dana regarded as "an unassailable position", that ownership of the *Virginius* by Spanish subjects gave to Spain "jurisdiction" over the vessel.[3]

It is believed that justification for the seizure of the *Virginius* was not to be determined by reference to the right of the ship to fly the flag under which she sailed. The nationality of a vessel is not always decisive of the legality of measures to be directed against her. On grounds of self-defense an aggrieved State may subject a foreign ship to restraint on the high seas and in times of peace, if the conduct of those controlling the vessel is such as to render the seizure of her the necessary mode of warding off threatened and instant danger. Circumstances may in fact rarely combine to warrant such preventive action. In the case of the *Virginius* they appear to have been such as to impose no duty on the Spanish authorities to refrain from seizing the vessel until she entered Cuban waters.

When a foreign vessel, after having violated the municipal laws of a State within the territorial waters thereof, puts to sea to avoid detention, conditions justifying capture on the high seas on grounds of self-defense are rarely present. The prior misconduct of the ship does not necessarily indicate present danger of a repetition of similar wrongful conduct. The purpose of those controlling the vessel is usually to enable her to escape, rather than

[1] H. Ex. Doc. 43 Cong., 1 Sess., 81, Moore, Dig., II, 896.
[2] 14 Ops. Attys.-Gen., 340, Moore, Dig., II, 898.
[3] R. H. Dana, Jr., in communication to a Boston journal, Jan. 6, 1874, cited by Woolsey, 6 ed., 366. See, also, Scott's Cases, 320–322, note, in which Dr. Scott observes: "The *Virginius* was rightly captured by the Spanish authorities, provided it was, and such was the fact, in the employ of the Cuban insurgents. The jurisdiction is, therefore, twofold: piracy and self-defense, which latter, if it exists at all, exists as well on sea as on land."

to cause her to resume locally offensive activities. The object, moreover, of pursuit and seizure is primarily to inflict a penalty rather than to prevent the recurrence of wrong-doing. Unless the vessel, at the time of capture, threatens to violate anew the rights of the offended State within its own waters, and unless the State to which the vessel belongs is then powerless to check further her hostile progress, requiring immediate restraint as a necessary deterrent, there are lacking the elements necessary to excuse interference with the further movements of the ship on grounds of self-defense. If there be any generally acknowledged right of pursuit and capture on the high seas of foreign vessels which have violated municipal laws within territorial waters, its basis must be sought elsewhere.[1]

6

INTERVENTION

a

§ 69. In General.

In a broad sense any form of external interference with the exercise by a State of its normal rights of any kind, whether pertaining to the control of territory or ships at sea, or to the enjoyment of political independence, may be deemed to constitute intervention. The various forms of interference are, however, so diverse in kind, and vary so greatly in the relative frequency with which in practice they recur, as to demand, for sake of clearness of thought, distinct and appropriate appellations.[2]

[1] Rights of Jurisdiction on the High Seas, *infra*, § 236.

Denying the existence of the right of pursuit and capture, see Award of Mr. T. M. C. Asser in the cases of the capture by Russia of the American whaling vessels, *James Hamilton Lewis*, and the *C. H. White*, under convention between the United States and Russia, Aug. 26/Sept. 8, 1900. Malloy's Treaties, II, 1532–1534, *Rev. Droit Int.*, 2 ser., V, 83, 90. See, also, *The Itata*, United States and Chilean Claims Commission, under convention of Aug. 7, 1872, Moore, Arbitrations, III, 3067–3071; Dana's Wheaton, Dana's Note No. 108. But *contra*, Marshall, C. J., in Church *v.* Hubbart, 2 Cranch, 187, 234; Mr. E. J. Phelps, Oral Argument in behalf of the United States, Fur Seal Arbitration, *Proceedings*, XV, 128–131. *Cf.* Rose *v.* Himely, 4 Cranch, 241; Hudson *v.* Guestier, 4 Cranch, 293; s.c., 6 Cranch, 281; The Apollon, 9 Wheat. 362. See, also, Sir Charles Russell, Oral Argument in behalf of Great Britain, Fur Seal Arbitration, *Proceedings*, XIII, 298–302; Westlake, 2 ed., I, 177–178; Art. VIII of rules adopted by the Institute of International Law, at Paris, Mar. 31, 1894, *Annuaire*, XIII, 328, 330, J. B. Scott, Resolutions, 113, 115.

[2] See, generally, Bonfils-Fauchille, 7 ed., §§ 295–323 (with bibliography); Calvo, 5 ed., I, 266–355; Arrigo Cavaglieri, *L'Intervento*, Bologna, 1913; Dana's Wheaton, §§ 63–72; A. de Floeckher, *De l'Intervention*, Paris, 1896; Hall, Higgins' 7 ed., §§ 88–95; Hershey, §§ 136–145; Henry G. Hodges, The Doctrine of Intervention, Princeton, 1915 (with bibliography in Ap-

The term intervention is, therefore, here given a somewhat narrow and technical signification. It is not employed to refer to those cases where, for example, territory is temporarily invaded on grounds of self-defense, or for the protection of nationals resident therein, and with no further object or result. There are also eliminated the numerous instances of essentially non-political interference in which a State interposes in behalf of nationals deemed to have been denied justice at the hands of another, and merely seeks to obtain compensatory damages in their behalf.[1] Nor is there included the demand for redress of a public wrong where the form of reparation involves no impairment of political independence or sacrifice of territory in opposition to the will of the sovereign.

The term intervention is here used to describe simply the interference by a State in the domestic or foreign affairs of another in opposition to its will and serving by design or implication to impair its political independence.[2] Such action may or may not

pendix III; Lawrence, 115–135; Charles de Morillon, *Du Principe d'Intervention*, Dijon, 1904; Oppenheim, 2 ed., I, §§ 134–140, with bibliography; Phillimore, 3 ed., I, 553–638; Pradier-Fodéré, I, 546–678; Rivier, I, 389–407; A. G. Stapleton, Intervention and Non-Intervention, or The Foreign Policy of Great Britain from 1790–1865, London, 1866; Westlake, 2 ed., I, 317–321; Woolsey, 6 ed., 43–52. Also, especially, see Moore, Dig., VI, 1–247, and documents there cited; Memorandum by J. R. Clark, Jr., Solicitor, Dept. of State, on Right to Protect Citizens in Foreign Countries by Landing Forces, Dept. of State, Division of Information, Series M, No. 14, 1912, 1–22.

[1] "The difference between intervention and interposition is most clearly drawn in the principles which have governed and the practice which has been followed by this country [the United States], for while it has been the studied policy most rigidly adhered to (with one or two isolated exceptions — for example, our political intervention in Cuba and perhaps Samoa) to refrain from interfering in the purely political affairs of other countries (but see Monroe Doctrine), no nation, it would seem, has with more frequency than this Government used its military forces for the purpose of occupying temporarily parts of foreign countries in order to secure adequate safety and protection for its citizens and their property.

"The United States has, either alone or jointly with other powers, many times interposed for the protection of American interests and American property, an action classified by Mr. Moore as non-political intervention in the affairs of foreign countries. While this action has at times resulted in a real interference in the political affairs of a foreign country, either with or without the request of a foreign government, at other times the interference in political affairs has been merely incidental — indeed, accidental — and not the main purpose of the action taken." Memorandum by J. R. Clark, Solicitor of Dept. of State, on Right to Protect Citizens in Foreign Countries by Landing Forces, Dept. of State, Division of Information, Oct. 12, 1912, p. 30.

[2] Intervention takes place, declares Hall: "When a State interferes in the relations of two other States without the consent of both or either of them, or when it interferes in the domestic affairs of another State irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it." Higgins' 7 ed., § 88. The same writer adds: "The right of independence is so fundamental a part of international law, and

be lawful. The gravity of what takes place whenever an act of intervention is committed is, however, such as to require, by way of justification, the presence of unusual if not extraordinary circumstances. Moreover, the legal value of these for such purpose is not to be derived from the power of the intervening State, but rather from the sinister and lawless conduct of that other whose freedom of will is opposed.

Unless a State is guilty of, or threatens to be guilty of wrongful conduct towards the outside world, whether directed generally against the family of nations, or in opposition to one of its members, there seems to be no just ground for interference.[1] It is the absence of internationally illegal conduct which in such case removes the possibility of lawful intervention.[2] Whether conduct is to be deemed internationally illegal must be ascertained by reference to the requirements of the system of the law designed to promote international justice. Those requirements doubtless vary from time to time, not in principle, but in their application to the acts of the individual State. At the present day there is evidence of an increasing disposition, on the one hand, to assure respect for acknowledged rights of political independence of each member of the family of nations, and on the other, to facilitate united efforts to intervene when a particular State definitely abuses those rights. It is the mode of collective interference, through an established agency, as well as the recognition of circumstances when such action is excusable, which characterize the existing tendency and afford hope of the development of a sounder practice than has hitherto prevailed.[3]

respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias." Higgins' 7 ed., § 89.

The term intervention is not employed in the text to describe the interference or interposition by an independent State in the affairs of another, which by treaty or otherwise is dependent upon the former as a protector. Where such a relationship exists, interference does not, on account of the status of the ward, interfere with any right of independence.

Cf. Relationships Established between the United States and Certain Neighboring States, *supra*, §§19–24.

[1] Hall, Higgins' 7 ed., §§ 90 and 92.

[2] It should be observed that the wrong with which a State may be chargeable may be attributable to its impotence to maintain its supremacy in fact over its own domain or its own property, and thereby permit their use in such a way by a foreign power as to cause injury to a third State.

[3] See, for example, Art. XII of the treaty between the Allied and Associated Powers, on the one hand, and Poland, on the other, concluded June 28, 1919, making certain stipulations a matter of international concern and placing them under the guarantee of the League of Nations. British Treaty Series No. 8, 1919 [Cmd. 223].

b

§ 70. Self-Defense.

It is subversive of justice among nations that any State should, in the exercise of its own freedom of action, directly endanger the peace and safety of any other which has done no wrong. Upon such an occurrence the State which is menaced is free to act. For the moment, it is justified in disregarding the political independence of the aggressor and in so doing may be guided by the requirements of its own defense.[1] This freedom of action is due not merely to the circumstance that the continuance of the life of the State demands extraordinary measures, but rather to the fact that its safety is jeopardized by the essentially wrongful conduct of another.[2] It is not, therefore, the broad ground of self-preservation, but the narrower yet firmer basis of one form of self-preservation, that of self-defense, on which justification rests.

The nature of the conduct which menaces the safety of a foreign State is perhaps unimportant in determining the right of the latter to have recourse to intervention. It has been already observed, however, that an aggrieved State, although compelled on grounds of self-defense to resort to extraordinary measures, involving even the despatch of armed forces to foreign territory, may neither design nor effect interference with the political independence of the sovereign thereof, and may not in fact intervene.[3] It suffices to note that if interference constituting intervention is reasonably deemed to be required for the defense of the State whose safety is menaced, such action is not unlawful, and may be anticipated.[4]

c

§ 71. Prevention of Unlawful Intervention by Another State.

To prevent the illegal interference by one State with the political independence of another, a third State may doubtless on principle lawfully intervene, even though its own safety is not endan-

[1] Intervention to preserve rights of succession, as Professor Moore declares, "has never been exemplified in America." Dig., VI, 2. For that reason it is not discussed. That it lacks justification in law, is the opinion of Hall, who points out that: "International Law no longer recognises a patrimonial State. A country is not identified with its sovereign. He is merely its organ for certain purposes, and it has no right to interfere for an object which is personal to him." Higgins' 7 ed., § 91.

[2] Westlake, 2 ed., I, 309–312.

[3] *Cf.* The Pursuit of Villa, *supra*, § 67.

[4] States have not hesitated to act upon this principle. It has been invoked by the United States.

gered by the action to which it is opposed. Justification rests upon the fact that any member of the family of nations is authorized to oppose so grave a violation of international law as the unwarranted interference with the political independence of one of their number.[1]

When the third State intervenes under a treaty guaranteeing protection to another against foreign interference with its territorial integrity or political independence, the situation is the same. The treaty merely imposes a legal duty on the guarantor to take certain action, which, in the absence of agreement, might also be not unlawfully taken. The intervention is in such case justified not by reason of the treaty, but on account of the illegal character of the conduct which it is sought to check.[2]

d

Domestic Affairs

(1)

§ 72. Harsh Treatment of Nationals.

The nature and extent of the right of a State to treat as it may see fit its own nationals within places subject to its control has been observed.[3] It has been seen, moreover, that certain forms or degrees of harsh treatment are deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of

[1] The successful, though tardy effort of the United States to check the French intervention in Mexico, 1862–1867, was an application of this principle. Mr. Seward justified the opposition of his government on the ground that the wrongful treatment of Mexico "could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions." Mr. Seward, Secy. of State, to the French Minister, Dec. 6, 1865, H. Ex. Doc. 73, 39 Cong., 1 Sess., II, 347, Moore, Dig., VI, 501. *Compare* interference of Great Britain in Portugal in 1826, to thwart Spanish aid of Don Miguel, the pretender to the Portuguese crown. *Cf.* Dana's Wheaton, § 68.

[2] A treaty purporting to bind the parties to assist each other in case of any external aggression may embrace an undertaking to come to the aid of a ruthless intervening State even in case of just resistance against its operations. Such an alliance in so far as it is designed to strengthen a wrong-doer in its opposition to measures lawfully directed against it, is detrimental to the welfare of the family of nations because necessarily at variance with the principles of international justice.

[3] Treatment of Nationals, *supra*, § 55.

them.[1] If it can be shown (and doubtless it oftentimes may be) that such acts are immediately injurious to the nationals of a particular foreign State grounds for interference by it might be acknowledged. Again, the society of nations, acting collectively, might not unreasonably maintain that a State yielding to such excesses was rendering itself unfit to perform its international obligations, and possibly also thereby inviting war.

It seems important to observe that since the outbreak of The World War there has developed a fresh international interest in the normally domestic affairs of the individual State, and a disposition on the part of certain European statesmen to curb by united action such abuses as appear directly to be a menace to the general peace.[2]

(2)

§ 73. Revolution.

A revolution or a civil war within the domain of a particular State may be a source of grave concern to a neighboring power. Its commerce may be adversely affected; its burden of abstaining from participation may be heavy; its obligations as a neutral (in case the insurgents are recognized as belligerents) may prove to be exacting and onerous. Nevertheless, the fight for the reins of government is not in itself internationally wrongful. Until the conduct of hostilities, by reason of the mode or place of operations, or through some other circumstance, menaces the safety of the outside State, or otherwise directly interferes with the exercise by it of some definite right which should be respected, no ground for intervention is apparent. Prior, therefore, to such a time, intervention to assist in suppressing or aiding the revolution must, on principle, lack justification.[3]

[1] *Cf.* Hall, Higgins' 7 ed., p. 288. According to the preamble of the treaty of July 6, 1827, concluded by Great Britain, France and Russia with reference to the intervention of those powers in the struggle of the Greeks for independence, sentiments of humanity, the tranquillity of Europe, a condition of anarchy causing impediments to foreign commerce, and giving opportunity for acts of piracy, and also compliance with the invitation of the Greeks, were referred to in justification of the stand to be taken. *Nouv. Rec.*, VII, 282–283. See, also, Dana's Wheaton, § 69; Abdy's Kent (1878), 50, quoted in Moore, Dig., VI, 4–5.

"As an example of intervention to put an end to abhorrent conditions, the case of Bulgaria in 1876 may be taken." Moore, Dig., VI, 3, note. See, also, Final Act of the Congress of Berlin, July 13, 1878. *Nouv. Rec. Gén.*, 2 ser., III, 449.

Cf. Mr. Wilson, Acting Secy. of State, to Mr. W. S. Bennett, June 28, 1909, relative to the massacre of Armenians in Asia Minor, For. Rel. 1909, 557.

[2] In this connection see Art. XI of the Covenant of the League of Nations.

[3] Pradier-Fodéré, I, 378; Bonfils-Fauchille, 7 ed., §§ 310–312. See documents in Moore, Dig., VI, 6–10, showing the attitude of the United States

Nor is the situation legally altered by reason of the fact that intervention occurs in pursuance of a treaty of guaranty, or that such action is in response to an invitation from either party to the conflict.[1] Foreign interference, howsoever invoked, is necessarily directed against a portion of the population of a foreign State, and is thus a denial of its right to engage in or suppress a revolution, or of employing its own resources to retain or acquire control over the government of its own country.[2]

It must be acknowledged that the normal obligation of outside States not to intervene may be regarded as inapplicable by those in close proximity to the area of hostilities, especially if the conflict be prolonged and ruthlessly waged with contempt for the dictates of humanity. In such case, however, it is not the bare fact of revolution, but rather its causal connection with the impairment of definite rights possessed by the aggrieved States, which must be relied upon to excuse interference. Unfortunately there has been a tendency to imply such a consequence when the interests rather than the legal rights of foreign States have suffered from the prolongation of the conflict. Nor has there been alertness to distinguish between the two, or to respect the distinction when the reason for it was obvious.

§ 74. Intervention by a Body of States.

On principle, a group of States acting in concert has no broader right of intervention than that possessed by a single State. Clean

respecting the possible intervention of certain European powers during the War of the Rebellion, particularly Circular of Mr. Seward, Secy. of State, March 9, 1863, Dip. Cor. 1863, II, 812–814; Communication of Mr. Seward, Secy. of State, to Mr. Dayton, Minister to France, No. 278, Dec. 29, 1862, Dip. Cor. 1863, I, 639, 640–641. For an illuminating commentary on the attitude of the British Government with respect to the Confederacy, see The Education of Henry Adams, by himself, Boston, 1918, Chap. X.

[1] But see case of Belgium, 1830, set forth in Wheaton, Hist. Law of Nations, Part 4, sec. 26. *Cf.* earlier "Instances of interference for or against revolutions", in Woolsey, 6 ed., 49–53. The intervention of Great Britain, France and Russia in the Greek insurrection against Turkey in 1827 was in compliance with the request of the Greeks. *Cf.* Treaty of July 6, 1827, concluded by France, Great Britain and Russia. *Nouv. Rec.*, VII, 282–283.

[2] Declares Lawrence: "Any intervention in an internal struggle is an attempt to prevent the people of a State from settling their own affairs in their own way, and, as such, a gross violation of national independence. The request of one of the parties cannot alter the quality of the act, and render legal that which without it would be contrary to the fundamental principles of the law. It makes no difference whether the invitation comes from the established authorities or from rebels. In neither case can an incitement to do wrong render the act done in consequence of it lawful and right." Int. Law, 3 ed., 126. *Cf.* 6 ed. of same work, 134–135.

motives may inspire their action. Their very power may silence protests and insure the success of their operations. Unless, however, such a group is fairly representative of the entire family of nations, so as to be capable of establishing rules of conduct to be observed by each of its members, it cannot create new grounds to justify interference with the political independence of a sovereign State.[1]

f

§ 75. Chronic Disregard of International Obligations.

A State through neglect, or design, may continuously and increasingly fail to respond to its several international obligations. It may cease to be capable of maintaining adequate government within its territory; it may be persistently guilty of tortious conduct for which no means of redress through any channels are available; it may flout its fiscal or other contractual undertakings and invite national bankruptcy. In a word, it may relapse into a condition of chronic impotence to perform the common duties of a member of the family of nations. Under such circumstances the State forfeits the right to complain if a foreign power or group of powers which have suffered direct injury from its misconduct resort to intervention.[2] Nor is their freedom of action necessarily limited by the nature of the wrongs which they have sustained. These may arise from tort or contract, and they may or may not

[1] Declares Hall: "There is fair reason consequently for hoping that intervention by, or under the sanction of, the body of States on grounds forbidden to single States, may be useful and even beneficent. Still, from the point of view of law, it is always to be remembered that States so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one." Higgins' 7 ed., § 94. In his article entitled "*La question d'Orient en* 1885", *Rev. Droit Int.*, 1 ser., XVIII, 591, 603, Mr. Rolin-Jacquemyns declares that there is "collective authority historically and judicially established by the Great Powers of Europe over affairs of the Turkish Empire." In 1897 the Great Powers intervened in affairs in Crete. Streit, "*La question crétoise*", in *Rev. Gén.*, I, IV, VI, VII and X; E. Nys, "*Le concert européen et la notion du droit international*", *Rev. Droit Int.*, 2 ser., 1, 273.

Concerning the action of the Powers in causing Montenegro to evacuate Scutari in 1913, *cf.* Bonfils-Fauchille, 7 ed., § 301.

Concerning the pressure exerted by Russia, Germany and France to cause Japan to relinquish the cession to it of the Liao-tung Peninsula, including Port Arthur, and yielded by China in the treaty of Shimonoseki of April, 1895, see Hall, Higgins' 7 ed., § 95.

The provisions of the treaty of peace with Germany of June 28, 1919, contemplating the renunciation by Germany of its several rights, titles and privileges in the Province of Shantung [Arts. 156–158] manifested intervention by the group of Powers responsible for the terms of the treaty as against China, the territorial sovereign whose opposition as such was unavailing.

[2] President Roosevelt, Annual Message, Dec. 6, 1904, For. Rel. 1904, xli, Moore, Dig., VI, 596. Also Westlake, 2 ed., I, 318, 319–320.

involve moral turpitude.[1] It is the condition into which the State has relapsed and from which no means of recovery is otherwise apparent which is believed to sustain the right to interfere.

An aggrieved State may in fact resort to various measures short of intervention to cause the abatement of even chronic conditions of disorder within the territory of a neighbor. There may be vigorous diplomatic interposition. Even force may be temporarily employed without, however, any actual interference with the political independence of the State against which it is directed.[2] Such methods may not, however, suffice; and when they do not, intervention is to be anticipated. As a result, the delinquent State is likely to be placed for the time being under the protection of that which it has wronged or of some other foreign power, thereby losing during the period of protection the condition and privileges of independence.

g

The Conduct of the United States

(1)

§ 76. The Policy of Non-Intervention.

In so far as the United States observed a policy of non-intervention with respect to the affairs of European States, its conduct was attributable in large degree to respect for the views of President Washington as expressed in his farewell address of September, 1796. He there said in part:

> Europe has a set of primary interests which to us have none or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course.[3]

[1] See, in this connection, the Hague Convention of 1907, Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Malloy's Treaties, II, 2248; also *infra*, § 309, and The Monroe Doctrine, *infra*, § 95.

[2] *Cf.* The Pursuit of Villa, *supra*, § 67; The Landing of Foreign Forces, *infra*, § 202; Retorsion, *infra*, § 588.

[3] Writings of Washington, by Ford, XIII, 277, 316, Moore, Dig., VI, 12. With reference to the conduct thus advised, Mr. Seward, Secretary of State,

Throughout the nineteenth century and well into the twentieth, American statesmen responsible for the foreign relations of the United States were reluctant to encourage intervention with respect to conduct having no immediate connection with the affairs of the American continents. Nor was there a disposition to place the United States in such a relation to the affairs of other continents as to increase the likelihood of its being called upon to intervene for the preservation of its rights therein.[1] Even with respect to events of the Western hemisphere, the United States evinced generally no alertness to avail itself of the right of intervention whenever circumstances appeared to warrant such action.[2]

declared in the course of a despatch to Mr. Riotte, Minister to Costa Rica, July 7, 1862: "It may well be said that Washington did not enjoin it upon us as a perpetual policy. On the contrary he inculcated it as the policy to be pursued until the union of the States, which is only another form of expressing the idea of the integrity of the nation, should be established, its resources should be developed and its strength, adequate to the chances of national life, should be matured and perfected." MS. Inst. Am. States, XVI, 225, Moore, Dig., VI, 18. Again, in addressing Mr. Dayton, Minister to France, May 11, 1863, Mr. Seward declared: "It is true that Washington thought a time might come when, our institutions being firmly consolidated and working with complete success, we might safely and perhaps beneficially take part in the consultations held by foreign States for the common advantage of the nations." Dip. Cor., 1863, I, 667, 668, Moore, Dig., VI, 22, 23.

[1] See a series of declarations of policy respecting non-intervention expressed in documents in Moore, Dig., VI, 11–32. See attitude of President Cleveland respecting the position taken by the United States relative to the General Act of the Berlin Conference of Feb. 26, 1885, in his Annual Message, Dec. 8, 1885, For. Rel. 1885, viii–ix.

Concerning the participation by the United States in the Conference at Algeciras in 1906, dealing with Moroccan affairs, see instruction of Mr. Root, Secy. of State, to Ambassador White and Minister Gummeré, For. Rel. 1905, 678. In advising and consenting to the ratification by the United States of the General Act and an additional protocol of the Algeciras Conference, signed April 7, 1906, the Senate resolved that as a part of the act of ratification, it understood that the participation of the United States in the Conference and in the formation and adoption of the General Act and protocol was for the sole purpose of preserving and increasing its commerce in Morocco, the protection as to life, liberty, and property of its citizens residing or traveling therein, and of aiding by its friendly offices and efforts, in removing friction and controversy which seemed to menace the peace between powers signatory with the United States to the treaty of 1880, all of which were on terms of amity with its government; "and without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope." Malloy's Treaties, II, 2183.

Cf. reservation under which the American plenipotentiaries signed the Hague Convention of 1899, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2032; also resolution of ratification by the Senate of the Hague Convention of 1907, for the Settlement of International Disputes, *id.*, II, 2247. Also J. B. Moore, Principles of American Diplomacy, New York, 1918, Chap. VI, "Non-Intervention and the Monroe Doctrine."

[2] See, for example, Senate Resolution of April 20, 1911, to the effect that intervention by the United States in the existing revolution in Mexico would be without justification. Senate Document No. 25, 62 Cong., 1 Sess., with brief in support of the resolution.

(2)

§ 77. Departure from the Policy of Non-Intervention.

Since its participation as a belligerent in The World War, both in the conduct of hostilities and in the formulation of terms of peace,[1] the United States appears to acknowledge such an interest in the affairs of European and Asiatic States as to manifest concern therein, even to the extent of intervention should there be adequate legal excuse for such action, and when, in its judgment, failure to interfere would tend to establish a condition of things at variance with the requirements of international justice.[2] It should be observed that it is a matter of American policy rather than of law which has undergone a change. That change seems to be due to a widening perception of the fact that American interests are bound up with, and are, to a certain degree, inseparable from those of States of other continents, and that, therefore, the commission in any one of them of internationally illegal acts provocative of war may, in a particular case, prove to be as highly detrimental to the United States as to other members of the family of nations. It is not acknowledged, however, that such conduct is always to be regarded as productive of such an effect, or that the concern of the United States may not be dependent upon the geographical relationship of the place where the disturbance occurs to American territory, or upon other considerations.

(3)

§ 78. Instances of Intervention.

The grounds on which the United States has relied in justification of intervention or contemplated intervention are to be observed by reference to certain cases which at various times prior to The World War confronted the nation.

[1] See correspondence between the United States and Germany regarding an armistice, Oct. 6, 1918, to Nov. 5, 1918, *Am. J.*, XIII, Supp., 85–96, and especially communication of Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, Nov. 5, 1918, indicating the willingness of the Allied Governments, subject to specified qualifications, to make peace with the Government of Germany according to the terms laid down in President Wilson's address to Congress of January 8, 1918, and the principles enunciated in his subsequent addresses. Official Bulletin, Nov. 6, 1918, Vol. II, No. 456, p. 1.

[2] *Cf.*, for example, statement by President Wilson, April 23, 1919, relative to the conflicting claims of the Italians and the Jugoslavs with respect to Fiume, *Current Hist. Magazine*, X, June, 1919, 405.

Cuba

§ 79. Transfer to a Third State.

While Cuba remained under the dominion of Spain it was frequently declared that the United States would regard as dangerous to its peace and safety, and hence as an unfriendly act, the cession of that island to a third State. Such a transfer the United States, for that reason, asserted the right to oppose.[1]

§ 80. Revolution, 1868–1878.

During the Cuban Revolution of 1868–1878, President Grant declared that the United States would be justified in intervening to bring hostilities to an end, on account of the disregard of the laws of civilized warfare, the injury to commercial interests of the United States, as well as to property of American citizens in Cuba, and by reason of the close proximity of the Island to the United States. He added that the interests of humanity demanded the cessation of hostilities before the whole island should be laid waste and larger sacrifices of life be made. The President did not, however, recommend intervention.[2]

§ 81. Revolution, 1895–1898.

President McKinley in his special message of April 11, 1898, declared that intervention by the United States in the existing Cuban Insurrection would be justified for the following reasons:

[1] Mr. Adams, Secy. of State, to Mr. Nelson, Minister to Spain, April 28, 1823, H. Ex. Doc., 121, 31 Cong., 1 Sess., 6, Moore, Dig., VI, 380, 383; Mr. Jefferson to President Monroe, Oct. 24, 1823, S. Ex. Doc., 26, 57 Cong., 1 Sess., Moore, Dig., VI, 394, 395; Mr. Webster, Secy. of State, to Mr. Barringer, Nov. 26, 1851, Webster's Works, 513, 514, Moore, Dig., VI, 57; Mr. Seward, Secy. of State, to Mr. Bancroft, Minister to Prussia, Oct. 28, 1867, MS. Inst. Prussia, XIV, 486; Speech of Senator Calhoun in U. S. Senate, May, 1848, Calhoun's Works, IV, 457 *et seq.*, Moore, Dig., VI, 424, 426.

Said President Grant in his Annual Message, December 6, 1869: "The United States has no disposition to interfere with the existing relations of Spain to her colonial possessions on this continent. They believe that in due time Spain and other European powers will find their interest in terminating those relations and establishing their present dependencies as independent powers — members of the family of nations. These dependencies are no longer regarded as subject to transfer from one European power to another. When the present relation of colonies ceases, they are to become independent powers, exercising the right of choice and of self-control in the determination of their future condition and relations with other powers." Richardson's Messages, VII, 31, Moore, Dig., VI, 61.

The Monroe Doctrine, *infra*, § 90.

[2] President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, vi, Moore, Dig., VI, 94–97. *Cf.*, also, Mr. Fish, Secy. of State, to Mr. Cushing, No. 266, Nov. 5, 1875, H. Ex. Doc. 90, 44 Cong., 1 Sess. 3, Moore, Dig., VI, 85, 87.

First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is specially our duty, for it is right at our door.

Second. We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.

Third. The right to intervene may be justified by the very serious injury to commerce, trade, and business of our people, and by the wanton destruction of property and devastation of the island.

Fourth, and which is of the utmost importance. The present condition of affairs in Cuba is a constant menace to our peace, and entails upon this government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined; where our trading vessels are liable to seizure and are seized at our very door by war-ships of a foreign nation, the expeditions of filibustering that we are powerless to prevent altogether, and the irritating questions and entanglements thus arising — all these and others that I need not mention, with the resulting strained relations, are a constant menace to our peace, and compel us to keep on a semi-war footing with a nation with which we are at peace.[1]

[1] For. Rel. 1898, 750, 757–758.

By a Joint Resolution of the Congress, approved April 20, 1898, the United States recognized the independence of the people of Cuba, demanded that the Government of Spain relinquish its authority and government over that island, and withdraw its land and naval forces therefrom, and also directed the President to use the military and naval forces of the United States to carry the resolution into effect. For. Rel. 1898, 763. On April 22, the President proclaimed a blockade of certain portions of the coast of Cuba, *Id.*, 769. An Act of Congress approved April 25, declared the existence of war with Spain from and including April 21. *Id.*, 772. *Cf.* President McKinley, Annual Message, Dec. 5, 1898, *id.*, lv. See, also, President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, xxix, Moore, Dig., VI, 124, 129; Mr. Sherman, Secy. of State, to General Woodford, Minister to Spain, July 16, 1897, For. Rel. 1898, 558, Moore, Dig., VI, 139, 142. *Cf.* Señor Gullon, Minister of State, to General Woodford, American Minister, Feb. 1, 1898, For. Rel. 1898, 658, Moore, Dig., VI, 166, 167–168.

Declares Professor Moore, in his work on American Diplomacy (edition of 1918), p. 208: "The destruction of the *Maine* doubtless kindled the intense popular feeling without which wars are seldom entered upon; but the government of the United States never charged — on the contrary, it refrained from

§ 82. **Panama.**

In November, 1903, the United States intervened to prevent the suppression by Colombia of the revolution of Panama.[1] The acts of intervention took the form of the prevention of the landing of armed forces on the Isthmus, the bombardment of the town of Panama, and the recognition of Panama as a State.[2] Justification was declared by President Roosevelt to be found in: first, our treaty rights; second, our national interests and safety; and, third, the interests of collective civilization.[3]

It was contended that by virtue of Article XXXV of the treaty of December 12, 1846, between the United States and New Granada (the predecessor of Colombia), the former not only assumed the duty to guarantee the constant "neutrality" of the Isthmus, but also acquired the right to maintain the free and open transit thereof, and incidentally the further right to prevent the commission of any warlike acts in the Isthmian Zone by whomsoever committed.[4]

charging — that the catastrophe was to be attributed to 'the direct act of a Spanish official.' Its intervention rested upon the ground that there existed in Cuba conditions so injurious to the United States, as a neighboring nation, that they could no longer be endured. Its action was analogous to what is known in private law as the abatement of a nuisance."

[1] See instructions to Naval Officers of the United States, Nov. 2–5, 1903, For. Rel. 1903, 247–248, Moore, Dig., III, 46.

[2] President Roosevelt, special message, Jan. 4, 1904, For. Rel. 1903, 260, 272, Moore, Dig., III, 56, 71.

[3] For. Rel. 1903, 273, Moore, Dig., III, 71.

[4] Art. XXXV of the treaty of 1846 is in part as follows: "The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; . . . And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th Articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory." Malloy's Treaties, I, 312.

With reference to the divergent interpretations of the treaty on the part of Colombia and the United States, see President Roosevelt, special message, Jan. 4, 1904, For. Rel. 1904, 260–278, Moore, Dig., III, 56; also correspondence between Mr. Hay, Secy. of State, and Gen. Reyes, Colombian Envoy on special mission, December, 1903, and January, 1904, For. Rel. 1903, 283–314, Moore, Dig., III, 78–113.

INTERVENTION OF THE UNITED STATES IN THE WORLD WAR IN 1917. Concerning the causes which led the United States to become a belligerent on the side of the Allied Powers, see Maritime Warfare, *infra*, §§ 747–749.

§ 83. Certain Minor Instances.

In the course of the Chile-Peruvian war in 1881, Mr. Blaine, Secretary of State, fearful lest Chilean demands for Peruvian territory as a condition of peace might prove destructive of Peruvian nationality, instructed Mr. Trescot, special envoy to the belligerent States, to lodge such a protest and take such a stand as might have been fairly looked upon as amounting to intervention.[1] The instruction was, however, a few weeks later modified by Secretary Frelinghuysen (Mr. Blaine's immediate successor), and the United States did not in fact, in its subsequent conduct, have recourse to such interference.[2]

[1] Mr. Blaine expressed surprise and regret at the treatment accorded the Calderon government of Peru by Chile, which had forbidden that government to exercise its functions within territory occupied by the Chilean army, and which had arrested President Calderon. The Secretary declared that if it should be avowed that the motive for such action was resentment by Chilean authorities on account of the continued recognition by the United States of the Calderon government, the proceeding would be regarded by the President "as an intentional and unwarranted offense" and regarded by the Government of the United States "as an act of such unfriendly import as to require the immediate suspension of all diplomatic intercourse." Mr. Blaine added that should the Chilean government, while disclaiming any intention of offense, maintain its right to settle its difficulties with Peru without the friendly intervention of other powers, and refuse to allow the formation of any government in Peru which did not pledge its consent to the cession of Peruvian territory, it would be Mr. Trescot's duty in language as strong as was consistent with the respect due an independent power, to express the disappointment and dissatisfaction felt by the United States at such a deplorable policy. He admitted that if Peru was unable or unwilling to furnish adequate indemnities for specified purposes, the right of conquest put it in the power of Chile to satisfy itself, and that the reasonable exercise of that right, however to be regretted, was not a legitimate ground of foreign complaint. He declared, however, that the Government of the United States felt that the exercise of the right of absolute conquest was dangerous to the best interests of all republics of the American continents, and that from it were certain to spring other wars and political disturbances. He maintained that Peru had the right to demand that opportunity be allowed her to find the requisite indemnity and guarantee, and he announced that the United States could not admit that a section of territory could be properly exacted far exceeding in value the amplest estimate of a reasonable indemnity. He declared that if the good offices of the United States were rejected and the policy of absorption of an independent State were persisted in, the United States would consider itself discharged from any further obligation to be influenced in its action by the position which Chile had assumed, and would hold itself free to appeal to the other American republics to join it in an effort to avert consequences which could not be confined to Chile and Peru, but which threatened with extremest danger the political institutions, the peaceful progress, and the liberal civilization of all America. Mr. Blaine, Secy. of State, to Mr. Trescot, No. 2, Dec. 1, 1881, For. Rel. 1881, 143, Moore, Dig., VI, 39.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Trescot, No. 6, Jan. 9, 1882, For. Rel. 1882, 57, Moore, Dig., VI, 40. Also Same to Mr. Phelps, Minister to Peru, No. 6, July 26, 1883, For. Rel. 1883, 709, Moore, Dig., VI, 42; Same to Same, No. 8, Aug. 25, 1883, For. Rel. 1883, 711, Moore, Dig., VI, 42.

In 1913, President Wilson not only declined to recognize the Mexican government of General Huerta, but also, as has been noted (*supra*, § 44) made known to certain foreign powers his sense of duty to require Huerta's retire-

In the process of its acquisition of rights of sovereignty over the Island of Tutuila and adjacent islands in the Samoan group, the United States seems to have had recourse to intervention, in so far as it caused the Samoans to accept the form of government prescribed by the General Act of the Conference at Berlin in 1889,[1] to yield to a cessation of hostilities in the fight for the kingship, and to bow to the tri-partite agreement of 1899, concluded by the United States with Great Britain and Germany.[2] It was by virtue of British and German renunciations therein of territorial pretensions, rather than by any other means, that the United States appears to have perfected its rights. No native government in those islands seems to have been regarded at that time as possessed of rights of political independence or of property and control which the parties to the arrangement regarded themselves as obliged to respect.[3]

ment, and his opinion that the United States should proceed to employ such means as might be necessary to secure that result. Those powers were, accordingly, called upon to exert their influence to impress upon Huerta the wisdom of retiring in the interest of peace and constitutional government in Mexico. For. Rel. 1913, 856.

[1] President Cleveland, Annual Message, Dec. 3, 1894, For. Rel. 1894, xv-xvi, Moore, Dig., I, 548. For the text of the General Act for the Neutrality and Autonomous Government of the Samoan Islands, concluded June 14, 1889, by the United States, Great Britain and Germany, see Malloy's Treaties, II, 1576.

[2] Malloy's Treaties, II, 1595.

[3] See, generally, documents in Moore, Dig., I, 536–554.

DEMANDS OF THE ALLIED POWERS ON CHINA FOLLOWING THE BOXER TROUBLES OF 1900. Following the military operations of the allied expedition in China in 1900, to raise the siege of the legations at Peking, the United States in conjunction with Austria-Hungary, Belgium, France, Great Britain, Germany, Italy, Japan, Russia and Spain, compelled China to yield to heavy demands. These embraced not only various forms of reparation for wrongs sustained in the course of the so-called "Boxer" troubles, but also measures specially designed to prevent a recurrence of acts such as had been committed. These measures, which were embodied in the final protocol of Sept. 7, 1901, Malloy's Treaties, II, 2006, involved the relinquishment by China of certain important rights. Thus she was obliged to yield the special reservation of the so-called Legation quarter in Peking, together with the exclusive control thereof, embracing the fullest right of defense, to the interested Powers. Art. VII. She was forced to consent to the razing of the forts at Taku and those which might impede free communication between Peking and the sea, Art. VIII, and the occupation by the Powers of certain points for the maintenance of communication between the capital and the sea. Art. IX. She was compelled to agree to prohibit the importation of arms and ammunition, as well as materials used exclusively in their manufacture. Art. V. She was obliged also to transform her Office of Foreign Affairs (Tsungli Yamen) into a Ministry of Foreign Affairs on lines indicated by the Powers, and to give it precedence over the other six Ministries of State, and simultaneously modify the existing ceremonial respecting the reception of foreign diplomatic representatives. Art. XII. Save for these and kindred concessions, the United States had, however, no design which was at variance with the policy announced by Secretary Hay in July, 1900, and which aimed to "preserve Chinese territorial and administrative entity." For. Rel. 1900, 299. The interference with the political

The nature and extent of the right asserted by the United States to restrict the freedom of action of foreign powers with respect to certain forms of action affecting States of the American continents, and by virtue of what is known as the Monroe Doctrine, require separate examination.[1]

h

§ 84. The League of Nations and Intervention.

The Covenant of the League of Nations, in so far as it establishes a right of interference in case of a breach of the agreement by a member of the League, as manifested, for example, in aggression against the territorial integrity or political independence of a member,[2] or in disregard of the undertaking not to resort to war under specified conditions,[3] is not at variance with any principle of international law pertaining to intervention. It is the consent to interference under the contingencies set forth in the compact which prevents such action when taken against any member proving to be a covenant-breaker from resembling the case where external opposition is in plain defiance of the will of the State which is thwarted.

A different situation is contemplated, however, when it is designed to compel a State which has not accepted the Covenant to refrain from action which as an independent sovereign it sees fit to take. According to Article XVII of the Covenant, in the event of a dispute between a member of the League and a State which is not a member, if the latter refuses the invitation (which is to be made to it upon such conditions as the Council of the

independence of China, manifested in the demands made of her, was a natural incident or consequence of the military expedition of the Powers to relieve the legations, and was necessitated by the nature and extent of the disturb-

times objected to the exercise of a protectorate by Great Britain over the Mosquito Indians, on the ground that such action was in violation of the convention between the United States and Great Britain of April 19, 1850, known as the Clayton-Bulwer Treaty, as well as in conflict with the spirit of the Monroe Doctrine. See statement of Mr. Buchanan, Minister to Great Britain for the Earl of Clarendon, Jan. 6, 1854, Brit. and For. State Pap., XLVI, 244, 247, H. Ex. Doc. 1, 34 Cong., 1 Sess. 55, Moore, Dig., III, 154, 159; statement of Lord Clarendon for Mr. Buchanan, May 2, 1854, Brit. and For. State Pap., XLVI, 255, H. Ex. Doc. 1, 34 Cong., 1 Sess., 80, Moore, Dig., III, 161; Memorandum of General Cass, Secy. of State, of conversations with M. Sartiges, Dec. 1, 1858, MS. Inst. Am. States, XVI, 22, Moore, Dig., III, 178, note; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, Nov. 23, 1888, For. Rel. 1888, I, 759–767, Moore, Dig., III, 227, 236.

[2] Art. X.

[3] Arts. XII and XV.

League may deem just) to accept the obligations of membership in the League for the purposes of adjusting the dispute, and resorts to war against a member of the League, the war-waging State exposes itself to the drastic measures to be applied by the League and its several members against a covenant-breaker.[1] In a word, the States constituting and adhering to the League assert the right to interfere with and prevent the making of war by an outside power upon one of their members save under contingencies which they prescribe. These deserve attention. War is in no case to be made until three months after an arbitral award or a report by the Council of the League. If arbitration is in fact avoided, the issue must be referred to the Council whose report, with its recommendations for the just settlement of the controversy, if unanimously agreed to by the members thereof other than the representatives of the parties to the controversy, deprives the losing State of the right to go to war with its adversary complying with those recommendations.[2] It is the right of an outside State to refuse to submit to such procedure, with the incidental obligation not to fight under such a contingency, which the members of the League of Nations appear to challenge. Technically their interference with such a State must be regarded as amounting to intervention, the propriety of which on principle would depend upon the merits of the particular case, unless it be admitted that the States constituting the League may by virtue of their organization alter the principles of international law. The United States is not as yet prepared to make such an admission.

7

THE MONROE DOCTRINE

a

§ 85. Preliminary.

In examining the practice of the United States in attempting to check the conduct of foreign powers by reason of its special relation to States or territory situated in the Western Hemisphere, the attempt is here made primarily to observe the precise charac-

[1] Art. XVI. Art. XVII also provides that if both parties to a dispute, when so invited, refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute. This provision would appear to cover the case where neither party to the controversy is a member of the League.

[2] Arts. XII and XV.

ter of acts which have been thwarted, the grounds relied upon in justification of interference, and the mode by which such action has been taken.[1] It is not sought to trace the development of a national policy, or to emphasize the extent of the divergence between current interpretations of it and those of 1823. The purpose is rather to take full note of the magnitude of the claims of the United States, however much they may differ from those once put forward in its behalf, and to perceive the legal theory on which they rest.

It has seemed important to observe also the relation of what is asserted by virtue of the Monroe Doctrine, both to international law and to the Covenant of the League of Nations.

b

§ 86. Prior Events.

Some time before President Monroe gave utterance to the policy expressed in his message of December 2, 1823, American statesmen had not infrequently declared that the United States could not, for reasons of self-defense, look with indifference upon certain

[1] For bibliographies of the extensive literature dealing with the Monroe Doctrine, see Library of Congress, List of References on the Monroe Doctrine, compiled under direction of Herman H. B. Meyer, Chief Bibliographer, Washington, 1919; also Albert Bushnell Hart, The Monroe Doctrine: An Interpretation, Boston, 1916, 405–421; Herbert Kraus, *Die Monroedoktrin*, Berlin, 1913, 19–36; Edith M. Phelps, Selected Articles on the Monroe Doctrine, 2 ed., New York, 1916, XVII–XXXIII. These bibliographies are mentioned in the Library of Congress, List of References.

For documents relative to the origin of the Monroe Doctrine, see collection by Worthington C. Ford from among the papers of John Quincy Adams and from the Department of State, published in *Proceedings of Massachusetts Hist. Soc.*, XV, 373–429; also Moore, Dig., VI, 369–412; Memoirs of John Quincy Adams, comprising portions of his diary from 1795–1848, edited by Charles Francis Adams, Philadelphia, 1875, Vol. VI. The messages and addresses of the Presidents and the diplomatic correspondence of the United States contain the views of responsible American statesmen.

Among the numerous works touching the subject, the few following, which reveal a diversity of views, may be noted: Archibald Cary Coolidge, The United States as a World Power, New York, 1908 (reprinted 1919), 95–120; Thomas Benton Edgington, The Monroe Doctrine, Boston, 1905; John W. Foster, A Century of American Diplomacy, Boston, 1900, 438–478; Albert Bushnell Hart, The Monroe Doctrine: An Interpretation, Boston, 1916; William Isaac Hull, The Monroe Doctrine: National or International? New York, 1915; Herbert Kraus, *Die Monroedoktrin in ihren Beziehungen zur amerikanischen Diplomatie und zum Völkerrecht*, Berlin, 1913; John Bassett Moore, Principles of American Diplomacy, New York, 1918, Chap. VI; Hector Pétin, *Les États-Unis et la doctrine de Monroe*, Paris, 1900; William F. Reddaway, The Monroe Doctrine, 2 ed., New York, 1905; Charles H. Sherrill, Modernizing the Monroe Doctrine, Boston, 1916; George F. Tucker, The Monroe Doctrine, Boston, 1885; Hiram Bingham, The Monroe Doctrine: An Obsolete Shibboleth, New Haven, 1915. See, also, series of papers concerning the Monroe Doctrine in *Annals of American Academy of Pol. and Soc. Science*, entitled "International Relations of the United States", July, 1914, LIV, Part 1; also another series in *Proceedings, Am. Soc. Int. Law*, 1914, Vol. VIII.

action of European States with reference to the American continents. It was the possible transfer of American colonial possessions by one European power to another, which seems to have been a cause of special anxiety.[1]

Before the close of the year 1823, the United States had witnessed a series of events in Europe which were productive of grave alarm. As a result of the Holy Alliance of September 26, 1815,[2] and of the subsequent Conferences of Aix-la-Chapelle, Troppau and Laybach,[3] the Allied Powers of Europe had not only declared themselves possessed of the right to overthrow governments founded on revolution, but had also proceeded to act upon that principle. In 1822 revolutions in Naples and Piedmont had been suppressed. The following year, in pursuance of an understanding agreed upon at the Congress of Verona in 1822, France had overthrown the constitutional government in Spain, and had reëstablished the Monarchy of Ferdinand VII.[4] It had, furthermore, been made known to the United States by Mr. Canning, the British Foreign Secretary, that upon the achievement of military objects in Spain, proposal would be made for a consultation of the Allies concerning affairs in Spanish-America; that a concerted movement to enable Spain to regain control over her revolutionary colonies in America was to be anticipated.[5] Mr. Canning had

[1] Mr. King, Minister to Great Britain, to the Secy. of State, June 1, 1801, Am. St. Pap., For. Rel., II, 509, Moore, Dig., VI, 370; President Jefferson to the Governor of Louisiana, Oct. 29, 1808, Ford's Writings of Jefferson, IX, 212, Moore, Dig., VI, 371.

In pursuance of a recommendation of President Madison, Congress resolved January 15, 1811, that by reason of "the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity and commerce", the United States could not "without serious inquietude, see any part of the said territory pass into the hands of any foreign power", and that regard for the safety of the United States compelled provision under certain contingencies for the temporary occupation of East Florida by the United States. The President was, therefore, authorized to take possession of East Florida in case an arrangement had been made for the transfer of its possession, or in the event of its occupation by a foreign State. His employment of the army and navy of the United States was further authorized, and $100,000 was appropriated to defray expenses. 3 Stat. 471; Am. St. Pap., For. Rel., III, 571; Moore, Dig., VI, 372.

[2] Brit. and For. State Papers, III, 211.

[3] Concerning the Congress of Aix-la-Chapelle, which was held in 1818, see *Nouv. Rec.*, IV, 549–566. The Conference at Troppau convened in October, 1820, and was removed later to Laybach. See, in this connection, Woolsey, 6 ed., § 47; also Mr. Adams, Secy. of State, to Mr. Thompson, Secy. of Navy, May 20, 1819, 17 MS. Dom. Let. 304, Moore, Dig., VI, 375; Same to Mr. Middleton, American Minister to Russia, No. 1, July 5, 1820, MS. Inst. to U. S. Ministers, IX, 18, Moore, Dig., VI, 376.

[4] The Congress of Verona occurred in the autumn of 1822.

[5] Mr. Canning, to Mr. Rush, "private and confidential", Aug. 23, 1823, Moore, Dig., VI, 392.

also suggested the united action on the part of his Government and that of the United States to oppose the European design.[1]

Between the United States and Russia there had been diplomatic discussions relating to the neutrality of both States in the conflict between Spain and its American colonies,[2] and also to the extent of Russian possessions on the northwest coast of America. Mr. Adams, Secretary of State, had vigorously opposed the claim of Russia to rights of sovereignty as far south as the fifty-first degree of latitude.[3] This issue was quite distinct from that pertaining to the relationship which Russia or any other European power might assume with respect to the revolutionary movement in Spanish America. The difference between these two problems, the one concerning the acquisition of rights of sovereignty over American territory, the other concerning interference or non-interference with struggles therein for political independence, was not lost sight of in the United States.[4]

c

§ 87. President Monroe's Message.

Such briefly, was the situation when President Monroe declared in his annual message of December 2, 1823:

> At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the

[1] For the Canning-Rush negotiations, see Moore, Dig., VI, 386–392, and documents there cited; also Worthington C. Ford's texts of original documents on the genesis of the Monroe Doctrine contained in *Proceedings*, Massachusetts Hist. Soc., XV, 412–434. For the text of the Monroe-Jefferson-Madison correspondence in 1823, Moore, Dig., VI, 393–397, and documents there cited.

[2] Memorandum of Mr. Adams, Secy. of State, 1823, giving account of his communications with Baron Tuyll, the Russian Minister at Washington, as given by Worthington C. Ford in *Proceedings*, Massachusetts Hist. Soc., XV, 394; Moore, Dig., VI, 397, *citing* MS. Inst. Special Missions, I, 1. See note of Baron Tuyll to Mr. Adams, Oct. 4/16, 1823, Adams MSS., *Proceedings*, Massachusetts Hist. Soc., XV, 400. Also observations of Mr. Adams with respect to communications from the Russian Minister, Nov. 27, 1823, *id.*, 405.

[3] Mr. Adams, Secy. of State, to Mr. Middleton, No. 16, July 22, 1823, American State Papers, For. Rel., V, 436.

[4] Concerning discussions in President Monroe's Cabinet in November, 1823, see statement in Moore, Dig., VI, 399–401, *citing* Memoirs of J. Q. Adams, VI, 177, 185, 186, 192, 194, 199, 200, 205, and 206. See, also, documents published by Worthington C. Ford in *Proceedings*, Massachusetts Hist. Soc., XV, 408–412; "John Quincy Adams and The Monroe Doctrine" (by the same author), *Am. Hist. Rev.*, VIII, 28, in which is published (p. 46) communication of Mr. Adams to Mr. Rush, American Minister at London, Nov. 30, 1823 (*citing* the Adams MSS.).

United States at St. Petersburg, to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal has been made by his Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers. [Paragraph 7, message of December 2, 1823.]

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been, so far, very different from what was then anticipated. Of events in that quarter of the globe with which we have so much intercourse, and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their

part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States. In the war between these new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed, by force, in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting, in all instances, the just claims of every power; submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other

powers will pursue the same course. [Paragraphs 48 and 49, message of December 2, 1823.][1]

d

§ 88. The Non-Colonization Principle.

The declaration concerning non-colonization (as expressed in paragraph 7 of the message), and which was attributable to Mr. Adams, Secretary of State,[2] was made with a view to checking the advance of Russian colonial establishments on the northwest coast of America.[3] It was based, moreover, on the assumption that, with the exception of the then existing colonial possessions of European powers, independent States possessed rights of sovereignty, and hence of property and control, over the entire area of the two American continents, and that there remained, therefore, no territory therein still open to acquisition by means of occupation.[4] This claim doubtless did not rest upon any contention that there were no lands within those continents which were in fact unoccupied or over which enlightened States were in reality not in possession, but rather upon the theory that the several American territorial sovereigns enjoyed by virtue of constructive occupation, exclusive rights of ownership and sovereignty which should be respected.[5] It should be observed that it was

[1] Am. State Pap., For. Rel., V, 246 and 250, Moore, Dig., VI, 401–403.

[2] Memoirs of John Quincy Adams, edited by Charles Francis Adams, XII, 218, with reference to a conversation with Mr. Bancroft, Dec. 6, 1845, Moore, Dig., VI, 422. See, also, speech of Mr. John C. Calhoun, in the Senate, May 15, 1848, Calhoun's Works, IV, 454, 457, and following, Moore, Dig., VI, 424.

[3] Mr. Adams, Secy. of State, to Mr. Rush, American Minister at London, No. 70, July 22, 1823, Am. State Pap., For. Rel., V, 446, 447, Moore, Dig., VI, 412; also observations of Mr. Adams, Secy. of State, communicated with his letter to Mr. Middleton of July 22, 1823, Am. State Pap., For. Rel., V, 443, 445, Moore, Dig., VI, 414.

[4] The principle, declared Mr. Adams, when President in 1826, "rested upon a course of reasoning, equally simply and conclusive. With the exception of the existing European colonies, which it was in nowise intended to disturb, the two continents consisted of several sovereign and independent nations, whose territories covered their whole surface. By this, their independent condition, the United States enjoyed the right of commercial intercourse with every part of their possessions. To attempt the establishment of a colony in those possessions, would be to usurp to the exclusion of others a commercial intercourse which was the common possession of all. It could not be done without encroaching upon existing rights of the United States." Richardson's Messages, II, 334, Moore, Dig., VI, 417.

[5] Writes Prof. Moore: "It has sometimes been remarked that if Mr. Adams intended to do no more than announce that territory already occupied by civilized powers was not subject to future colonization, he merely stated a truism. But in its application to the American continents at that time the announcement was far from being a truism. It was by no means generally admitted that the American continents were then wholly occupied by civilized

not asserted that a European power might not reasonably, by some process other than colonization or occupation, acquire lawful title to American soil.

e

§ 89. The Non-Intervention Principle.

With respect to the latter portion of the message (paragraphs 48 and 49), it should be observed that the declarations were directed against possible attempts of the Allied European powers to reëstablish monarchical government in Spanish America. Because European interposition encroaching upon the political independence of American States was regarded as dangerous to the safety of the United States, such conduct was referred to accordingly, and, therefore, as something not to be looked upon with indifference.

f

Scope of Opposition to Foreign Territorial Aggrandizement

(1)

§ 90. The General Claim.

The United States appears to assert the right to oppose the acquisition by any non-American power of any territorial control over American soil by any process.[1] Objection seems to be made and is likely to be anticipated, whether such control be effected through the voluntary transfer by an existing territorial sovereign, republican or monarchical in its government,[2] or be attained in

nations. There were vast regions of territory not actually settled by the subjects of civilized powers." Dig., VI, 414, note. See, also, in this connection, Dana's Wheaton, Dana's Note No. 36.

[1] President Polk, Annual Message, Dec. 2, 1845, S. Doc. No. 1, 29 Cong., 1 Sess., 14, Moore, Dig., VI, 420; Report of Mr. Fish, Secy. of State, to the President, July 14, 1870, S. Ex. Doc. No. 112, 41 Cong., 2 Sess., 1, 3, Moore, Dig., VI, 429, 431; Mr. Cass, Secy. of State, to Mr. Faulkner, Minister to France, No. 27, Aug. 31, 1860, MS. Inst. France, XV, 481, Moore, Dig., VI, 480; Mr. Seward, Secy. of State, to Mr. Hale, Minister to Spain, No. 35 (confidential), July 16, 1866, MS. Inst. Spain, XV, 568, Moore, Dig., VI, 507–508; Mr. Hay, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 1186, April 10, 1901, MS. Inst. Germany, XXI, 283, Moore, Dig., VI, 583; President Roosevelt, Annual Message, Dec. 3, 1901, For. Rel. 1901, xxxvi, Moore, Dig., VI, 595.

[2] President Polk, special message, April 29, 1848, concerning the offer of the Yucatan to transfer the "dominion and sovereignty" of that country to certain States, Cong. Globe, 30 Cong., 1 Sess., 709, Moore, Dig., VI, 423; Mr. Fish, Secy. of State, to Count Lewenhaupt, Swedish and Norwegian Minister, Feb. 14, 1870, concerning the possible acceptance by Norway and Sweden of an offer from Italy for the purchase of the Island of St. Bartholomew, MS. Notes to Sweden, VI, 221, Moore, Dig., VI, 428; President Grant, An-

consequence of forcible encroachment upon it. Thus the right is apparently asserted to interfere with the political independence of an American grantor consenting to the cession of its territory to a proscribed grantee of the Eastern Hemisphere. It is believed, moreover, that the United States, if confronted with the actual problem, might evince indifference as to the relative proximity to, or remoteness from, its domain of the particular area concerned. The basis of this claim is necessarily that the proper defense of the United States is rendered difficult and its safety jeopardized by the transfer generally of American territory to non-American States, and to a degree which justifies objection to any acts which if tolerated would serve to diminish respect for, and so weaken the efficacy of this mode of safeguarding the nation.[1]

The acquisition of any form of control established by any public agencies of non-American States would appear to be regarded as at variance with the foregoing requirements. In 1912, the Senate of the United States, whether or not sharing the fears that had

nual Message, Dec. 6, 1869, Richardson's Messages, VII, 32, Moore, Dig., VI, 429; Mr. Evarts, Secy. of State, to Mr. Logan, Minister to Central America, No. 53 (confidential), Mar. 4, 1880, with reference to the possible transfer of the Bay Islands by Honduras to Great Britain, MS. Inst. Cent. Am. XVIII, 73, Moore, Dig., VI, 432; Mr. Frelinghuysen, Secy. of State, to Mr. Morton, Minister to France, No. 698, Feb. 28, 1885, concerning the possible transfer by Haiti of the Mole St. Nicholas or the whole Island of Tortuga to France, MS. Inst. France, XXI, 172, Moore, Dig., VI, 432; Mr. Adee, Acting Secy. of State, to Mr. Beaupré, Minister to Venezuela, telegram, Aug. 6, 1908, For. Rel. 1909, 632, concerning the Netherlands and Venezuela.

Concerning the possible transfer of Cuba by Spain to a foreign State see Intervention, *supra*, § 79; also Mr. Van Buren, Secy. of State, to Mr. Van Ness, Minister to Spain, No. 2, Oct. 2, 1829, MS. Inst. U. S. Ministers, XIII, 19, Moore, Dig., VI, 448; Same to Same, Oct. 13, 1830, MS. Inst. U. S. Ministers, XIII, 184, Moore, Dig., VI, 449; Mr. Forsyth, Secy. of State. to Mr. Vail, Minister to Spain, No. 2, July 15, 1840, MS. Inst. Spain, XIV, 111, Moore, Dig., VI, 450; Mr. Clayton, Secy. of State, to Mr. Barringer, Minister to Spain, No. 2, Aug. 2, 1849, MS. Inst. Spain, XIV, 295, Moore, Dig., VI, 452; Memorandum of Mr. Seward, Secy. of State, May 7, 1867, MS. Notes to Spanish Legation, IX, 398, Moore, Dig., VI, 456; Mr. Everett, Secy. of State, to the Count Sartiges, Dec. 1, 1852, S. Ex. Doc. 13, 32 Cong., 2 Sess., 15, Moore, Dig., VI, 460, 461.

[1] "Undoubtedly as one passes to the south and the distance from the Caribbean increases, the necessity of maintaining the rule of Monroe becomes less immediate and apparent. But who is competent to draw the line? Who will say, 'to this point the rule of Monroe should apply; beyond this point it should not'? Who will say that a new national force created beyond any line that he can draw will stay beyond it and will not in the long course of time extend itself indefinitely?" Elihu Root, "The Real Monroe Doctrine", *Proceedings* Am. Soc. Int. L., 1914, VIII, 6, 20. See, also, Archibald C. Coolidge, The United States as a World Power, 112–113, *citing* an important paper by Capt. A. T. Mahan on the Monroe Doctrine, in *National Review*, 1903, Vol. XL, p. 871.

It may be observed that by a treaty concluded Aug. 10, 1877, Sweden ceded to France the Island of St. Bartholomew. For the text of the agreement, see *Nouv. Rec. Gén.*, 2 ser., IV, 366.

been expressed lest Japan sought indirectly lodgment in territory adjacent to Magdalena Bay,[1] adopted a resolution declaring

> That when any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power or control for naval or military purposes.[2]

It is believed that this resolution gives expression to a moderate and reasonable enunciation of the principle of self-defense. While it was doubtless regarded in certain quarters as a novel application of the Monroe Doctrine on account of the warning sought to be given to an Asiatic State, the resolution by its comprehensive terms, embracing any foreign government "not American" did not advance any new legal theory. It must be recalled that it was against the territorial aggrandizement of Russia as an Asiatic power that the United States directed its earliest protest respecting colonization.

It seems important to observe that the opposition of the United States to territorial aggrandizement has long since ceased to be based on the theory that the American continents contain no lands not subjected to rights of sovereignty and so not open to occupation as a technical mode of creating or perfecting rights of property and control therein. For that reason the term "occupation" as employed by the United States in current diplomatic correspondence respecting the Monroe Doctrine, has merely its colloquial signification. Objections to acquisitions by non-American States rest simply upon the ground that they jeopardize the safety of the

[1] See, in this connection, message from President Taft to the Senate, May 23, 1912, transmitting in response to Senate Resolution of May 16, 1912, copies of correspondence relative to the American syndicate interested in lands on Magdalena Bay, Senate Doc. No. 694, 62 Cong., 2 Sess.

[2] Senate Resolution 371, adopted Aug. 2, 1912, Cong. Record, Vol. 48, Part 10, 10045–10046. In urging the adoption of the resolution, which he had introduced, Senator Lodge declared, Aug. 2, 1912: "This resolution rests on a generally accepted principle of the law of nations, older than the Monroe Doctrine. It rests on the principle that every nation has a right to protect its own safety, and that if it feels that the possession by a foreign power, for military or naval purposes, of any given harbor or place is prejudicial to its safety, it is its duty as well as its right to interfere. . . . The resolution is merely a statement of policy, allied to the Monroe Doctrine, of course, but not necessarily dependent upon it or growing out of it." *Id.*, 10045.

United States, or incidentally constitute an encroachment upon the rights of an existing territorial sovereign.

(2)

§ 91. The British Guiana–Venezuelan Boundary Dispute

Where any acts are deemed to amount to encroachment upon or interference with the territorial integrity of an American State against its will, the United States appears to be alert in making felt its opposition. The British Guiana–Venezuelan boundary dispute reached a stage in 1895, which offered occasion for the United States to proclaim its theory and act upon it.

Secretary Olney, in instructions of July 20, 1895, to Mr. Bayard, American Ambassador at London, adverted to the very large extent of the area in dispute, the disparity in the strength of the opposing claimants, the duration of the controversy for more than half a century, during which Venezuela had sought in vain to establish a boundary by agreement, the long and futile efforts of that State to secure an agreement to arbitrate, save upon condition that it renounce a substantial part of its claim, and to the fact that by the frequent interposition of its good offices to facilitate arbitration, and by other acts, the United States had made clear to Great Britain that the controversy was one in which both its honor and interests were involved, and the continuance of which it could not regard with indifference.[1] He declared that a State possessed a right of interposition in a controversy between two others, according to international law, when the contemplated action of either of them was a "serious and direct menace to its own integrity, tranquillity, or welfare." He maintained that the Venezuelan boundary controversy was within the scope and spirit of the rule laid down in the Monroe Doctrine. He emphasized a sharp differentiation between American and European interests.[2] He stated that the safety and welfare of the United States were so related to the maintenance of the independence of every Ameri-

[1] Mr. Olney, Secy. of State, to Mr. Bayard, Ambassador to Great Britain, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535.

[2] In this connection he said: "That distance and three thousand miles of intervening ocean make any permanent political union between an European and an American State unnatural and inexpedient will hardly be denied." Lord Salisbury, British Foreign Secretary, declared in reply that Her Majesty's Government were prepared emphatically to deny this proposition on behalf of both the British and American people who were subject to the British Crown, and maintained "that the union between Great Britain and her territories in the Western Hemisphere is both natural and expedient." Communication to Sir Julian Pauncefote, Nov. 26, 1895, For. Rel. 1895, I, 567, Moore, Dig., VI, 559.

can State as against European power, as to justify and require the interposition of the United States whenever that independence was endangered. He declared that the United States was practically sovereign on the American continent, and its fiat law upon the subjects to which it confined its interposition, and that because, in addition to all other grounds, its infinite resources combined with its isolated position rendered it master of the situation and practically invulnerable as against any or all other powers. The advantages of that superiority would, he contended, be at once imperiled if the principle were admitted that European powers might convert American States into colonies or provinces of their own.[1] He adverted to the loss of prestige, of authority and of weight in the councils of the family of nations, as among the consequences which the United States would thereby suffer. He contended that there was a doctrine of American public law, well founded in principle and abundantly sanctioned by precedent, which entitled and required the United States to treat as an injury to itself the forcible assumption by a European power of political control over an American State. Being entitled, he said, to resent and resist any sequestration of Venezuelan soil by Great Britain, the United States was, he added, necessarily entitled to know whether such sequestration had occurred or was then going on, and to have such fact ascertained by arbitration of the entire controversy, without the inequitable conditions demanded by Great Britain.[2]

[1] He said in this connection: "The principle would be eagerly availed of, and every power doing so would immediately acquire a base of military operations against us. What one power was permitted to do could not be denied to another, and it is not inconceivable that the struggle now going on for the acquisition of Africa might be transferred to South America. If it were, the weaker countries would unquestionably be soon absorbed, while the ultimate result might be the partition of all South America between the various European powers. The disastrous consequences to the United States of such a condition of things are obvious." For. Rel. 1895, I, 558.

[2] In an earlier portion of his communication, Mr. Olney quoted a note of Mr. Frelinghuysen, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 203, Jan. 31, 1883, MS. Inst. Venezuela, III, 280, to the effect that the United States regarded such questions as the dispute relating to the boundary of Venezuela, "as essentially and distinctively American", and that it would always "prefer to see such contentions adjusted through the arbitrament of an American rather than an European power." He added later: "Another development of the rule, though apparently not necessarily required by either its letter or its spirit, is found in the objection to arbitration of South American controversies by an European power. American questions, it is said, are for American decision, and on that ground the United States went so far as to refuse to mediate in the war between Chile and Peru jointly with Great Britain and France." In his response of Nov. 26, 1895, Lord Salisbury declared that such a principle "even if it receive any countenance from the language of President Monroe (which it does not), cannot be sustained by any reasoning from the law of nations."

Those conditions would amount in substance, he declared, to an invasion and conquest of Venezuelan territory, and ought not to be assented to by the United States. He concluded with the declaration that Great Britain's assertion of title to the disputed territory, together with her refusal to have that title investigated, constituted a substantial appropriation of the territory to her own use, and required that protest be given that the transaction would be regarded as injurious to the United States. The American Ambassador at London was instructed to ask for definite decision upon the point whether Great Britain would consent or would decline to submit the Venezuelan boundary question in its entirety to impartial arbitration.[1]

In his reply, Lord Salisbury, British Foreign Secretary, declared that he was not aware that the Monroe Doctrine had ever before been advanced on behalf of the United States in any written communication addressed to the Government of another nation.[2] Adverting to the real dangers against which President Monroe had thought it right to guard, he contended that they had no relation to the existing state of things. The controversy with Venezuela was one, he said, with which the United States had no apparent practical concern, and which had nothing to do with any of the questions dealt with by President Monroe.[3] He stated that if the Government of the United States would not control the conduct of the States of Central and South America, it could not undertake to protect them from the consequences attaching to any misconduct of which they might be guilty towards other nations. He dwelt upon the difficulties of arbitration as a mode of adjusting international disputes. Admitting the right of the United States to interpose in any controversy by which its own interests were affected, and to judge of whether those interests were touched and of the measure to which they should be sustained, he denied that the United States was entitled to affirm as a universal proposition, with reference to a number of independent States for whose conduct it assumed no responsibility, that its interests were neces-

[1] It was added that a decision to decline such arbitration would, in the judgment of the President, be calculated greatly to embarrass the future relations between the United States and Great Britain.

[2] Communication to Sir Julian Pauncefote, British Ambassador at Washington, Nov. 26, 1895, For. Rel. 1895, I, 563, Moore, Dig., VI, 559.

[3] He said in this connection: "It is not a question of the colonization by a European power of any portion of America. It is not a question of the imposition upon the communities of South America of any system of government devised in Europe. It is simply the determination of the frontier of a British possession which belonged to the Throne of England long before the Republic of Venezuela came into existence."

sarily concerned in whatever might befall those States simply because of their situation in the Western Hemisphere.

He declared that the British Government fully concurred with the view apparently entertained by President Monroe that any disturbance of the existing territorial distribution in the Western Hemisphere on the part of any European State would be a highly inexpedient change, but were not prepared to admit that the recognition of that expediency was clothed with the sanction which belongs to a doctrine of international law, or that the interests of the United States were necessarily concerned in every frontier dispute which might arise between any two of the States possessing dominion in the Western Hemisphere. Still less, he said, could his Government accept the doctrine that the United States was entitled to claim that the process of arbitration be applied to any demand for the surrender of territory which one of those States might make against another.[1]

The result was significant. President Cleveland, in a special message of December 17, 1895, expressing dissatisfaction with the British reply, recommended the appropriation for the expenses of a commission to be appointed by the Executive, which should investigate and report upon the boundary dispute. He declared that when such report was made and accepted, it would, in his opinion, be the duty of the United States to resist by every means in its power as a willful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which after investigation the United States would have determined of right to belong to Venezuela.[2]

An appropriation was duly made, and a commission appointed, which entered upon the discharge of its duties.[3] It was saved, however, from the necessity of making a report by an agreement concluded between Great Britain and Venezuela, February 2, 1897, to arbitrate the whole controversy upon bases alike just and honorable to both the contestants, and, therefore, satisfactory to the United States.[4]

[1] See, also, Lord Salisbury, British Foreign Secretary, to Sir Julian Pauncefote, Nov. 26, 1895, For. Rel. 1895, I, 567, Moore, Dig., VI, 565, in which the technical and substantial aspects of the British claim against Venezuela were discussed.

[2] For. Rel. 1895, I, 542, Moore, Dig., VI, 576. See, also, President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxviii, Moore, Dig., VI, 575.

[3] Act of Dec. 21, 1895, 29 Stat. 1. *Cf.* also Report of Mr. Olney, Secy. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxi., Moore, Dig., VI, 580.

[4] *Id.;* also For. Rel. 1896, 254–255.

The Court of Arbitration composed of Professor de Martens of Russia,

The most important political result of the controversy and of the mode of its adjustment was not "the decision upon the territorial question, but the official adoption of the Monroe Doctrine by the Congress of the United States, and its explicit acceptance by the principal maritime power of Europe." [1]

(3)

§ 92. Certain Acts Involving or Threatening Permanent Occupation.

The United States appears to object to any acts by a non-American State which are of a character such as to involve or even threaten permanent occupation of American soil. Obviously the establishment of a protectorate falls within such a category and is, therefore, looked upon with distinct disapproval.[2]

In 1905, President Roosevelt expressed opinion that the taking possession, even though temporarily, of the custom houses of an American insolvent State by a creditor State of another continent as a means of collecting its debts, might well result in a permanent occupation which the United States could not, in his judgment, regard with unconcern.[3]

as President, and Chief Justice Fuller, Mr. Justice Brewer, Lord Herschell and Sir Richard Collins, rendered a unanimous award Oct. 3, 1899. See President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxxii, Moore, Dig., VI, 583. *Cf.* also documents in Moore, Dig., VI, 581–583.

[1] J. B. Moore, Principles of American Diplomacy, 1918, 251; see, also, John W. Foster, A Century of American Diplomacy, 468–474; John H. Latané, *Proceedings*, Am. Soc. Int. Law (1914), VIII, 105, 111.

[2] Mr. Forsyth, Secy. of State, to Mr. Barry, Minister to Spain, No. 2, June 30, 1835, MS. Inst. Spain, XIV, 70, Moore, Dig., VI, 442; Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, No. 414, Dec. 21, 1888, MS. Inst. France, XXI, 616, Moore, Dig., VI, 433; Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, July 25, 1858, MS. Inst. American States, XV, 321, Moore, Dig., VI, 443; Memorandum of Mr. Seward, Secy. of State, May 7, 1867, MS. Notes to Spanish Leg. IX, 398, Moore, Dig., VI, 456; Mr. Cass, Secy. of State, to Mr. Dodge, Minister to Spain, No. 66 (confidential), Oct. 21, 1858, MS. Inst. Spain, XV, 187, Moore, Dig., VI, 477; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, Nov. 23, 1888, For. Rel. 1888, I, 759–767, Moore, Dig., III, 227, 236.

The outbreak of the Civil War, and the attitude of Spain "through the observance of our blockade and the closing of Spanish ports to the insurgent privateers", may be accountable for the fact that the United States remained content to lodge protests against the Spanish re-annexation of Santo Domingo, 1861–1865. Mr. Seward, Secy. of State, to Mr. Schurz, Minister to Spain, No. 20, confidential, Aug. 14, 1861, MS. Inst. Spain, XV, 287, Moore, Dig., VI, 517, note; also documents cited in Moore, Dig., VI, 515–518.

[3] President Roosevelt, message to the Senate, Feb. 15, 1905, concerning protocol of Feb. 7, 1905, with the Dominican Republic, For. Rel. 1905, 334, 335, and 337, Moore, Dig., VI, 518, 519, 522–523; also Same, Annual Message, Dec. 5, 1905, For. Rel. 1905, xxxiii–xxxv.

It is important to observe that the United States does not assert the right to interfere with attempts of non-American States to resort to coercive action against American States on account of their alleged contractual or tortious delinquencies, when the steps taken do not involve the occupation of territory.[1] Thus in 1901, upon the assurance of the German Government that it had no purpose or intention to make even the smallest acquisition of territory on the South American continent or islands adjacent thereto, in connection with a proposed use of force against Venezuela, as a means of securing the adjustment of claims, Secretary Hay offered no objection.[2] Likewise in 1908, in response to an

[1] "In popular discussions the position has sometimes been urged that it is a violation of the Monroe Doctrine for a European power to employ force against an American republic for the purpose of collecting a debt or satisfying a pecuniary demand, no matter what may have been its origin. For this supposition there appears to be no published official sanction." J. B. Moore, Principles of American Diplomacy, 1918, 255–256.

[2] See memorandum communicated by Mr. Hay, Secy. of State, to the German Embassy at Washington, Dec. 16, 1901, in response to the promemoria of that Embassy of Dec. 11, 1901, For. Rel. 1901, 195, Moore, Dig., VI, 589. For the text of the promemoria, *cf.* For. Rel. 1901, 192, Moore, Dig., VI, 586.

In December, 1902, Great Britain together with Italy and Germany blockaded certain Venezuelan ports as a means of enforcing claims. The previous month Lord Lansdowne, British Foreign Secretary, instructed Sir M. Herbert, British Ambassador at Washington, to inform Secretary Hay that if Venezuela persisted in its refusal to offer reparation for its wrongful treatment of British subjects and their property, coercive action against that State was to be anticipated. Brit. and For. State Papers, XCV, 1081. On November 13, this information was conveyed to Secretary Hay, who stated in reply, that the United States Government, although regretting that European powers should use force against Central and South American countries, could not object to the action of the former in taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated. *Id.*, 1084, containing report of Sir M. Herbert to Lord Lansdowne.

In his Life and Letters of John Hay, Boston, 1915, William Roscoe Thayer makes the following statement with reference to an occurrence in December, 1902, and doubtless at the time when the Venezuelan ports were under blockade: "One day, when the crisis was at its height, he [President Roosevelt] summoned to the White House, Dr. Holleben, the German Ambassador, and told him that unless Germany consented to arbitrate, the American squadron under Admiral Dewey would be given orders, by noon ten days later, to proceed to the Venezuelan coast and prevent any taking possession of Venezuelan territory. Dr. Holleben began to protest that his Imperial master, having once refused to arbitrate, could not change his mind. The President said that he was not arguing the question, because arguments had already been gone over until no useful purpose would be served by repeating them; he was simply giving information which the Ambassador might think it important to transmit to Berlin. A week passed in silence. Then Dr. Holleben again called on the President, but said nothing of the Venezuelan matter. When he rose to go, the President asked him about it, and when he stated that he had received nothing from his Government, the President informed him in substance that, in view of this fact, Admiral Dewey would be instructed to sail a day earlier than the day he, the President, had originally mentioned. Much perturbed, the Ambassador protested; the President informed him that not a stroke of the pen had been put on paper; that if the

inquiry from the Netherlands, the Department of State declared that the Government of the United States did not feel at liberty to object to coercive measures to be taken by the Netherlands in regard to Venezuela and which did not involve "occupation of territory either permanent or of such a character as to threaten permanency." [1]

It should be noted, however, that the gaining of actual control of the custom houses (and that possibly for an indefinite period of time) of certain insolvent American States, has appeared at times to offer the sole means of obtaining satisfaction of pecuniary claims of contractual origin. President Roosevelt, believing that interference with such action, in the case of the Dominican Republic, under cover of the Monroe Doctrine, would place foreign aggrieved States in a remediless condition, and also tend to deprive them of possibly just rights of coercion, logically proposed in 1905, as a feasible alternative, that the United States be itself allowed to collect the claims of European States as well as its own.[2] The application of this theory, through the establishment

Emperor would agree to arbitrate, he, the President, would heartily praise him for such action, and would treat it as taken on German initiative; but that within forty-eight hours there must be an offer to arbitrate or Dewey would sail with the orders indicated. Within thirty-six hours Dr. Holleben returned to the White House and announced to President Roosevelt that a despatch had just come from Berlin, saying that the Kaiser would arbitrate. Neither Admiral Dewey (who with an American fleet was then maneuvering in the West Indies) nor any one else knew of the step that was to be taken; the naval authorities were merely required to be in readiness, but were not told what for.

"On the announcement that Germany had consented to arbitrate, the President publicly complimented the Kaiser on being so stanch an advocate of arbitration." II, 286–288.

[1] Mr. Adee, Acting Secy. of State, to Mr. Beaupré, Minister to Venezuela, telegram, Aug. 6, 1908, For. Rel. 1909, 632.

[2] In his Annual Message of Dec. 5, 1905, President Roosevelt put the matter thus: "If a republic to the south of us commits a tort against a foreign nation, such as an outrage against a citizen of that nation, then the Monroe Doctrine does not force us to interfere to prevent punishment of the tort, save to see that the punishment does not assume the form of territorial occupation in any shape. The case is more difficult when it refers to a contractual obligation. Our own Government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not; and in consequence we are liable at any time to be brought face to face with disagreeable alternatives. On the one hand, this country would certainly decline to go to war to prevent a foreign government from collecting a just debt; on the other hand, it is very inadvisable to permit any foreign power to take possession, even temporarily, of the custom houses of an American Republic in order to enforce the payment of its obligations; for such temporary occupation might turn into a permanent occupation. The only escape from these alternatives may at any time be that we must ourselves undertake to bring about some arrangement by which so much as possible of a just obligation shall be paid. It is far better that this country should put through such an arrangement, rather than allow any foreign country to undertake it. To

of a virtual receivership, proved to be of practical value as a means both of avoiding friction between the United States and European powers, and of conserving available assets for the benefit of all concerned.[1] It is believed that the financial protection which by convention it has established over Haiti, as well as the Dominican Republic, has served to avert controversies otherwise to have been anticipated, unless the United States was prepared to tolerate not merely the use of non-American force, but rather those forms of it which involved acts threatening the permanent occupation of American soil.[2]

do so insures the defaulting republic from having to pay debts of an improper character under duress, while it also insures honest creditors of the republic from being passed by in the interest of dishonest or grasping creditors. Moreover, for the United States to take such a position offers the only possible way of insuring us against a clash with some foreign power. The position is, therefore, in the interest of peace as well as in the interest of justice." For. Rel. 1905, xxxiv-xxxv. See, also, *id.*, xxxvi-xxxvii.

[1] See convention between the United States and the Dominican Republic concluded Feb. 8, 1907, Malloy's Treaties, I, 418; and with respect to the convention Jacob B. Hollander, in *Am. J.*, I, 287. Also President Roosevelt, message to the Senate, Feb. 15, 1905, Moore, Dig., VI, 518. *Cf.*, *supra*, § 21.

It should be observed that in the latter message, President Roosevelt adverted to the decision of the Tribunal at the Hague in the Venezuelan cases pursuant to conventions of 1903, Malloy's Treaties, II, 1872, whereby the powers which had blockaded Venezuela were acknowledged to have acquired by so doing, a preference in the payment of their claims over the non-blockading claimant powers, of which the United States was one. For the text of the award, see Malloy's Treaties, II, 1878.

In the judgment of the President, it evidently appeared to be difficult to draw an exact line between acts which, by virtue of the decision, a creditor State might reasonably commit without violating international law, and those which the United States, under the theory of the Monroe Doctrine, might feel itself obliged to oppose. He did not maintain that such opposition would, when reasonably applied, amount to internationally illegal conduct. But he perceived that it might be so regarded abroad, especially when the attempt to thwart acts involving permanent occupation occurred at an early stage of the proceeding directed against the debtor State. His purpose was, therefore, to avoid such a dilemma by means of the proposal which he offered.

[2] See treaty between the United States and Haiti of Sept. 16, 1915, U. S. Treaty Series No. 623; *Am. J.*, X, Supp., 234; 39 Stat. II, 1654.

Declared Mr. Root, Secy. of State, in an address before the New England Society in 1904: "If we are to maintain this doctrine [that of Monroe], which is vital to our national life and safety, at the same time when we say to the other powers of the world, 'You shall not push your remedies for wrong against these republics to the point of occupying their territory,' we are bound to say that whenever the wrong cannot be otherwise redressed we ourselves will see that it is redressed." After quoting the foregoing utterance, Mr. Knox, Secy. of State, declared in January, 1912: "It appears to me evident that there is one certain deduction from the premises, and that is that the best way to avoid the difficulties occasionally arising out of any responsibilities which this doctrine in certain of its aspects may seem to impose, is to assist the less fortunate American Republics in conducting their own affairs in such a way that those difficulties should not be liable to arise. The most effective way to escape the logical consequences of the Monroe Doctrine is to help them to help themselves. Assuming the correctness of Mr. Root's corollary, it is our duty, to ourselves and to them, to coöperate in preventing, where possible, specific conditions where we might have to become in too great a measure accountable.

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§ 93. Opposition to Interference with Political Independence.

The United States asserts the right to oppose generally the attempt of any non-American power to interfere with the political independence of any American State. This assertion, apart from its relation in any particular case to the requirements of self-defense which may confront the United States, finds justification on those grounds which normally excuse intervention; for it is simply the manifestation of the propriety of interference with acts themselves essentially illegal and oppressive.

Objection is thus made to the assertion of non-American influence to change the form of an existing American Republic, or to control the free will of its people.[1] While there appears at the present time little danger of an attempt from another continent to impose a repressive or undemocratic system of government upon an American State, such efforts were made long after President Monroe's message of 1823.

Between 1862 and 1867, France intervened in Mexico, making the attempt to suppress by force republican government in that State and to establish a monarchy therein.[2] This conduct, as is

We diminish our responsibilities in proportion as we bring about improved conditions. Like an insurance risk, our risk decreases as the conditions to which it pertains are improved." Address at New York, Jan. 19, 1912, before New York State Bar Association, on "The Monroe Doctrine and Some Incidental Obligations in the Zone of the Caribbean."

[1] Mr. Seward, Secy. of State, to Mr. Kilpatrick, Minister to Chile, No. 9. June 2, 1866, MS. Inst. Chile, XV, 333; Dip. Cor. 1866, II, 413, Moore, Dig., VI, 445; Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, July 25, 1858, MS. Inst. American States, XV, 321, Moore, Dig., VI, 443; Mr. Buchanan, Secy. of State, to Mr. Livingston, Minister to Ecuador, May 13, 1848, MS. Inst. Ecuador, I, 3, Moore, Dig., VI, 473; Mr. Buchanan, Secy. of State, to Mr. Appleton, Minister to Bolivia, No. 2, June 1, 1848, MS. Inst. Bolivia, I, 2, Moore, Dig., VI, 436; Mr. Buchanan, Secy. of State, to Mr. Hise, Minister to Central America, June 3, 1848, H. Ex. Doc. 75, 31 Cong., 1 Sess., 92–96, Moore, Dig., VI, 442; Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, May 18, 1900, For. Rel. 1900, 712, Moore, Dig., VI. 476; Mr. Olney, Secy. of State, to Mr. Bayard, Ambassador to Great Britain, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535, 549; Mr. Foster, Secy. of State, to Mr. Lincoln, Minister to Great Britain, Feb. 8, 1893, For. Rel. 1893, 313, Moore, Dig., III, 238, 241.

[2] See communications from Mr. Seward, Secy. of State, and other documents in Moore, Dig., VI, 488–507, especially Mr. Seward to Mr. Motley, American Minister to Austria, No. 41, Sept. 11, 1863, Dip. Cor. 1863, II, 929; same to Mr. Dayton, American Minister to France, No. 400, Sept. 21, 1863, *id.*, 703; Same to Same, No. 406, Sept. 26, 1863, *id.*, 709; Same to Same, No. 417, Oct. 23, 1863, *id.*, 726; Same to Mr. Bigelow, American Minister to France, No. 300, Nov. 6, 1865, MS. Inst. France, XVII, 467; Same to Same, No. 332, Dec. 16, 1865, House Ex. Doc. No. 73, 39 Cong., 1 Sess., Part 2, p. 495; Same to the Marquis de Montholon, French Minister, Feb. 12, 1866, *id.*, 548. Also address of James M. Callahan, *Proceedings*, Am. Soc. of Int. Law, IV,

well known, ultimately aroused such opposition on the part of the United States as to bring about the evacuation of French troops and the reëstablishment of a republican government.[1] It should be observed that American interference was attributable not only to sympathy for the oppressed people of a neighboring country, but also to the requirements of the defense of the United States.[2]

Modes of Applying the Monroe Doctrine

(1)

§ 94. Avoidance of Concerted Action.

In the process of its own defense a State may or may not deem it necessary to secure the aid of its neighbors or friendly powers of distant continents. It may be reluctant, moreover, to yield by convention or alliance to any foreign States the right to determine under what circumstances the requirements of its own safety demand recourse to a particular form of conduct.[3]

The United States has generally avoided concerted action with European States in proceedings directed against or especially pertaining to States of the American continents. Thus in 1852,

59, 92–105; George F. Tucker, The Monroe Doctrine, Boston, 1885, Chap. VII; Herbert Kraus, *Die Monroedoktrin*, Berlin, 1913, 123–128, and documents cited.

[1] That the United States for some time remained a passive spectator of French intervention in Mexico may be attributed partly to the assurances that France "did not intend to permanently occupy or dominate in Mexico, and that she should leave to the people of Mexico a free choice of institutions of government." Mr. Seward, Secy. of State, to Mr. Motley, Minister to Austria, No. 41, Sept. 11, 1863, Dip. Cor. 1863, II, 929, Moore, Dig., VI, 491; also to the fact that the United States was engaged in a civil war the successful prosecution of which called for the exercise of all available military and naval force, and rendered necessary the avoidance of serious differences with foreign States. See confidential communication of Mr. Seward, Secy. of State, to Mr. Motley, Minister to Austria, April 14, 1864, MS. Inst. Austria, I, 215, Moore, Dig., VI, 498, note.

[2] Said Mr. Seward, Secretary of State, in the course of a communication to the French Minister, Dec. 6, 1865: "The real cause of our national discontent is, that the French army which is now in Mexico is invading a domestic republican government there which was established by her people, and with whom the United States sympathize most profoundly, for the avowed purpose of suppressing it and establishing upon its ruins a foreign monarchical government, whose presence there, so long as it should endure, could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions." H. Ex. Doc. 73, 39 Cong., 1 Sess., II, 347, Moore, Dig., VI, 500, 501.

Concerning the prevention by the United States in 1866, of Austrian aid to Maximilian, see Moore, Dig., VI, 505–507, and documents there cited.

[3] See, in this connection, Elihu Root, "The Real Monroe Doctrine", Am. Soc. of Int. Law, *Proceedings*, VIII, 6, 19–20.

it refused to enter into an arrangement with Great Britain, France and Spain for the neutralization of Cuba.[1] In 1861, it declined to join those powers in a combined movement upon Mexico.[2] In 1881, it was unwilling to unite with France and Great Britain in order to bring to a close a war between Chile and Peru.[3] In 1886, it was indisposed to act in concert with certain European powers against Venezuela.[4]

On the other hand, the United States, in coöperation with Great Britain and France, intervened in 1850–1851, in order to bring about peace between the Empire of Haiti and the Dominican Republic.[5]

By the Clayton-Bulwer Treaty, concluded April 19, 1850, the United States and Great Britain agreed to impose rigid restrictions on their freedom of action with reference to Central America.[6] Each party undertook not to obtain or maintain for itself any exclusive control over a proposed trans-Isthmian canal, not to erect or maintain any fortifications commanding it or in the vicinity thereof, and not to occupy, fortify or colonize, or assume, or exercise any dominion over any part of Central America.[7] Both Governments agreed to accord protection to persons and property involved in the construction of the canal,[8] and they engaged to "guarantee the neutrality" of it upon its completion.[9] Declaring that their purpose was not only to accomplish a particular object, but also to establish a general principle, they agreed to extend their protection to other practicable interoceanic communications by land and water across the isthmus.[10]

The effect of this treaty was to bind Great Britain not to commit numerous acts which would have been opposed to the theory of the Monroe Doctrine, and thereby to secure the coöperation

[1] Mr. Everett, Secy. of State, to the Count Sartiges, Dec. 1, 1853, Senate, Ex. Doc. 13, 32 Cong., 2 Sess., 15. Moore, Dig., VI, 460.

[2] Mr. Seward, Secy. of State, to Messrs. Tassara, Mercier, and Lord Lyons, Dec. 4, 1861, H. Ex. Doc. 100, 37 Cong., 2 Sess., 187, Moore, Dig., VI, 485.

[3] Mr. Blaine, Secy. of State, to Mr. Morton, Minister to France, No. 30, Sept. 5, 1881, For. Rel. 1881, 426.

[4] Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 70 (confidential), Oct. 14, 1886, MS. Inst. Venezuela, III, 540, Moore, Dig., VI, 532. Also Mr. Fish, Secy. of State, to General Schenck, Minister to Great Britain, No. 5 (confidential), June 2, 1871, MS. Inst. Great Britain, XXII, 471, Moore, Dig., VI, 531.

[5] Senate Ex. Doc. No. 113, 32 Cong., 1 Sess., especially communication of Mr. Webster, Secy. of State, to Mr. Walsh, special agent, Jan. 18, 1851, contained therein, and given in Moore, Dig., VI, 509; also statement, *id.*, 509–514, and other documents there cited. See, also, Frederic L. Paxson, "A Tripartite Intervention in Hayti, 1851", reprinted from *University of Colorado Studies*, I, No. 4, 1904.

[6] Malloy's Treaties, I, 659. [7] Art. I. [8] Art. III.
[9] Art. V. [10] Art. VIII.

of that State in maintaining it.[1] In view of the ascendancy of Great Britain in the Isthmus in 1850, it is believed that the Clayton-Bulwer Treaty served greatly to facilitate the prevention of the development of a British zone in Central America which would have closed the door against the conclusion fifty years later of any agreement permitting any other power such as the United States to construct an interoceanic canal.[2]

There has been no disposition on the part of the United States to enter into agreements with other States of the Western Hemisphere for the purpose of safeguarding the latter against acts which the former might regard as at variance with the theory of the Monroe Doctrine.[3]

[1] In a Memorandum by Mr. Olney, Secy. of State, in 1896, on the Clayton-Bulwer Treaty, it was said: "The treaty is characterized by certain remarkable features. It contains numerous and apt provisions for the protection, safety, and neutralization of the proposed ship canal; but it deals not merely with the particular subject-matter which, in the view of the United States, led to its negotiation. It also deals with others of larger magnitude, contemplates alliances with other powers, and lays down general principles for the future guidance of the parties. The United States, in entering upon the negotiation, aimed to accomplish two specific things — the renunciation by Great Britain of its claim to the Mosquito Coast, and such a protectorate over the canal by Great Britain jointly with the United States as might be expected to attract to the canal British capital. As the result of the negotiations, it secured not only the two things specified, but also a third, viz., Great Britain's express agreement, so far as Central America was concerned, to give effect to the so-called Monroe Doctrine. For these advantages it rendered, of course, a consideration. It waived the Monroe Doctrine to the extent of the joint protectorate of the then proposed canal and by Article VIII agreed to waive it as respects all other practicable communications across the Isthmus connecting North and South America, whether by canal or railway. In short, the true operation and effect of the Clayton-Bulwer Treaty is that, as respects Central America generally, Great Britain has expressly bound herself to the Monroe Doctrine, while, as respects all water and land interoceanic communications across the Isthmus, the United States has expressly bound itself to so far waive the Monroe Doctrine as to admit Great Britain to a joint protectorate." Moore, Dig., III, 203, 204. See, also, Same, to Mr. Bayard, American Ambassador at London, July 20, 1895, For. Rel. 1895, I, 545, 555, Moore, Dig., VI, 535, 550.

Compare comment of Dr. Francis Wharton, in Wharton, Dig., I, 168; also that of John W. Foster, Century of American Diplomacy, Boston, 1900, 457–458, where it is said: "The treaty marks the most serious mistake in our diplomatic history, and is the single instance, since its announcement in 1823, of a tacit disavowal or disregard of the Monroe Doctrine, by the admission of Great Britain to an equal participation in the protection and control of a great American enterprise."

[2] It will be recalled that the Clayton-Bulwer Treaty was superseded by the Hay-Pauncefote Treaty of Nov. 18, 1901, permitting the construction of an interoceanic canal under the auspices of the United States. Malloy's Treaties, I, 782.

[3] Declared President Wilson in an address at Topeka, Kansas, Feb. 2, 1916: "We have made ourselves the guarantors of the right of national sovereignty and of popular sovereignty on this side of the water in both the continents of the Western Hemisphere. You would be ashamed, as I would be ashamed, to withdraw one inch from that handsome guarantee; for it is a handsome guarantee. . . . We have nothing to make by allying ourselves with the

(2)

§ 95. Preventive Measures.

The United States assumes no responsibility for the action of other American States.[1] Nor, as has been seen, does it assert the right to shield them from the consequences of misconduct, save under circumstances when attempts to secure justice involve acts on the part of non-American powers threatening permanent occupation of territory or interference with rights of political independence.[2]

It was suggested by President Roosevelt in 1904, that "chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society", might in America, as elsewhere, ultimately require intervention by some civilized power, and that in the Western Hemisphere the adherence of the United States to the Monroe Doctrine might force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.[3] This idea has doubtless been influential in causing the United States to conclude agreements designed to place under its protection for specified pur-

other nations of the Western Hemisphere in order to see to it that no man from outside, no government from outside, no nation from outside attempts to assert any kind of sovereignty or undue political influence over the peoples of this continent." President Wilson's State Papers and Addresses, edited by Albert Shaw, New York, 1917, 193, 198.

It may be observed that the United States has not infrequently acted in concert with American States to prevent war or establish conditions of peace on American soil. Thus through the united efforts of the United States and Mexico, and in the presence of their diplomatic representatives, there was signed at Washington, Dec. 20, 1907, by plenipotentiaries of Costa Rica, Guatemala, Honduras, Nicaragua and Salvador, a general treaty of peace and amity. *Am. J.*, II, Supp., 219; Malloy's Treaties, II, 2392. In 1915, the United States joined with six other American States in an appeal to the revolutionary factions in Mexico to meet in conference to adjust their differences and reëstablish constitutional government in that country. Senate Doc. No. 324, 64 Cong., 1 Sess. Such efforts do not, however, manifest any application of the Monroe Doctrine, inasmuch as the participants have been exclusively American States, and the problems involved have been unrelated to those of other continents.

[1] Mr. Olney, Secy. of State, to Mr. Bayard, American Ambassador at London, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535, 548.

"As the Monroe Doctrine neither asserts nor involves any right of control by the United States over any American nation, it imposes upon the United States no duty towards European powers to exercise such a control. It does not call upon the United States to collect debts or coerce conduct or redress wrongs or revenge injuries." Elihu Root, "The Real Monroe Doctrine", *Proceedings*, Am. Soc. Int. Law, VIII, 6, 18.

[2] Certain Acts Involving or Threatening Permanent Occupation, *supra*, § 92. See, also, President Roosevelt, Annual Message, Dec. 3, 1901, For. Rel. 1901, xxxvi, Moore, Dig., VI, 595.

[3] President Roosevelt, Annual Message, Dec. 6, 1904, For. Rel. 1904, xli, Moore, Dig., VI, 596. *Cf.* Leo S. Rowe, "Misconceptions and Limitations of the Monroe Doctrine", Am. Soc. Int. Law, *Proceedings*, VIII, 126, 140–141.

poses certain Central American States.[1] It is believed, moreover, that in the event of conditions stated by President Roosevelt, the United States would in fact prefer to exercise an international police power, than to endeavor, as an alternative, to thwart vigorous non-American coercive measures otherwise demanded by the requirements of justice and necessitating any occupation of American territory.[2]

i

§ 96. The Relation of the Monroe Doctrine to International Law.

The place in law which the assertions by the United States of a right to check the freedom of action of non-American States with respect to the American continents have attained, must depend upon the effect which in practice such assertions have produced upon the conduct of those States. That effect is a bare fact; and it is not to be ascertained by reference to the supposed expediency or inexpediency of the policies which have influenced the United States in its conduct. Nor is it related to the circumstance that grounds of interference relied upon in the twentieth century may differ in any respect from those invoked by President Monroe and embrace objections which he and his cabinet did not

[1] Certain Acts Involving or Threatening Permanent Occupation, *supra*, § 92; A. B. Hart, The Monroe Doctrine, 1916, Chap. XX.

[2] The theory advanced in certain quarters that a measure practically preventive of issues demanding interference by the United States under cover of the Monroe Doctrine is to be found in the releasing or emancipation of Latin America from fiscal dependence upon non-American States, is not without significance. Its application appears to offer certain objections, of which the most obvious is that any retarding of the investment of non-American capital in American territory constitutes an economic detriment to the State whose normal development is hampered by lack of fiscal means of transmuting natural resources into liquid assets required for other purposes, and when those means are not available to a sufficient degree in neighboring countries. Any effort to check the healthy and normal progress of American States as a means of avoiding difficulties to which it is feared their unwisdom or misconduct may give rise, would appear to stunt artificially their natural growth. If foreign fiscal aid of whatever origin is in fact needed by an American State, the latter cannot be said to attain its reasonable aspirations unless the channel which should attract capital be unobstructed by any obstacle. See, in this connection, Leo S. Rowe, *Proceedings*, Am. Soc. Int. Law, VIII, 138–140; also A. B. Hart, The Monroe Doctrine, 238–241, with special reference to the views of President Wilson, 1913–1915.

In response to a request from Salvador in February, 1920, for an exposition of the views of the Government of the United States concerning the Monroe Doctrine, a response was made referring to the views expressed by President Wilson in an address before the Second Pan American Scientific Congress at Washington, Jan. 6, 1916. See *República de El Salvador: Boletín del ministerio de Relaciones Exteriores*, March, 1920, p. 19. For the text of that address, see J. B. Scott, President Wilson's Foreign Policy, New York, 1918, 154, 159–162.

raise. It is also unimportant in legal contemplation, whether the term Monroe Doctrine fitly describes what has taken place.

It is believed to be of utmost significance that acts of interference within the limits above observed have been eminently successful, and have at times led to explicit acknowledgment of the soundness of the principle behind them.[1] The real reason for such a yielding has been that the conduct of the United States has commonly found simple justification, either in the circumstance that the acts which it sought to thwart amounted to unjust and oppressive treatment of American States, or because when such did not appear to be the case, the requirements of the defense of the United States could be fairly invoked by way of excuse. Concerning those requirements there has been at times difference of opinion, and it may still be anticipated, should an American State endeavor to transfer territory or any rights therein to a proscribed grantee of another continent. Yet the known opposition of the United States to such a proceeding would doubtless tend, as it has heretofore, to prevent a non-American State from venturing upon a contract of cession with even the most willing grantor.

It may be acknowledged that no rule of international law imposes a duty upon the United States to intervene when under the theory of the Monroe Doctrine it may elect to do so. It may also be acknowledged that that law does not in terms announce or intimate as yet that the United States may lawfully invoke that doctrine as such, and according to its own interpretation of it, as a sufficient justification for its action. To this extent, and no further, it may be safely declared that the Monroe Doctrine is not itself a part of international law. On the other hand, the steadily increasing disposition of non-American States to accept as not unlawful the claims of the United States to the possession of a right to thwart interference with the political independence of American States, or to oppose acts involving the occupation of their territory even when not of such

[1] J. B. Moore, Principles of American Diplomacy, New York, 1918, 258–261. "The governments of Europe have gradually come to realize that the existence of the policy which Monroe declared is a stubborn and continuing fact to be recognized in their controversies with American countries. We have seen Spain, France, England, Germany, with admirable good sense and good temper, explaining beforehand to the United States that they intended no permanent occupation of territory, in the controversy with Mexico forty years after the Declaration, and in the controversy with Venezuela eighty years after. In 1903 the Duke of Devonshire declared 'Great Britain accepts the Monroe Doctrine unreservedly.' " Elihu Root, *Proceedings*, Am. Soc. Int. Law, VIII, 6, 9.

character, has already served to establish a practice which regards the actual operation of the Monroe Doctrine as not internationally illegal. It is the absence of tokens of disapproval on the part of non-American States which has significance; and this finds fresh illustration when, on occasions as declarations appended by the United States to its ratifications of general international conventions advert to the theory of the Monroe Doctrine as a national pretension, the claim remains unchallenged.[1]

The present importance of the Monroe Doctrine is largely derived, as Sir Frederick Pollock has pointed out, from the continuous and deliberate approval of it by the presidents of the United States. The doctrine, he declared, "is a living power because it has been adopted by the Government and the people of the United States, with little or no regard to party divisions, for the best part of the century." [2] It is the resolute, and what has come to be habitual attitude expressed in behalf of the United States, whenever the conduct of non-American States threatens to disregard the obligations of non-interference and of abstinence from acquisitions of territory which it has sought to impose, that sustain and invigorate its claims.[3] The acquiescence of non-American States together with the devotion of the United States to the principles on which it rests, have united to cause the Monroe Doctrine to be regarded as a reasonable and lawful basis of re-

[1] "To its explicit acceptance by Great Britain and Germany there may be added the declaration which was spread by unanimous consent upon the minutes of the Hague Conference, and which was permitted to be annexed to the signature of the American delegates to the Convention for the peaceful adjustment of international disputes, that nothing therein contained should be so construed as to require the United States 'to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign State', or to relinquish 'its traditional attitude towards purely American questions.'" J. B. Moore, Principles of American Diplomacy, 261.

See Malloy's Treaties, II, 2032. *Cf.* also Resolution of Ratification by the Senate of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, *id.*, II, 2247.

[2] "The Monroe Doctrine", Senate Doc. No. 7, 58 Cong., 1 Sess., reprinted from *The Nineteenth Century*, Oct., 1902.

[3] "As the particular occasions which called it forth have slipped back into history, the declaration itself, instead of being handed over to the historian, has grown continually a more vital and insistent rule of conduct for each succeeding generation of Americans. Never for a moment have the responsible and instructed statesmen in charge of the foreign affairs of the United States failed to consider themselves bound to insist upon its policy. Never once has the public opinion of the people of the United States failed to support every just application of it as new occasion has arisen. Almost every president and secretary of state has restated the doctrine with vigor and emphasis in the discussion of the diplomatic affairs of his day." Elihu Root, *Proceedings*, Am. Soc. Int. Law, 1914, VIII, 9. See John W. Foster, A Century of American Diplomacy, Boston, 1900, 477.

straint. Such a result could not have occurred had not the application of that doctrine wrought justice for the Western Hemisphere and done no harm to States outside of it.[1]

j

§ 97. The Relation of the Monroe Doctrine to the League of Nations.

In January, 1917, President Wilson announced as a proposal "that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful." [2]

The terms of Article X of the Covenant of the League of Nations established the undertaking of the members of that body to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of the League.[3] This undertaking would forbid those members which were not American States from committing against their fellow members in the Western Hemisphere acts of aggression such as the United States itself, in pursuance of the Monroe Doctrine, asserts the right to oppose. Respect for the Covenant would, therefore, appear to diminish the burden assumed by the

[1] "Finally, and principally, it is a mistake to imagine that the Monroe Doctrine is other than a policy beneficial to the whole world — a true gospel of peace." Eugene Wambaugh, *Proceedings*, Am. Soc. Int. Law (1914), VIII, 143, 154.

[2] Address to the Senate, Jan. 22, 1917, on the essentials of permanent peace, American White Book, European War, IV, 381, 385–386; President Wilson's Foreign Policy, Messages, etc., edited by J. B. Scott, 1918, 245, 254. On Jan. 8, 1918, the President proposed as one of the fourteen points of what he declared to be the only possible program for peace, a general association of nations to be formed under specific covenants for the purpose of affording mutual guaranties of political independence and territorial integrity to small and great States alike. Address to the Congress, Official Bulletin, Jan. 8, 1918, Vol. II, No. 202, p. 3.

[3] According to the typewritten draft of the original plan of a covenant understood to have been proposed by President Wilson at the Peace Conference early in 1919, the contracting parties agreed to "unite in guaranteeing to each other political independence and territorial integrity." *Cf.* Treaty of Peace with Germany, Hearings before Senate Committee on Foreign Relations, 66 Cong., 1 Sess., II, 1165, 1166. See supposed comments of Messrs. D. H. Miller and G. Auchincloss, legal advisers, touching this proposal, *id.*, 1183. The foregoing documents were offered as exhibits by Wm. C. Bullitt, formerly Chief of Division of Current Intelligence Summaries of the American Commission at the Peace Conference, at a hearing before the Senate Committee on Foreign Relations, Sept. 12, 1919.

United States, by lessening the probability that there would be occasion for interference.

The question may arise, however, whether by accepting the obligation to abstain from political interference with other members of the League, including those which are American States, the United States would give up the right to prevent voluntary transfers of American territory sought to be made by neighboring countries to non-American powers. Whether or not the declaration of the Covenant to the effect that nothing therein shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace, offers a sufficient answer, it is not to be doubted that the United States would not adhere to the League of Nations save on terms definitely recognizing the propriety of the invocation of the Monroe Doctrine, to the full extent to which it had been applied, embracing the use of it to thwart the transfers of territory to non-American States.[1]

It seems to be clear that through the provisions of Article X as well as of others, the Covenant recognizes the voice of American States in the affairs of non-American States, and reciprocally that of the latter in affairs of the Western Hemisphere. This appears to be true notwithstanding a possible design to leave to American States (and to the United States as their leader should it become a member of the League) the general conduct of American affairs, involving the prevention of war and the maintenance of conditions not provocative of it. Thus acceptance by American States of membership in the League would point to the weakening of the so-called Pan-American system.[2] With the United States

[1] In this connection see communication of Mr. Elihu Root, to Senator H. C. Lodge, June 19, 1919, *Am. J.*, XIII, 596.

[2] "The idea of Pan-Americanism is obviously derived from the conception that there is such a thing as an American system; that this system is based upon distinctive interests which the American countries have in common; and that it is independent of and different from the European system. To the extent to which Europe should become implicated in American politics, or to which American countries should become implicated in European politics, this distinction would necessarily be broken down, and the foundations of the American system would be impaired; and to the extent to which the foundations of the American system were impaired, Pan-Americanism would lose its vitality and the Monroe Doctrine its accustomed and tangible meaning. I say this on the supposition that the Monroe Doctrine is, both geographically and politically, American, its object being to safeguard the Western Hemisphere against territorial and political control by non-American powers. Of this limited application I would adduce as proof not so much the fact that the Monroe Doctrine, although conceived in terms of colonial emancipation, has not prevented the United States and other American governments from forcibly

represented on the Council of the League, the chief burden of whose work doubtless pertains to essentially non-American affairs, the argument advanced by Washington, employed by Monroe, and frequently relied upon by their successors, to the effect that American abstinence from implication in European affairs justified the demand for European abstinence from implication in American affairs, could no longer be invoked. The participation of American States in the League and in the labors of the Council thereof, would seem to remove one basis of an essentially American alignment of those States in the formulation and advocacy of proposals designed to modify or give fresh application to principles of international law.

extending their territorial limits at one another's expense, as to the fact that it has been regarded by the United States as justifying the latter's recent enforcement in Nicaragua, Haiti, Santo Domingo, and elsewhere, of precisely such measures of supervision and control as it is understood to forbid non-American powers to adopt in American countries." J. B. Moore, Principles of American Diplomacy, 1918, X–XI.

Declared President Harding in his inaugural address, March 4, 1921: "The recorded progress of our Republic, materially and spiritually, in itself proves the wisdom of the inherited policy of non-involvement in Old World affairs. Confident of our ability to work out our own destiny, and jealously guarding our right to do so, we seek no part in directing the destinies of the Old World. We do not mean to be entangled. We will accept no responsibility except as our own conscience and judgment, in each instance, may determine. . . .

"We are ready to associate ourselves with the nations of the world, great and small, for conference, for counsel; to seek the expressed views of world opinion; to recommend a way to approximate disarmament and relieve the crushing burdens of military and naval establishments. We elect to participate in suggesting plans for mediation, conciliation, and arbitration, and would gladly join in that expressed conscience of progress, which seeks to clarify and write the laws of international relationship, and establish a world court for the disposition of such justiciable questions as nations are agreed to submit thereto. In expressing aspirations, in seeking practical plans, in translating humanity's new concept of righteousness and justice and its hatred of war into recommended action we are ready most heartily to unite, but every commitment must be made in the exercise of our national sovereignty. Since freedom impelled, and independence inspired, and nationality exalted, a world supergovernment is contrary to everything we cherish and can have no sanction by our Republic. This is not selfishness, it is sanctity. It is not aloofness, it is security. It is not suspicion of others, it is the patriotic adherence to the things which made us what we are." Cong. Record, March 4, 1921, Vol. LX, No. 79, p. 4740.

TITLE B

GENERAL RIGHTS OF PROPERTY AND CONTROL

1

CREATION. TRANSFER. EXTINCTION

a

Creation

(1)

§ 98. In General.

The existence of an exclusive right of property and control over territory necessarily implies the existence of a possessor whose capacity to possess is recognized by the family of nations. Every State of international law has such capacity, and is bound to utilize it. A country may, in the course of its internal development, reach a stage where it is deemed to be capable of possessing such a right, and of responding to the obligations incidental to it, long before it attains a position such as to justify its admission to full membership in the society of States.[1] Thus certain countries, which by reason of their connection with and attachment to a civilization other than that which is known as European or Christian, have not been received for all purposes into the family of nations, nevertheless, hold titles to territory not unlike those held by States generally. The former are regarded as capable of possessing exclusive rights of property and control.[2]

[1] According to Westlake, in order to enable a country to secure recognition of its capacity to possess a title to territorial sovereignty, there must be "a territory in which the pursuits of civilised life can be carried on, under a sovereign power sufficiently understanding those pursuits and sufficiently organised to be capable of giving them the necessary protection, and of administering justice in the questions arising out of them. Or at least whether there is a sovereign power which can do this in conjunction with consuls accredited to it and whose authority is normally supported by it, as happens in states like Turkey or China." Int. L., 2 ed., I, 91–92.

[2] In spite of the "Boxer" troubles in China in 1900, Mr. Hay, Secretary of State, made singular effort to secure a solution which should preserve the territorial and administrative entity of that country. See his circular note of July 3, 1900, For. Rel. 1900, 299.

Acts in Derogation of the Supremacy of the Territorial Sovereign, *infra*, § 20[illegible]; The Conclusion of Special Relationships, *supra*, § 57.

A right of property and control, or, as it is frequently termed, a right of territorial sovereignty, may be said to come into being when a State, or a country regarded as possessed of the requisite capacity, asserts dominion by appropriate action over territory not in fact under that of any other State or political entity acknowledged to be qualified to hold title.[1] It becomes necessary to observe what acts have been regarded, and are now deemed, essential in order to create such a right.

(2)

§ 99. Discovery.

The term discovery refers to the ascertaining of the existence of territory previously unknown to civilization.[2] Such an act is not in itself assertive of dominion.

At the time of the European explorations in the Western Hemisphere in the fifteenth and sixteenth centuries, the so-called discoverer seems to have been expected to do more than merely ascertain the existence of new lands. He was often given letters patent, authorizing him to assert dominion in behalf of his sovereign.[3] Upon reaching previously unknown shores he landed and formally took possession.[4] Sometimes he built a fort; some-

[1] Moore, Dig., I, 303.

[2] In earlier centuries the so-called discoverer was oftentimes in reality merely the explorer who investigated the nature and extent of lands of which the existence was generally, although loosely known, but of which the contour and area and physical characteristics were unknown. He was truly the discoverer of mountains and plains and rivers and islands; and he ascertained, as no others had before him, the vastness of territories through which he roamed. In a strict sense the places which he explored were not infrequently new-found lands, because no representative of European civilization had previously seen them or had the slightest knowledge of what they were like.

Mr. Upshur, Secy. of State, to Mr. Everett, Oct. 9, 1843, MS. Inst. Great Britain, XV, 148, 165, Moore, Dig., I, 259, 260.

[3] Henry VII, by letters patent of March 5, 1496 (the date assigned to them by J. W. Jones of the British Museum), authorized John Cabot and his sons not only "to seeke out, discouer, and finde, whatsoeuer iles, countreyes, regions or prouinces, of the heathen and infidelles, whatsoeuer they bee, and in what part of the worlde soeuer they be, whiche before this time haue been vnknowen to all Christians", but also "to set up our banners and ensignes in euery village, towne, castel, yle, or maine lande, of them newely founde", and to "subdue, occupie, and possesse" the same, and "as our vassailes and lieutenantes, getting vnto vs the rule, title, and jurisdiction of the same." Richard Hakluyt, Divers Voyages Touching the Discovery of America, published by The Hakluyt Society, with notes and introduction by John Winter Jones, London, 1850, p. 21.

See letters patent granted by Queen Elizabeth to Sir Humphrey Gilbert, June 11, 1578, Richard Hakluyt, The Principal Navigations Voyages Traffiques & Discoveries of the English Nation, 1904 ed., Glascow, p. 17.

[4] In the Journal of his first voyage, Columbus thus describes his landing on Oct. 12, 1492: "The Admiral took the royal standard, and the captains went with two banners of the green cross, which the Admiral took in all the

times he left a portion of his followers in control of a thin area adjacent to it. Occasionally he sailed away, leaving little or no trace of his visit.[1] Frequently the fact of his achievement remained long unknown. Thus it sometimes happened that a later explorer made claim to the same territory in behalf of another sovereign, whose subjects, finding none in possession, went into the surrounding country and settled there. Such settlers, after securing a frail lodgment, were in turn oftentimes exterminated by the Indians or by the subjects of another monarch whose later explorations they opposed.[2]

Such situations gave rise to the inquiry how far an act of so-called discovery, whether or not coupled with a formal taking of possession, served in itself to create a right of property and control, or lay the foundation for one.[3]

States were agreed that the native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect.[4] They were also agreed, with

ships as a sign, with an F and a Y and a crown over each letter, one on one side of the cross and the other on the other. Having landed, they saw trees very green, and much water, and fruits of diverse kinds. The Admiral called to the two captains, and to the others who leaped on shore, and to Rodrigo Escovedo, secretary of the whole fleet, and to Rodrigo Sanchez of Segovia, and said that they should bear faithful testimony that he, in presence of all, had taken, as he now took, possession of the said island for the King and for the Queen his Lords, making the declarations that are required, as is now largely set forth in the testimonies which were made in writing." Original Narratives of Early American History, The Northmen, Columbus, and Cabot, edited by Julius E. Olson and Edward Gaylord Bourne, New York, 1906, p. 110.

[1] Westlake, 2 ed., I, 101–105.

[2] "When navigators have met with desert countries, in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the Popes, who divided a great part of the world between the crowns of Castile and Portugal." Vattel, Book I, Ch. 18, Sec. 208, Chitty's ed., London, 1834, p. 99. The experience of the French at the Bay of Espiritu Santo, called by La Salle the Bay of St. Bernard, on the Gulf of Mexico, 1685–1689, is a good illustration. American State Papers, For. Rel. IV, 473–475; see, also, Ernest Nys in "*Les États-Unis et le Droit des Gens*", *Rev. Droit Int.*, 2 ser., XI, 36, 39–45.

[3] A portion of the Roman law concerning the theory of the possession of immovables embodied principles capable of aiding the statesmen of the sixteenth century. According to that law, in order to obtain a right of possession, there was required of the possessor, declares Westlake, both "a bodily act and a mental attitude." The "necessary bodily act," he adds, "was prehension; such a seizure as to give the mastery over the thing, including the power of retaining it, without which there would not be mastery." The extent of the possession was determined by the amount which the possessor could control from the position actually taken up. The mental attitude required was an intention to possess. Such intention, however, had reference to the nature of the right sought to be acquired, rather than to the extent of what was acquired. Westlake, 2 ed., I, 99–100, *citing* Paulus, in Dig. 41, 2, 3; Javolenus, in Dig. 41, 2, 22; Savigny on Possession, pp. 173–174, English translation.

[4] Marshall, C. J., in Johnson *v.* McIntosh, 8 Wheat. 543, 573; Messrs. C.

the possible exception of Spain and Portugal, that the Pope possessed neither the title to unknown lands, nor the right to regulate their discovery and exploration.[1]

As the acquisition of ownership of new lands was always in behalf of the sovereign, and involved public acts for his benefit, it was not supposed that title could be acquired through the efforts of one who was not commissioned, or whose acts were not in due course ratified.[2] Moreover, it was deemed of utmost importance

Pinckney and Monroe, U. S. Ministers, to Mr. Cevallos, Spanish Minister of State, April 20, 1805, American State Papers, For. Rel., II, 664; Brit. and For. State Pap. (1817–1818), 322, 327, Moore, Dig., I, 263. See, also, Dana's Wheaton, § 166.

[1] See The Bull *Romanus Pontifex* (Nicholas V), Jan. 8, 1455, and The Bull *Inter Caetera* (Calixtus III), March 13, 1456, by which exclusive rights to acquire territory and make conquests from the capes of Bojador and Não southward through and beyond Guinea were given to Portugal. Also, the Bulls of Pope Alexander VI (*Inter Caetera*, May 3, 1493; *Eximiae Devotionis*, May 3, 1493; *Inter Caetera*, May 4, 1493; *Dudum Siquidem*, Sept. 26, 1493), assigning to the Crown of Castile exclusive rights in lands discovered and to be discovered west of the meridian fixed one hundred leagues west of any of the islands of the Azores and Cape Verde, provided that such lands were not in the actual possession of any Christian king or prince by Christmas, 1492.

It may be observed that of the foregoing Bulls, those of 1455 and 1456 referred to lands already acquired and to be acquired (*jam acquisita et que in futurum acquiri contigerit, postquam acquisita fuerint*, according to that of Jan. 8, 1455), while those of Alexander VI of 1493 embraced lands which were unknown and had been or remained to be discovered (*omnes et singulas terras et insulas predictas, sic incognitas, et hactenus per nuntios vestros repertas et reperiendas in posterum*, according to the Bull *Inter Caetera* of May 3; *omnes insulas et terras firmas inventas et inveniendas, detectas et detegendas*, according to the Bull *Inter Caetera* of May 4, 1493). Perhaps the achievement of Columbus may account for the specific reference to acts of discovery. It should be noted, however, that the treaty concluded between Spain and Portugal at Alcaçovas, Sept. 4, 1479, referred to lands "discovered or to be discovered" (*tierras descobiertas e por descobrir*), and that this treaty was confirmed by the Bull *Aeterni Regis* (Sixtus IV), of June 21, 1481, which made reference likewise to "lands, discovered or to be discovered" (*terris, detectis seu detegendis, inventis et inveniendis*).

Authoritative texts of all of these Bulls, and of the Treaty of Alcaçovas, together with English translations, are among the first eight documents contained in European Treaties Bearing on the History of the United States and Its Dependencies, edited by Frances G. Davenport, Washington, The Carnegie Institution, 1917. Attention is called to the illuminating introduction by the editor, and to the introductory editorial note and bibliography preceding each document.

See, also, E. Nys, *Les Origines du Droit International* (1894), 370–374; H. Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal", *Am. Hist. Rev.*, XXII, I. See, in this connection, British Guiana-Venezuela Boundary Arbitration, Case of Great Britain, Venezuela No. I (1899) [Cd. 9336], pp. 157 *et seq.*: also by comparison, Counter Case of Venezuela, Venezuela No. 5 (1899) [Cd. 9500], pp. 116 *et seq.*

[2] Captain Gray, an American Citizen, on whose discovery and exploration of the Columbia River in May, 1792, the United States relied in part in claiming the territory drained by that river, did not take formal possession of the territory watered by it, and held no commission to do so. For that reason the British Government contended that the acts of its agent, Captain Vancouver, in previously discovering the mouth of the Columbia, and subsequently, upon

that discoveries and explorations should be proclaimed and widely known.[1]

While it was admitted that the ascertaining of the existence of territory and the formal taking possession of it might not suffice to create a complete right of property and control,[2] it was generally maintained that the acts of the discoverer afforded his sovereign at least an exclusive right within a reasonable time to perfect his title by use and settlement.[3] Concerning what were the limits of a reasonable time, there was no unanimity of view. Such wide latitude was claimed and enjoyed by European States in availing themselves of so-called discoveries in their behalf, that in practice, the distinction between the legal effect of such acts and that of explorations followed by settlement, for a long time meant little.[4]

learning of Gray's discovery, in exploring the river for one hundred miles and taking possession of the country in behalf of his sovereign, secured a better foundation for a title than had the acts of his predecessor. See correspondence between the United States and Great Britain relating to the Oregon Dispute, 1842–1846, Brit. and For. State Pap., XXXIV, 49–64, 108, 125–126. *Cf.* Mr. Upshur, Secy. State, to Mr. Everett, Oct. 9, 1844. MS. Inst. Great Britain, XV, 148, 165; Moore, Dig., I, 260; Twiss, The Oregon Question, London, 1846; Hall, Higgins' 7 ed., § 33; Dana's Wheaton, 250–254.

"The Settlements of La Salle, therefore, at the head of the Bay St. Bernard, Westward of the River which he called Rivière aux Boeufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private Adventurer into the Territories of Spain, but an Establishment having every character that could sanction the formation of any European Colony upon this Continent; and the Viceroy of Mexico had no more right to destroy it by a Military Force, than the present Viceroy would have, to send an army and destroy the City of New Orleans. It was a part of Louisiana, discovered by La Salle under formal and express authority from the King of France." Mr. Adams, Secy. of State, to Mr. Onis, Spanish Minister, March 12, 1818. American State Papers, For. Rel., IV, 473; Brit. and For. State Pap., 1817–1818, 477.

[1] Westlake, 2 ed., I, 102–103.

[2] This is interestingly brought out in the instructions to the English commissioners, May 22/June 1, 1604, to negotiate the treaty with Spain which was concluded Aug. 18/28, 1604. European Treaties Bearing on the History of the United States and Its Dependencies to 1648, edited by Frances Gardiner Davenport, Carnegie Institution, Washington, 1917, 247, note 4.

[3] "The two rules generally, perhaps universally, recognized and consecrated by the usage of nations, have followed from the nature of the subject. By virtue of the first, prior discovery gave a right to occupy, provided that occupancy took place within a reasonable time and was ultimately followed by permanent settlements and by the cultivation of the soil." Mr. Gallatin, American Plenipotentiary, to Mr. Addington, British Plenipotentiary, Dec. 19, 1826, American State Pap., For. Rel., VI, 667; Moore, Dig., I, 263. See, also, Mr. Fish, Secy. of State, to Mr. Preston, Dec. 31, 1872, *citing* Vattel, Chap. XVIII, p. 98, Philadelphia edition, 1859, MS. Notes to Haiti, I, 125, 126, Moore, Dig., I, 260; Marshall, C. J., in Johnson *v.* McIntosh, 8 Wheat. 543. *Cf.* British Guiana-Venezuela Boundary Arbitration, Printed Argument on behalf of Venezuela, British Blue Book, Venezuela No. 6 (1899) [Cd. 9501], Chap. VI, pp. 177–238.

[4] See portions of correspondence between Mr. Adams, Secy. of State, and Mr. Onis, Spanish Minister, relating to the Florida Boundary Dispute, Jan. 5, and March 18, 1818. American State Pap., For. Rel., VI, 455–460, 468–478; Brit. and For. State Pap. (1817–1818), 425–439, 461–491.

With the gradual acceptance of the principle that a complete right of sovereignty over newly found lands could not be established by any means short of effective occupation, the necessity of shortening the period during which a State might avail itself of a discovery made in its behalf became better understood. If such an act served to create but an inchoate title, it was unreasonable that the steps necessary to perfect it should be delayed indefinitely.[1] Thus, the modern principle was finally accepted that the legal value of discovery depended upon the celerity with which it was followed by effective occupation. In the sixteenth century the discoverer brought into being rights which might be safely slept upon for generations. To-day, were he able to ascertain the existence of lands still unknown to civilization, he would have no significance save as he might herald the advent of the settler.

(3)

Occupation

(a)

§ 100. In General.

Occupation may be described as the assertion, by use and settlement, of sovereignty over territory not already under the dominion of a State or of a country deemed to be capable of exercising an exclusive right of property and control. By such action, as has been observed, a monarch, in former times, perfected his title to lands which his agent had discovered.

Occupation is thus essentially a means whereby a right of property and control comes into being or is perfected, rather than transferred. It is, therefore, a process which is only available for use in relation to lands not subjected to a claim of sovereignty deemed to be entitled to respect. Nor can it be utilized at such time as there may remain throughout the surface of the earth no territory which is not subjected to such a claim.

(b)

§ 101. Extent of Possession. Continuity.

If the physical control of territory effected by settlement and use is essential to the creation or perfecting of an exclusive right

[1] Declared Vattel: "Thus, navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation: and this title has been usually respected, provided it was soon after followed by a real possession." Vattel, Chap. XVIII, 98, Philadelphia edition, 1859; quoted by Mr. Fish, Secy. of State, to Mr. Preston, Dec. 31, 1872, MS. Notes to Haiti, I, 125, 126. Moore, Dig., I, 260.

of sovereignty, the extent of the area over which such a right should be generally respected ought to be measured and limited according to a like test. Numerous considerations, however, long deterred States from accepting this principle.

Centuries were required for the settlement of the American continents after their form and size were roughly known. During that interval European monarchs sought, in fierce opposition to each other, to establish rights of property and control over vast and uninhabited areas by virtue of barest lodgments effected along the coasts or within the interior. While it came to be admitted that occupation was necessary in order to perfect a title based on discovery, it was constantly asserted that a State whose nationals had established a number of isolated settlements at points remote from each other, was to be regarded as legally in possession of broad expanses of territory connecting them or extending away from them. Thus constructive, rather than effective, occupation was relied upon in support of rights of sovereignty.[1]

The basis of this doctrine or practice was that the occupant of any given spot might be supposed within a reasonable time to seek to extend his dominion over the surrounding country, because such an extension was either necessary for his own safety, or incidental to his natural development. The application of such a theory was, however, full of difficulties. Questions arose concerning the length of time within which a State might exercise the exclusive right to extend its territory to the surrounding country. There were disputes also with respect to the extent of the area over which such a right existed, and concerning the

[1] Messrs. Pinckney and Monroe, American Plenipotentiaries, to Don Pedro Cevallos, April 20, 1805, Am. State Pap., For. Rel., II, 662, 664; Brit. and For. State Pap. (1817–1818), 323, 327; Mr. Gallatin, American Plenipotentiary, to Mr. Addington, British Plenipotentiary, Dec. 19, 1826, Am. State Pap., For. Rel., VI, 666, 667.

In the course of his correspondence with Mr. John Quincy Adams, Secy. of State, relating to the boundaries of the territory acquired by the United States in the Louisiana Purchase, Don Luis de Onis, in 1818, declared: "These Dominions and Settlements of the Crown of Spain were connected with those which she had on the Gulf of Mexico, that is to say, with those of Florida and the Coasts of the Province of Texas, which being on the same Gulf, must be acknowledged to belong to Spain, since the whole circumference of the Gulf was hers, which property, incontestably acquired, she had constantly maintained among her Possessions, not because she occupied it throughout its whole extent, which was impossible, but on the principle generally recognized, that the property of a lake or narrow Sea, and that of a Country, however extensive, provided no other Power is already established in the interior, is acquired by the occupation of its principal points." Am. State Pap., For. Rel., IV, 455–456; Brit. and For. State Pap. (1817–1818), 425–428.

method of adjusting conflicting claims to broad and uninhabited areas separating rival settlements.[1]

As long as portions of the American continents remained in fact unoccupied, and until the boundaries marking the limits of the territories of opposing States were fairly established by treaty, there was little agreement as to the principles which should govern the solution of these problems. Respect for claims to lands actually unoccupied by civilized man was as frequently maintained by the sword as by any other means.

It was natural, however, that statesmen should enunciate principles in justification of claims which they asserted. In the controversy between the United States and Spain respecting the boundaries of the Louisiana territory, the American Plenipotentiaries, Messrs. Pinckney and Monroe, April 20, 1805, relied upon the following principles which were later supported by Mr. John Quincy Adams, as Secretary of State, in 1818:

> The first of these is, that when any European Nation takes possession of any extent of Sea Coast, that possession is understood as extending into the interior Country, to the sources of the Rivers emptying within that Coast, to all their branches, and the Country they cover, and to give it a right in exclusion of all other Nations to the same.
>
> The second is, that whenever one European Nation makes a discovery and takes possession of any portion of that Continent, and another afterwards does the same at some distance from it, where the Boundary between them is not determined by the principle above mentioned, the middle distance becomes

[1] Declared Lord Salisbury in a despatch May 18, 1896, for Mr. Olney, Secy. of State: "All the great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of 'Hinterland', with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control." For. Rel. 1896, 228, 230; Moore, Arbitrations, I, 974. In reply June 22, 1896, Mr. Olney said in part: "The accepted rule as to the area of territory affected by an act of occupation in a land of large extent has been that the crest of the watershed is the presumptive interior limit, while the flank boundaries are the limits of the land watered by the rivers debouching at the point of coast occupied. . . . Unless the treaties looking to the harmonious partition of Africa have worked some change, the occupation which is sufficient to give a State title to territory cannot be considered as undetermined. It must be open, exclusive, adverse, continuous, and under claim of right. It need not be actual in the sense of involving the *possessio pedis* over the whole area claimed. The only possession required is such as is reasonable under all the circumstances — in view of the extent of territory claimed, its nature, and the uses to which it is adapted and is put — while mere constructive occupation is kept within bounds by the doctrine of contiguity." For. Rel. 1896, 232, 235; Moore, Arbitrations, I, 976, 980.

such of course. The justice and propriety of this rule is too obvious to require illustration.

A third rule is, that whenever any European Nation has thus acquired a right to any portion of Territory on that Continent, that right can never be diminished or affected by any other Power, by virtue of purchases made, by grants or conquests, of the Natives within the Limits thereof.[1]

Mr. Calhoun, Secretary of State, in his correspondence with the British Minister in 1844, relating to the Oregon Dispute, contended that the principle of continuity furnished a just foundation for a claim of ownership to unoccupied lands adjacent to those which were actually occupied.[2] By virtue thereof he maintained that the United States was entitled to the territory on its western frontier as far as the Pacific Ocean.[3]

[1] Am. State Pap., For. Rel., II, 662, 664; Brit. and For. State Pap. (1817–1818), 322, 327–328, Moore, Dig., I, 263.

The United States claimed that France, by virtue of the explorations and settlements of La Salle in 1681–1682, along the Illinois and Mississippi rivers, and particularly at the mouth of the latter stream, acquired title to the Mississippi Valley. It was also claimed that the establishment by La Salle in 1685, of the settlement at the Bay of Espiritu Santo, four hundred miles west of the mouth of the Mississippi, which was destroyed by the Indians in 1689, and which the French never sought to regain, while they were sovereign of Louisiana, was still within the constructive possession of France by virtue of its retaining the mouth of the Mississippi. It was maintained, therefore, that the boundary line between the territories of the United States and Spain should be along the River Rio Grande, being halfway between the Bay of Espiritu Santo and the most easterly Spanish settlement, notwithstanding the fact that no French settlements had ever been permanently established in the vicinity of the Bay of Espiritu Santo, or even west of the Red River, and in spite of the fact that the Spanish had from 1690 continuously (save during their own ownership of Louisiana, 1763–1800) maintained settlements not only east of the Rio Grande, but even within a short distance of the Bay of Espiritu Santo. Don Pedro Cevallos, Spanish Minister of State, to Messrs. Pinckney and Monroe, April 13, 1805, Am. State Pap., For. Rel., II, 660; Brit. and For. State Pap. (1817–1818), 315; Messrs. Pinckney and Monroe to Don Pedro Cevallos, Spanish Minister of State, April 20, 1805, Am. State Pap., For. Rel., II, 662; Brit. and For. State Pap. (1817–1818), 322; Don Luis de Onis, Spanish Minister, to Mr. John Quincy Adams, Secy. State, Jan. 5, 1818, Am. State Pap., For. Rel., IV, 455; Brit. and For. State Pap. (1817–1818), 425; Mr. Adams, Secy. of State, to Don Luis de Onis, Spanish Minister, March 12, 1818, Am. State Pap., For. Rel., IV, 468; Brit. and For. State Pap. (1817–1818), 461. *Cf.* criticism of the position of the United States in Hall, Higgins' 7 ed., § 33.

Concerning the reasoning in support of the claim of the United States to the entire region drained by the Columbia River, *cf.* Mr. Calhoun, Secy. of State, to Mr. Pakenham, British Minister, Sept. 3, 1844, Brit. and For. State Pap., XXXIV, 64.

[2] Brit. and For. State Pap., XXXIV, 64, 67–68, Moore, Dig., I, 264.

[3] It was contended therefore by Mr. Calhoun, that Great Britain had claimed that its territorial rights extended from the Atlantic to the Pacific, and had definitely asserted them in patents and charters to the Plymouth Company, 1620; Massachusetts Bay, 1628; Connecticut, 1662; Carolina, 1663, and Georgia, 1764. Papers relating to the Treaty of Washington, V, 21–22, Moore, Dig., I, 265. By Article VII of the treaty of 1763, between Great

It suffices to observe that at the present time any theory of constructive occupation is regarded with increasing disapprobation, because of the absence of considerations which in earlier days appeared to strengthen the equities of States which in particular cases invoked such a doctrine.

(c)

§ 102. General Act of the Berlin Conference of 1885.

According to Articles XXXIV and XXXV of the General Act of the Berlin Conference of 1885, providing for the acquisition of rights of property and control on the African coast, there was required of any power which should take possession of a tract of land, or assume a protectorate therein, a notification addressed to the other signatory powers to enable them, if need be, to make good any claims of their own. Furthermore, the obligation was recognized by the signatory powers to assure the establishment of authority in the regions occupied "sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon." [1] It was also understood

Britain and France, the former yielded all claims and all chartered rights of its colonies west of the Mississippi. *Rec.* I, 104–106. According to Mr. Calhoun, the effect of the treaty was the extension beyond the Mississippi of the right of continuity previously claimed by Great Britain and transferred by it to France. "Certain it is," he declared, "that France had the same right of continuity, in virtue of her possessions in Louisiana, and the extinguishment of the right of England by the Treaty of 1763, to the whole country west of the Rocky Mountains, and lying west of Louisiana, as against Spain, which England had to the country westward of the Alleghany Mountains, as against France, with this difference, that Spain had nothing to oppose to the claim of France at the time but the right of discovery (and even that England has since denied), while France had opposed to the right of England in her case, that of discovery, exploration and settlement. It is therefore not at all surprising that France should claim the country west of the Rocky Mountains (as may be inferred from her maps), on the same principle that Great Britain had claimed and dispossessed her of the regions west of the Alleghany; or that the United States, as soon as they had acquired the rights of France, should assert the same claim, and take measures immediately after to explore it, with a view to occupation and settlement. But since then we have strengthened our title by adding to our own proper claims and those of France, the claims also of Spain, by the Treaty of Florida, as has been stated." Brit. and For. State Pap., XXXIV, 64, 69; another portion of this communication is contained in Moore, Dig., I, 264.

See, in this connection, Westlake, 2 ed., I, 115–117, who declares that the limits described in the British charters to the Colonies "must be taken as intended to operate between the Colonies and the Crown and between adjoining Colonies; no pretension of so far-reaching an extent was advanced by Great Britain against foreign States."

[1] For the proceedings of the Berlin Conference and the text of the General Act, see French Yellow Book, *Affaires du Congo et de L'Afrique Occidentale*, 1885; Brit. and For. State Pap., LXXVI, 4.

Mr. Bayard, Secy. of State, to Mr. von Alvensleben, German Minister,

that the notification to be given required a certain determination of the limits of the tracts of land occupied, and that the powers interested could always demand such information as they might deem necessary for the protection of their rights.[1]

(d)

§ 103. Declaration of the Institute of International Law of 1888.

In 1888, the Institute of International Law made a Declaration regarding the occupation of territories. It was there announced that occupation by sovereign right could not be recognized as effective unless it complied with the following conditions: first, the taking possession in the government's name of territory enclosed within certain limits; and secondly, official notification of taking possession. It was declared that the taking of possession was accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order and assure the regular exercise of its authority within the limits of the territory occupied, and that those means should be taken over from the institutions existing therein. It was prescribed that such notification, which was to be given either by publication in the form customarily employed in each State for the notification of official acts, or through the diplomatic channel, should contain an approximate statement of the limits of the occupied territory.[2]

This declaration was regarded by Westlake as a summing up of the existing state of enlightened opinion at the time when he wrote.[3]

April 6, 1885. For. Rel. 1885, 442; also Moore, Dig., I, 268. *Cf.* Westlake, 2 ed., I, 106–111.

[1] See declaration of the Commission annexed to Protocol No. 8 of Berlin Conference, French Yellow Book, *Affaires du Congo et de L'Afrique Occidentale*, 1885, 220.

[2] *Annuaire*, X, 201; J. B. Scott, Resolutions, 86. It was also declared that these rules were applicable in the case where a power, without assuming entire sovereignty over a territory, and while maintaining, with or without restrictions, the local administrative autonomy, placed the territory under its protection. Art. II.

[3] Westlake, 2 ed., I, 112. This edition was published in 1910. The Act of Congress of August 18, 1856, providing for the assertion of dominion by the United States over the Guano Islands, was based on the principle that such islands were capable of acquisition when they were outside of the lawful jurisdiction of any other government, and not occupied by its citizens; and that the assertion of ownership by the United States should be dependent on evidence of occupation and possession, as well as the discovery of the deposits of guano, by its own citizens. Rev. Stat., §§ 5570–5578, also U. S. Comp. Stat. Ann., Vol. IV, §§ 3916–3934. *Cf.* Brock, Atty.-Gen., 9 Ops. Attys.-Gen., 364, 367, Moore, Dig., I, 558 and 560; Jones *v.* United States, 137 U. S. 202. See, in general, statement in Moore, Dig., I, 556–580, comprising an exhaustive note (569–580), containing information respecting guano deposits discovered by American citizens.

It is believed to give expression to the principle which should hereafter be respected in any cases where there may be an opportunity and an attempt by occupation to bring into being a right of property and control.

(e)

§ 104. Contiguous Islands.

On principle, unoccupied islands in the open sea and beyond the territorial waters of a State are not, by reason of their relative proximity to its shores, to be deemed a part of its domain.[1] Such was the contention of the United States in 1852, with respect to the Lobos Islands off the coast of Peru.[2]

At the present time, however, a maritime power would neglect its interests should it fail to assert some form of control over an island in such contiguity to its ocean coast as to afford a menace thereto if acquired by a foreign State; and such assertion might be regarded as equivalent to occupation, even though the island remained uninhabited. The dangers from adverse possession, due in part to the range of modern guns and the potentialities of various instruments of war when offered lodgment near enemy territory, have served to widen the distance from the mainland within which an island would doubtless now be regarded as both politically and geographically appurtenant to it. It is not believed, therefore, that the case is to be anticipated which will present an instance of effective adverse occupation as against an

[1] See, in this connection, Westlake, 2 ed., I, 118–120.

[2] Declared Mr. Webster, Secretary of State, in a communication to Mr. Osma, Peruvian Minister, Aug. 21, 1852: "The Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as to give to her a right to their exclusive possession, *as against the United States and their citizens*, by the law of undisputed possession?" Sen. Ex. Doc., No. 109, 32 Cong., 1 Sess., 12, Moore, Dig., I, 575, note.

It may be observed that the distance from the Peruvian coast of the nearest Lobos Island (Lobos de Tierra) is nine nautical miles, and of the furthest therefrom (Lobos de Afuera) thirty-three nautical miles. See Quincy Wright, "Territorial Propinquity", *Am. J.*, XII, 519, 520–521.

See, also, Brief of Mr. J. H. Ashton, counsel for the United States, in case of Gowen and Copeland *v.* Venezuela, No. 16, United States and Venezuelan Claims Commission, under convention of Dec. 5, 1885, Moore, Dig., I, 265–267; also position of the United States in the case of Aves Island, Senate Ex. Doc. No. 10, 36 Cong., 2 Sess., 225; also other documents cited in Moore, Dig., I, 571. *Compare* protocol concluded by Great Britain, Germany and Spain March 7, 1885, relative to the sovereignty of Spain over the Sulu Archipelago, Brit. and For. State Pap., LXXVI, 58. Concerning the claims of Spain to the Falkland Islands and the position taken by Great Britain and France, respectively, *cf.* Calvo, 5 ed., I, 417–424.

enlightened maritime power with respect to a contiguous island which could be fairly deemed of military importance to it.

(4)

§ 105. Accretion.

By virtue of a principle known as that of accretion, a State may be said to acquire with respect to the outside world an original and exclusive right of sovereignty over lands which, imperceptibly in their process of formation, are added to its coasts and shores, or which so come into being as islands appendant thereto.[1] No formal acts of appropriation are required.[2]

When the appendage is on the ocean coast, neither the process of formation nor the length of time involved in it appears to be a matter of international concern.[3] The creation of the right of sovereignty, and likewise the question of ownership, are not dependent upon whether the new land is due to the work of men's hands, or formed by the action of water or attributable to other natural causes. Nor is it important whether it is in fact of sudden

[1] The Anna, 5 C. Rob. 373. "The doctrine of the English cases is, that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time." Blatchford, J., in Jefferis *v.* East Omaha Land Company, 134 U. S. 178, 193.

See County of St. Clair *v.* Lovingston, 23 Wall. 46, 68, where Mr. Justice Swayne declared: "In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same."

[2] The term accretion employed by English writers with reference to the acquisition of newly made lands was, notwithstanding its Latin derivation, not borrowed from the Roman law. Neither in the Institutes, nor in the works of its classic commentators is there any word of similar origin used with such a signification. The term *accretio* of that law was always employed in connection with another branch of law. The word *alluvio* was used in the Institutes to describe the process by which land was imperceptibly formed by the action of the water; and the rules of ownership applicable thereto were confined chiefly to situations where the formation occurred within a river. The earliest writers on international law borrowed the principle of *alluvio*, in so far as it was applicable to international disputes relating to newly made lands. Inasmuch, however, as those disputes related to broader problems than those for which the Roman law made provision, the term *alluvio* was incapable of describing generally either a process or a legal principle concerning the acquisition of newly made lands, however and wherever formed. The author acknowledges his indebtedness to Prof. Roscoe Pound and to Prof. Albert Kocourek for guidance enabling him to make this statement.

[3] Opinion of Sir William Scott, in The Anna, 5 C. Rob. 373, 385b–385d; Opinion of Mr. Justice Holmes, in Ker *v.* Couden, 223 U. S. 268, concerning the public ownership of accessions by accretion on the ocean coast in the Philippine Islands.

and perceptible growth, manifesting an instance of avulsion rather than accretion.[1]

When, however, new land comes into being along the shore of a river constituting an international boundary, the facts to which its existence are attributable may have significance. Even in such a situation causes productive of accretion seem to have no effect upon the creation of a right of property and control in favor of the State to whose territory such land is appendant, subject to the general limitation that no riparian proprietor may by its own acts, as through artificial works, lawfully alter the boundary.[2]

When new lands are gradually and imperceptibly formed within the course of a river, whether attached either to the shore or arising as islands, the right of sovereignty is in that State on whose side of the boundary line the formation occurs.[3]

§ 106. Conquest. (5)

The term conquest appears to be used to refer to at least two distinct processes or activities: first, that by which a military commander in time of war gains possession of hostile territory and subjects it and its occupants to his control;[4] and secondly, that by which a victorious belligerent compels its enemy to surrender the sovereignty of territory belonging to it.

It is not believed that conquest indicates a mode by which a right of sovereignty comes into being, or by virtue of which an existing one is transferred.[5] If the inhabitants of the territory concerned are an uncivilized people, deemed to be incapable of possessing a right of property and control, the conqueror may, in fact, choose to ignore their title, and proceed to occupy the land as though it were vacant. In such case the conquest refers merely

[1] Thus it is possible where land comes into being on the ocean coast by some sudden act of violence, however induced, for a right of property and control to be created simultaneously. That the case is one of avulsion rather than of accretion seems to be unimportant.

It should be observed that the litigated cases in the United States and elsewhere, which do not involve decisions as to the extent of the right of a maritime State under international law to assert, as against any other State, sovereignty or ownership over new lands which are added by various processes to its ocean coast, are not to be regarded as purporting to mark the limits of the claim.

[2] See Thalweg, *infra*, § 138.

[3] St. Louis *v.* Rutz, 138 U. S. 226, 250, 251. Also, Islands, *infra*, § 139.

[4] Story, J., in United States *v.* Rice, 4 Wheat. 246, 254. Declares Oppenheim: "Conquest is the taking possession of enemy territory through military force in time of war." 2 ed., I, § 236.

Belligerent Occupation, Nature and Effect, *infra*, § 688.

[5] Westlake, "The Nature and Extent of the Title by Conquest", Collected Papers, 475, reprinted from *Law Quar. Rev.*, XVII, 392–401.

to the military or physical effort by means of which occupation becomes possible. If, on the other hand, the vanquished enemy is a State, or a country whose exclusive rights as sovereign over the territory have been respected, the conqueror is not, at least at the present time, regarded as deriving rights of property and control from the military achievement. Although the victor may be able to bring about a transfer of rights of sovereignty by some appropriate action, the bare possession of such power does not suffice to effect a change. The State whose armies have gained control of enemy territory and occupied it may have no design of doing more. In such case it would be unreasonable to shift the title, and transform the conqueror into the territorial sovereign, even against its will. Thus in practice, upon the withdrawal of a belligerent occupant, the normal government of the State resumes automatically the exercise of its rights as sovereign which are deemed to have been suspended rather than transferred during the period of occupation.[1]

If, however, the conqueror so desires, it may, in theory, retain as the fruits of victory the territory which is held, and acquire the sovereignty thereof. The common method of so doing is by compelling a transfer embodied in an appropriate treaty.[2]

The conqueror may in fact resort to a different procedure. It may formally annex the occupied yet hostile territory to its own domain. By so doing it announces to the outside world both the design to acquire the rights of property and control over the

[1] Referring to the belligerent occupation by Great Britain of Castine during the war of 1812, Mr. Justice Story declared in the case of the United States *v.* Hayward: "It could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign." 2 Gall. 485, 501. Marshall, C. J., in The American Insurance Company *v.* Canter, declared: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace." 1 Pet. 511, 542. *Cf.*, also, United States *v.* Rice, 4 Wheat. 246, 254; Fleming *v.* Page, 9 How. 603, 614–616.

"It is quite true that down to the middle of the eighteenth century the practice of belligerent nations was in accord with the theory that all kinds of property, coming into the hands of one of the parties to the war, vested in him as conqueror and were subject to his absolute disposal, so that he might even alienate or cede the occupied territory while the issue of hostilities remained undecided. [*Citing* Hall, Int. Law, 4th ed., 482 *et seq.*] But since that period this rule has been either abandoned or subjected to very considerable limitations both in theory and in practice." Moore, Arbitrations, II, 1607.

[2] Thus in concluding peace with Spain in 1898, the United States secured by cession rights of sovereignty over territory which was then within its possession. See, for example, Art. II of treaty with Spain, of Dec. 10, 1898, Malloy's Treaties, II, 1691.

area involved, and the achievement of that end solely by its own act. This process is described as subjugation.[1] It betokens not only the acquisition of rights of sovereignty by virtue of sheer power, but also unconcern on the part of the conqueror as to the lack of any agreement manifesting acceptance of the change by its foe.[2] Subjugation, in so far as it is employed with respect to territory already subjected to rights of property and control by the country which is ousted therefrom, cannot be regarded as indicative of a method by which a right of sovereignty comes into being or is created. It manifests rather a mode by which an existing right of property and control is taken away from one State (possibly by its very extinction) and lodged in another.

It seems important to observe that at the present time there appears to be much less interest on the part of the family of nations in the mode, howsoever described, by which a conqueror compels its enemy to yield rights of sovereignty, than in the fundamental inquiry whether the conqueror should be deemed to possess a right, limited solely by its power to enforce its will.[3] Inasmuch as it is in connection with the transfer rather than the creation of rights of property and control that the problem arises, it is discussed elsewhere.[4]

b

Succession

(1)

Cession

(a)

§ 107. In General.

Cession is a process by which rights of property and control are transferred by one State to another. The terms of transfer

[1] Oppenheim, 2 ed., I, §§ 236–241. "As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation." Hall, Higgins' 7 ed., § 204.

[2] "Thus after the war with Austria and her Allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main, and Great Britain subjugated in 1900 the territories of the Orange Free State and the South African Republic." Oppenheim, 2 ed., I, § 239.

In the course of its war with Turkey, Italy, by a law of February 25, 1912, following a Royal Decree of November 5, 1911, annexed Tripoli and Cyrenaïca, placing them under its full sovereignty. *Collezione Celerifera*, 1912, p. 82.

[3] Declared President Wilson in an address before the Congress Jan. 8, 1918: "The day of conquest and aggrandizement is gone by." Official Bulletin, Vol. II, No. 202.

[4] Cession, Validity, The Principle of Self-Determination, *infra*, § 108.

are embodied in an agreement which commonly assumes the form of a treaty. There is always manifested an act of surrender by a grantor, and one of acceptance by a grantee. In this respect cession differs from relinquishment, a process which is perfected by the appropriate act of the relinquisher, and which thus obviates the necessity of action by a grantee.[1]

An act of cession may not in fact be described as such in the agreement which sets forth the transfer. Any terms suffice which express the design of a grantor to give over its rights to a grantee, and of a grantee to take what is yielded.[2] The interested parties are not, however, likely to have recourse to a treaty purporting to be one of cession unless it is agreed that the right of sovereignty has not already been transferred to the proposed grantee by some other process, and that it is desirable, if not essential, that there be a formal surrender of that right by a grantor. A cession usually implies, therefore, respect for the actual as well as theoretical lodgment of rights of property and control in the State called upon to divest itself thereof. When in consequence of the operations of a war those rights have been in fact wrung by force from a vanquished State, the only requirement at the conclusion of the conflict may be some appropriate acknowledgment of what has taken place.[3]

[1] Relinquishment, *infra*, § 115.

[2] The treaties by virtue of which the United States has acquired rights of sovereignty through acts of cession on the part of foreign States have commonly referred to the mode of transfer as one of cession. As a recent instance, *cf.* Art. I of convention with Denmark of Aug. 4, 1916, providing for the cession of the Danish West Indies, U. S. Treaty Series, No. 629, *Am. J.*, XI, Supp., 53. It should be noted, however, that the treaty of peace with Mexico of Feb. 2, 1848 (Guadalupe Hidalgo), whereby the United States acquired much territory from Mexico, merely referred to the transfer by a declaration (Art. V; Malloy's Treaties, I, 1109) indicating how the new boundary should run. In another portion of the same treaty reference to the transfer was made in connection with the treatment to be accorded "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty." Art. VIII.

[3] In the treaty of peace with Germany of June 28, 1919, the new boundaries of that State were minutely described so as to exclude (subject to specified reservations) from Germany the territory contiguous thereto and of which the sovereignty was, by any process, deemed to be transferred. (Part II, Arts. 27–30.) Acts amounting to cession were elsewhere variously described. By Art. 45 there was a definite cession of the coal mines in the Saar Basin to France. There was also an agreement to cede "all rights and title" to France over such part of the Saar Basin as might be specified by the League of Nations, in the event of a decision of the inhabitants thereof in favor of union with France at the termination of fifteen years from the coming into force of the treaty. (Chap. III of Annex following Art. 50.) According to Art. 51, the territories of Alsace-Lorraine, which had been "ceded" to Germany in 1871, were "restored to French sovereignty" as from the date of the armistice, Nov. 11, 1918. In numerous Articles it was declared that Germany "re-

(b)

Validity

(i)

§ 108. The Principle of Self-Determination.

The validity of a transfer of rights of sovereignty as set forth in a treaty of cession does not appear to be affected by the motives which have impelled the grantor to surrender its rights. Such action may have been induced by fear of the consequences of resisting the demands of a victorious foe, or merely by the offer of the grantee to pay an ample price for the territory concerned.[1]

nounces all rights and title over the territory" within specified limits, "in *favor of*" *a particular State, or in that of the principal Allied and Associated* Powers.

Obviously a so-called renunciation, even in favor of a particular party, signifies nothing more than the yielding to that party of a claim of right, valid or invalid, and for what it is worth, with respect to the territory concerned. It is the understanding of the parties in the light of the circumstances of the particular case, which must determine whether the act of renunciation constitutes a mode by which existing rights of sovereignty are transferred, or is merely a convenient method of waiving claims adverse to a transfer already effected, and of acknowledging its validity. In the German treaty of peace the renunciations appear oftentimes to have been regarded as amounting to cessions. This seems to have been the case, for example, with reference to the renunciation in favor of the Czechoslovak State of rights and title over a defined portion of Silesian territory (Art. 83), as well as that in favor of Belgium over the specified territory of Prussian Moresnet (Art. 33), and that in favor of the principal Allied and Associated Governments over the territory embracing the City of Danzig (Arts. 100 and 108). In certain other cases, however, where the agreement to renounce was followed by arrangements for a plebiscite, the definitive transfer of sovereignty was apparently to await the manifestation of the popular will, and then to be established by a new and appropriate frontier. (*Cf.* for example, Arts. 34–37, respecting the Kreise of Eupen and Malmédy.) In the case of Schleswig the very renunciation was limited in scope to territory north of a line to be fixed in conformity with the will of the inhabitants. (Art. 110.) It should be observed that one of the later and important financial clauses (Art. 254) provided that "the Powers to which German territory is ceded" shall undertake to make certain payments. Reference to this undertaking was constantly made in earlier portions of the treaty in connection with Articles declaratory of renunciations of rights and title. See, for example, Art. 39 (renunciations to Belgium), Art. 86 (renunciations to the Czechoslovak State), and Art. 92 (renunciations to Poland).

According to Art. 119, Germany renounced in favor of the principal Allied and Associated Powers all her rights and titles over her overseas possessions. This general renunciation was doubtless regarded as equivalent to cession. Generally speaking Germany seems to have been called upon, in accepting the terms of the treaty, to renounce her rights and title over territory as a means of transferring lands of which she was then acknowledged to be the *de jure* sovereign, whether or not they had then been wrested from her possession, and as a means also of facilitating the transfer of those to be subjected to the operation of a plebiscite, and with respect to which the final determination of the question of sovereignty was temporarily to remain in abeyance.

[1] *Cf.* Agreements between States, Validity, Consent, *infra*, § 493.

According to the practice of States up to the beginning of the twentieth century, no requirement of international law was deemed to forbid or denounce as internationally illegal a transfer which was opposed by the inhabitants of the territory ceded.[1] Nor were any particular grounds of opposition regarded as constituting a legal obstacle deterring a proposed grantee from acquiring what it desired, especially as the fruits of victory. Little heed was paid to the question whether lands occupied by inhabitants of a single race or nationality should, notwithstanding their opposition, be transferred to a foreign State whose territory was contiguous, and whose nationals inhabiting it were of an alien race. Nor was any economic detriment to the territory to be transferred, however certainly to be anticipated as the consequence of cession, believed to offer a decisive ground for restraint. In a word, the national domain of a State, regardless of the character or degree of civilization of the occupants, and in spite of the requirements of their race or their vital economic needs, was oftentimes dealt with as property subject to exploitation, so long as the individuals in control of the reins of government could be persuaded or compelled to conclude and ratify an appropriate treaty. It was not supposed that any equities of the inhabitants, although due to natural aspirations based upon the most solid ethnological and geographical foundation, were entitled to respect by the conqueror demanding the cession of coveted lands.

Such equities and the theory to which they gave birth sprang, however, from fundamental principles of justice, and, therefore, could not be obliterated even when they were ignored. Moreover, they took such deep root in the minds of peoples and nationalities who were oppressed by the prevailing practice, as to rebuke the whole family of nations for indolence, and to punish it for its unconcern.

It was the operation of the great European treaties of the nineteenth century which gradually led statesmen to see the error of their ways; but the light did not fully dawn upon them until the outbreak of The World War. Arrangements of the Congress of Vienna of 1815, of the Treaty of Frankfort of 1871, as well as the Treaty of Berlin of 1878, in assigning territory to alien rulers,

[1] According to Hall: "The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared." Higgins' 7 ed., § 9, p. 48, where the learned editor, writing in the year 1917, appends in a note the statement that "A plebiscite of the inhabitants of the ceded territory may be politically advisable, but is not legally necessary."

and with contempt for the ethnological and economic claims of the inhabitants, created causes of unrest which the lapse of time merely served to magnify. These not only defied reasonable hopes of permanent peace, in spite of the effort to preserve it by force of arms, but also encouraged war as the only potent means by which old and yet still festering wounds could be healed.[1]

Between the years 1914 and 1920, statesmen became fully aware of the disturbing effect upon the general peace which was likely to ensue if a victorious belligerent were permitted to suffer no restraint in enforcing the transfer to itself of hostile territories. The nature and extent of the equities of the inhabitants were perceived, and the value of respect for them as a means of preserving tranquillity was acknowledged. The welfare of the society of nations, in so far as it was associated with the removal of causes of war, was obviously opposed to yielding free rein to a conqueror. This general international interest became sufficiently acute to justify united effort in restraint of the individual State.

While it may be as yet premature to declare that recognition of the international interest has already sufficed to establish a rule of international law to the effect that the validity of a cession of territory depends, under any circumstances, upon the consent of the inhabitants thereof, recent events have afforded significant proof of the readiness of important States to respect such a principle. Nor is it to be doubted that their example and influence will develop a general practice serving to render internationally illegal attempts to disregard it, and to mark with precision the grounds on which the inhabitants of territory may reasonably invoke it.

It seems worth while at the present time to observe certain recent and notable manifestations of regard for the principle, embracing the attitude of certain American statesmen concerning it.

Following the proposal of Mr. Blaine, then Secretary of State, the International American Conference convening at Washington, 1889–1890, adopted a resolution denouncing the validity of cessions of territory made under threats of war or in the presence of an armed force.[2]

[1] See, in this connection, Sir Walter G. F. Phillimore, Bart. (now Lord Phillimore), Three Centuries of Treaties of Peace and Their Teaching, London, 1917.

[2] Moore, Dig., I, 292. Also, Mr. Blaine, Secy. of State, to Mr. Trescot, No. 2, Dec. 1, 1881, with respect to the right of a conqueror to demand a cession of territory from its foe, For. Rel. 1881, 143. *Compare* Mr. Sherman,

In his address to the Congress, January 8, 1918, announcing fourteen points as a proposed basis for peace, President Wilson declared that the adjustment of colonial claims should be based upon a strict observance of the principle "that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined." [1] In an address at New York, September 27, 1918, he announced that one of the issues of the existing war was, whether the military power of any nation or group of nations should be suffered to determine the fortunes of peoples over whom they had no right to rule except the right of force.[2]

The treaty of peace with Germany of June 28, 1919, reflected in some degree these views. Thus there was express recognition of the moral obligation to redress the wrongs done by Germany in 1871, both to the rights of France and to the wishes of the population

Secy. of State, to Mr. Toru Hoshi, Japanese Minister, Aug. 14, 1897, MS. Notes to Japanese Legation, I, 533, 535, Moore, Dig., I, 274.

In his Annual Message of Dec. 1, 1899, President McKinley declared with reference to the cession of the Philippine Islands to the United States: "I had every reason to believe, and I still believe, that this transfer of sovereignty was in accordance with the wishes and the aspirations of the great mass of the Filipino people." For. Rel. 1899, xliv, Moore, Dig., I, 531.

[1] Official Bulletin, Jan. 8, 1918, Vol. II, No. 202. In the same address the President demanded in part the restoration of territories occupied by the enemy, the readjustment of the frontiers of Italy "along clearly recognizable lines of nationality", and the erection of an independent Polish State which should include the territories inhabited by indisputably Polish populations, and which through free access to the sea should enjoy an economic as well as political independence. Again, he urged that the relations of the several Balkan States should be determined by friendly counsels along historically established lines of allegiance and nationality, and that their political and economic independence and territorial integrity be duly guaranteed.

[2] Official Bulletin, Sept. 28, 1918, Vol. II, No. 424. It will be recalled that these two addresses of the President embodied the terms on which, subject to certain qualifications, the United States and the belligerent Powers associated with it announced a readiness to negotiate peace with Germany. *Cf.* communication of Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, in charge of German interests, Nov. 5, 1918, Official Bulletin, Nov. 6, 1918, Vol. II, No. 456, *Am. J.*, XIII, Supp., 95.

Again, in his statement of April 23, 1919, concerning the dispute over Fiume, President Wilson vigorously opposed any adjustment which would place that port in the hands of a Power whose sovereignty, if established there would, in his judgment, inevitably seem foreign rather than domestic, or identified with the commercial and industrial life which the port would serve. He said: "The interests are not now in question, but the rights of peoples, of States new and old, of liberated peoples and peoples whose rulers have never accounted them worthy of a right; above all, the right of the world to peace and to such settlements of interest as shall make peace secure. These, and these only, are the principles for which America has fought. These, and these only, are the principles upon which she can consent to make peace. Only upon these principles, she hopes and believes, will the people of Italy ask her to make peace." *Current Hist. Mag.*, X (Aug., 1919), Part I, pp. 405–407.

of Alsace and Lorraine, "which were separated from their country in spite of solemn protests of their representatives at the Assembly of Bordeaux." There was, accordingly, a restoration to French sovereignty of what had been ceded to Germany in 1871.[1] Appended to numerous Articles providing for the renunciation by Germany of its rights and titles over other specified areas, were arrangements for a plebiscite to determine whether the inhabitants desired that the territory concerned should remain under German sovereignty or pass to a foreign State.[2] It is understood that in the establishing of the preliminary boundaries of these areas, extraordinary effort was made by the Allied and Associated Powers to ascertain the ethnological and economic basis of the claims of the inhabitants.[3]

§ 109. The Same.

In a joint memorandum from the Governments of the United States, France and Great Britain, to the Government of Italy, of

[1] Art. 51 and the clause prefatory to it.

[2] On the western frontier of Germany provisions for plebiscites were made with respect to the Kreise of Eupen and Malmédy (Arts. 34–35), and the Saar Basin, at the termination of fifteen years from the coming into force of the treaty (Chap. III of Annex following Art. 50). On the eastern frontier provisions for plebiscites were made with respect to a portion of Upper Silesia (Art. 88, and Annex), and two specified areas of East Prussia (Arts. 94–97). According to Art. 109, the frontier between Germany and Denmark was to be fixed "in conformity with the wishes of the population", and to that end provision was made for a plebiscite in a definite area of Schleswig.

"All 'territories inhabited by indubitably Polish populations' have been accorded to Poland. All territory inhabited by German majorities, save for a few isolated towns and for colonies established on land recently forcibly expropriated and situated in the midst of indubitably Polish territory, has been left to Germany.

"Wherever the will of the people is in doubt a plebiscite has been provided for. The town of Danzig is to be constituted a free city, so that the inhabitants will be autonomous and not come under Polish rule, and will form no part of the Polish State. . . . .

"At the same time, in certain cases, the German note has established a case for rectification, which will be made; and in view of the contention that Upper Silesia, though inhabited by a two-to-one majority of Poles (1,250,000 to 650,000, 1910, German census), wishes to remain a part of Germany, they are willing that the question of whether Upper Silesia should form a part of Germany or of Poland, should be determined by the vote of the inhabitants themselves." Letter of M. Clemenceau in behalf of the Allied and Associated Powers, to Count von Brockdorff-Rantzau, President of the German Peace Commission at Paris, June 16, 1919, in reply to German counter-proposals, Misc. No. 4 (1919), Cmd. 258, 6–7; also *Current Hist. Mag.*, X, part 2, July, 1919, 27.

Compare, however, the German renunciations in favor of Japan with respect to Shantung, contained in Arts. 156–158.

[3] In this effort the United States played a conspicuous part. Commissions appointed by the American Delegation at the Peace Conference were sent to enemy territory, and there made investigations of archives and authentic documents relative to the validity and merits of geographical and ethnological claims.

December 9, 1919, in regard to the adjustment of the territorial dispute with the Serb-Croat-Slovene Kingdom, it was declared that "the broad principle remains that it is neither just nor expedient to annex as the spoils of war territories inhabited by an alien race, anxious and capable to maintain a separate national State." [1] Inasmuch as he deemed that revised proposals offered to the Jugoslav delegation by the British and French Governments January 14, 1920,[2] failed to adhere to this principle, partly because it demanded the acceptance as an alternative, of the Treaty of London of 1915, believed to be at variance with the idea of self-determination, President Wilson on February 10, 1920, made vigorous protest.[3] It was declared in his behalf that if it did not appear feasible to secure acceptance of the concessions offered in the memorandum of December 9, he would be obliged to "take under serious consideration the withdrawal of the treaty with Germany and the agreement between the United States and France of June 28, 1919", which were then before the Senate. Following a reply signed by the Prime Ministers of France and Great Britain, February 17, 1920, the President on February 24, 1920, addressed to them a note in which he declared it to be "the central principle fought for in the war that no government or group of governments

[1] For the text of the memorandum see Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3779.

[2] See Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3782, for a paraphrase of the proposals of Jan. 14, 1920. *Cf.* also inquiry of Mr. Lansing, Secy. of State, Jan. 19, 1920, *id.:* also statement of the French and British Prime Ministers of Jan. 23, 1920, communicated to Mr. Wallace, American Ambassador at Paris, for transmission to Mr. Lansing, *id.* It should be observed that the United States was not a party to the proposals of Jan. 14, 1920, and does not appear to have been informed as to their contents until the response elicited by Mr. Lansing's inquiry.

[3] Congressional Record, Feb. 27, 1920, LIX, No. 66, pp. 3783–3784. It was here said in part: "But if substantial agreement on what is just and reasonable is not to determine international issues, if the country possessing the most endurance in pressing its demands rather than the country armed with a just cause is to gain the support of the Powers, if forcible seizure of coveted areas is to be permitted and condoned and is to receive ultimate justification by creating a situation so difficult that decision favorable to the aggressor is deemed a practical necessity; if deliberately incited ambition is, under the name of national sentiment, to be rewarded at the expense of the small and the weak; if, in a word, the old order of things which brought so many evils on the world is still to prevail, then the time is not yet come when this Government can enter a concert of Powers the very existence of which must depend upon a new spirit and a new order. The American people are willing to share in such high enterprise, but many among them are fearful lest they become entangled in international policies and committed to international obligations, foreign alike to their ideals and their traditions. To commit them to such a policy as that embodied in the latest Adriatic proposals and to obligate them to maintain injustice as against the claims of justice, would be to provide the most solid ground for such fears. This Government can undertake no such grave responsibility."

has the right to dispose of the territory or to determine the political allegiance of any free people." [1] His position was that "the Powers associated against Germany gave final and irrefutable proof of their sincerity in the war" by writing into the treaty of Versailles, Article X, of the Covenant of the League of Nations, which was said to constitute an assurance that all the great Powers had done what they had compelled Germany to do — to forego all territorial aggression and all interference with the free political self-determination of the peoples of the world.[2] The President announced that he would make no objection to a settlement mutually agreeable to Italy and Jugoslavia regarding their common frontier in the Fiume region, provided that such an agreement was not made on the basis of compensations elsewhere at the expense of nationals of a third Power; and he suggested that the results of direct negotiations of the two interested Powers would fall within the scope of the principle of self-determination.

(ii)

§ 110. Dependent States as Grantors.

A dependent State, by reason of the relationship which it bears to the State on which it depends, doubtless lacks the right, without the consent of the latter, to cede territory. The agreement establishing that relationship may definitely refer to this fact. Such was the case in the treaty of May 22, 1903, declaratory of the fundamental relations to exist between the United States and Cuba, and fixing the status of the latter.[3]

[1] Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3786.

[2] It should be observed that in defending their proposals of Jan. 14, 1920, the British and French Governments adverted to the difficulty of reconciling ethnographic with other considerations in general treaties of peace, and declared that this was recognized by President Wilson and his colleagues. That ethnologic reasons could not be the only ones to be taken into account, was said to be "clearly shown by the inclusion of three million Germans in Czecho-Slovakia and the proposals so actively supported by the United States delegation for the inclusion within Poland of great Ruthenian majorities, exceeding three million five hundred thousand in number, to Polish rule."

[3] Art. I, Malloy's Treaties, I, 363; *cf.* Oppenheim, 2 ed., I, § 215. On November 28, 1907, a treaty was concluded in behalf of Belgium and the Independent State of the Congo, providing for the cession of the latter to the former. *Am. J.*, III, Supp., 73. See, also, a decree suppressing the foundation of the Crown, March 5, 1908, *id.*, III, 87; Belgian laws of Oct. 18, 1908, approving treaty of cession, and act additional thereto. *Arch. Dip.*, CVII, 291 and 293. It will be remembered that both the grantor and the grantee, at the time of the conclusion of the treaty, were neutralized States.

(iii)

§ 111. Belligerent States as Grantors.

A State engaged in war does not necessarily lack the right to make a valid cession of territory to a neutral.[1] There may be circumstances where, as between the neutral grantee and the enemy of the grantor, there are no equities in favor of the latter. This would appear to be true where the transfer of rights of property and control offered no interference with the military or naval operations of the belligerents. A different situation would arise, however, if the territory concerned were occupied by the enemy of the grantor, or were in its grasp, or were within the zone of hostilities. In such case the lands sought to be transferred by virtue of a treaty of cession would doubtless not be deemed to acquire a neutral character, and would continue to be regarded for belligerent purposes as hostile territory.

(c)

§ 112. Protection of Territory Pending Cession.

No right of sovereignty is transferred by virtue of a treaty of cession prior to the ratification of the agreement by both the grantor and the grantee.[2] The question may arise, however, whether the prospective grantee, after having entered into negotiations for the cession, and having authorized the signature of an appropriate treaty which has been duly ratified by the grantor, acquires any right to protect the territory concerned against external aggression. The United States appears to have taken the stand that where the grantor has, by its act of ratification made known to the grantee, placed it within the power of the latter to accept the contract by taking appropriate steps, it may, within the period of time allotted for ratification, share with the grantor the right of protection.[3] Such a claim is based on the

[1] "That the right of a neutral to procure for itself by a *bona fide* transaction property of any sort from a belligerent power ought not to be frustrated by the chance that a rightful conquest thereof might thereby be precluded. A contrary doctrine would sacrifice the just interests of peace to the unreasonable pretensions of war, and the positive rights of one nation to the possible rights of another." Mr. Madison, Secy. of State, to Messrs. Livingston and Monroe, Plenipotentiaries to France, May 28, 1803, Am. State Pap., For. Rel., II, 562.

[2] But see special message of President Tyler, May 15, 1844, respecting the nature of the right of the United States to protect Texas by virtue of a treaty which ultimately failed to receive the necessary approval of the Senate. Senate Doc. No. 341, 28 Cong. 1 Sess., 74–81, Moore, Dig., I, 274–275.

[3] On November 18, 1903, a convention was signed in behalf of the United

theory that it lies within the power of the contingent grantee to accept an unrevoked offer, and that at least before the expiration of a reasonable interval, outside interference tending to impair the value of the territory concerned may be justly thwarted.[1]

(d)

§ 113. Property Passing by Cession.

It is believed that on principle all public property of the grantor, and which by reason of its nature or use is to be fairly regarded as belonging within the territory ceded, should pass to the grantee. This would embrace property of whatsoever kind, whether movable or immovable, corporeal or incorporeal.

The matter is commonly adjusted by the terms of the treaty of cession. As these have oftentimes been of narrow scope, the omissions have given rise to controversy as to what the law of nations prescribed. Thus the treaties of the nineteenth century in which the United States was the grantee of territory, always acknowledged that various forms of public immovable property such as buildings, wharves, barracks, docks and other like structures, together with the public domain to which they were attached, were embraced in the cession.[2] Doubt remained, however, as

States and Panama, providing for the grant to the former in perpetuity of the use, occupation and control of a zone of territory in Panama, in order to facilitate the construction of an interoceanic ship canal. The convention was ratified by Panama Dec. 2, 1903; ratification was advised by the Senate of the United States Feb. 23, 1904; and the treaty was ratified by the President Feb. 25, 1904. For. Rel. 1904, 543. On December 11, 1903, Mr. Hay, Secretary of State, in the course of a communication to General Reyes of Colombia, said: "Although the treaty has not yet become law by the action of the Senate, there are already inchoate rights and duties created by it which place the responsibility of preserving peace and order on the Isthmus in the hands of the Government of the United States and of Panama, even if such responsibilities were not imposed by the historical events of the last fifty years." For. Rel. 1903, 279. See President Polk, Annual Message, Dec. 2, 1845, Senate Doc. No. 1, 29 Cong., 1 Sess., 5. Moore, Dig., I, 277; also other documents, *id.*, I, 274–280.

[1] It must be clear that under the circumstances stated in the text the grantor must be regarded as free to withhold its final approval of the agreement and incidentally to terminate all negotiations and abandon the transaction. When, however, the grantor remains indisposed to do so, and is ready at the appropriate time to exchange ratifications with the grantee when it shall have availed itself of the opportunity to complete the contract, there arises a situation when, with respect to other States, the position of the contingent or prospective grantee appears to be fortified.

[2] See, for example, Art. VIII of the treaty of peace with Spain, Dec. 10, 1898, Malloy's Treaties, II, 1692. *Cf.* also Art. II of treaty with France for the cession of Louisiana, April 30, 1803, *id.*, I, 509; Art. II of treaty with Spain respecting the cession of the Floridas, Feb. 22, 1819, *id.*, II, 1652; Art. II of treaty with Russia for the cession of Alaska, March 30, 1867, *id.*, 1522.

to the fate of heavy ordnance such as fixed cannon.[1] Moreover there appears to have been no design to include generally public movable property.

As a matter of expediency, in the normal case of a cession the terms of which are not dictated by the exigencies of war between the parties to the transaction, it is useful that the agreement should have the broadest possible scope, embracing all forms of the public property of the grantor, subject to such reservations as are specified. The convention between the United States and Denmark providing for the cession of the Danish West Indies, and concluded August 4, 1916, is illustrative. It was there announced that

In all of the foregoing Articles the cession embraced documents or archives referring exclusively to the sovereignty over the territory ceded. See especially the provisions in this regard in Art. VIII of the treaty with Spain of Dec. 10, 1898.

The same Article further provided that neither relinquishment nor cession, as the case might be, could "in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." *Cf.* Articles V and IX of the Russo-Japanese Treaty of Portsmouth, Aug. 23 (Sept. 5), 1905, For. Rel. 1905, 824.

[1] Art. II of the treaty of April 30, 1803, with France, contained no specific provision with reference to cannon, which, according to the subsequent action of the contracting parties, were not deemed to pass to the grantee. Moore, Dig., I, 281, and documents there cited. After the cession of the Floridas to the United States, the grantee permitted the removal of cannon. Permission was given in consideration of the release by Spanish authorities of the duty of provisioning the troops whose transportation to Spain had been undertaken by the United States. See documents, *id.*, 282–284, especially, Mr. Adams, Secy. of State, to Mr. Nelson, Minister to Spain, April 28, 1823, MS. Inst. U. S. Ministers, IX, 183, 227. The treaty of cession of Feb. 22, 1819, made no provision as to the matter. The inventories of property delivered to the United States in pursuance of Art. II of the treaty with Russia of March 30, 1867, providing for the cession of Alaska (which embraced all public buildings, fortifications and barracks), included certain forts with their armaments. Moore, Dig., I, 285, and documents cited. The Commissioners who negotiated the Spanish-American treaty of peace of Dec. 10, 1898, were unable to agree as to the disposition of certain public property of Spain in the Island of Cuba and adjacent Spanish Islands, consisting of artillery and fixed batteries and fortifications, as well as fixtures and other property thereto belonging. *Id.*, 287. The treaty contained no provision as to the matter. With respect, however, to heavy guns and armaments in the Philippines it was agreed that "Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, livestock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defences, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the meantime, purchase such material from Spain, if a satisfactory agreement between the two Governments on the subject shall be reached." Art. V, Malloy's Treaties, II, 1692. *Cf.* also, Moore, Dig., I, 288–289, and documents cited.

This cession includes the right of property in all public, government, or crown lands, public buildings, wharves, ports, harbors, fortifications, barracks, public funds, rights, franchises, and privileges, and all other public property of every kind or description now belonging to Denmark together with all appurtenances thereto.

In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded, and which may now be existing either in the islands ceded or in Denmark. Such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required, shall be at all times given to the United States Government or to the Danish Government, as the case may be, or to such properly authorized persons as may apply for them.[1]

It was agreed, however, by way of reservation, that the arms and military stores existing in the islands at the time of the cession and belonging to the Danish Government, should remain its property, and be removed by it, unless part of it were sold to the United States.[2] It was likewise agreed that the movables, especially silver plate and pictures which might be found in the government buildings in the islands ceded and belonging to the Danish Government, should remain its property and be duly removed.[3]

§ 114. The Same.

According to the treaty of peace concluded with Germany June 28, 1919, the Powers to which German territory was ceded were to acquire "all property and possessions situated therein belonging to the German Empire or to the German States." The value of the acquisitions was to be fixed by the Reparation Commission, and paid by the State acquiring the territory to that

[1] Art. I, Treaty Series, No. 629, *Am. J.*, XI, Supp., 53.

[2] It was declared to be understood, however, that flags and colors, uniforms and such arms or military articles as were marked as being the property of the Danish Government should not be included in such purchase.

[3] Art. III. Also Art. II, where it was announced that "this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality, by municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the islands ceded.

"The congregations belonging to the Danish National Church shall retain the undisturbed use of the churches which are now used by them, together with the parsonages appertaining thereunto and other appurtenances, including the funds allotted to the churches."

Commission for the credit of the German Government on account of the sums due for reparation. The property thus described was to be deemed to include all the property of the Crown, the Empire or the States, and the private property of the former German Emperor and other royal personages.[1] In a word, the cession was to embrace every form of property, but subject to payment to be credited in diminution of the vast sums which by way of reparation Germany was obliged to undertake to pay. Such payments or credits were excepted, however, in the case of property in Alsace-Lorraine, in view of the terms on which that territory had been ceded to Germany in 1871, and in the case of property or possessions in lands ceded under the peace treaty to Belgium.[2] It was also provided that all property and possessions belonging to the German Empire or to the German States, within any of the former German territories, including colonies, protectorates or dependencies, administered by a mandatory (under the terms of the Covenant of the League of Nations), should be transferred with the territories to the Mandatory Power in its capacity as such, and that no payment should be made or credit given to Governments in consideration of the transfer.[3] Thus in general, while the terms of the several cessions were rendered broadly comprehensive, and that regardless of the various forms of property concerned, the duty to make compensation for what was transferred was made to depend upon, or arranged according to, the nature of the equities of the particular grantee as against the grantor, especially derived from the relation of such grantee to the territory ceded.[4]

[1] Art. 256. Also Art. 107, relative to property situated within the City of Danzig.

[2] Art. 256.

[3] Arts. 257, 120. *Cf.* Art. XXII of the Covenant of the League of Nations. It should be observed also that in Art. 92 of the treaty it was provided that in fixing under Art. 256 the value of the property and possessions belonging to the German Empire and to the German States within specified territory transferred to Poland, the Reparation Commission should exclude from the valuation, buildings, forests and other State property which belonged to the former Kingdom of Poland. These Poland was to acquire free of all costs and charges.

See also, the provision in Art. 130 respecting the cession to China of various forms of public property belonging to the German Government other than diplomatic or consular residences or premises, and situated in the German concessions at Tientsin and Hankow or elsewhere in Chinese territory. Also the specifications relative to German Governmental property in Shantung, and expressed in Arts. 156–158.

[4] It may be observed that certain clauses of the treaty made special provision for the surrender by the grantor to the grantee of archives and documents of every kind relative to the several forms of administration of the territory transferred. See, for example, Art. 38 relative to territory to be transferred to Belgium, Art. 52 relative to Alsace-Lorraine, and Art. 158 relative to Shantung.

(2)

§ 115. Relinquishment.

Relinquishment may be described as a process by which a State gives up its rights of property and control over territory, without simultaneously attempting to transfer them to another, or to designate its successor. Relinquishment is perfected by the appropriate act of the relinquisher. It does not contemplate the acceptance of any grant by a grantee.[1]

In a broad sense it may be said that a State relinquishes its rights of sovereignty over territory whenever, by any means, it gives them up or renounces its claim to them, whether, for example, by abandonment, or by the recognition of the independence of a former colony which has established by force its dominion over lands in its possession. The term relinquishment is believed, however, in so far as it refers to the succession to rights of sovereignty, to have a narrower and technical signification. In negotiations for peace with Spain in 1898, the Commissioners of the United States took the position that relinquishment occurs solely when a State or a country regarded as capable of exercising rights of property and control is the immediate successor to the title or thing relinquished. In this respect the process appears to differ sharply from that known as abandonment, which, as will be seen, is one whereby such rights become extinct.[2] Moreover, in the case of relinquishment, the relinquishing State may, until the moment of giving up its rights over the territory concerned, claim in fact to be the *de jure* sovereign thereof. Doubtless the validity of such a claim will depend upon the circumstances of the particular case. It must be clear, however, that relinquishment may betoken the surrender of actual rights of sovereignty, and that when it does, it marks the transfer thereof, and, simultaneously, the succession thereto.[3]

[1] This distinction was sharply drawn in the protocol of armistice between the United States and Spain of Aug. 12, 1898, as well as in the treaty of peace of Dec. 10, 1898, which provided for the Spanish relinquishment of the sovereignty over Cuba, and the cession to the United States of Porto Rico and other islands. Malloy's Treaties, II, 1688 and 1690. See, also, position taken by the American Peace Commissioners at Paris, in Annex to Protocol No. 5, of the Conference of Oct. 14, 1898, quoting Escriche, *Diccionario de Legislacion y Jurisprudencia*, as follows: "The relinquishment differs from the cession in that the latter requires for its completion the concurrence of the wills of the grantor and the grantee and a just cause for the transfer, while the former is perfect with only the will of the relinquisher. The effect of the relinquishment is confined to the abdication or dropping of the right or thing relinquished. The effect of the cession is the conveyance of the right to the grantee." Sen. Doc. 62, 55 Cong., 3 Sess. 1, 46, 47.

[2] Abandonment, *infra*, § 119.

[3] Thus there would appear to be no reason to employ the term relinquish-

(3)

§ 116. Prescription.

By operation of the principle known as that of prescription, the uninterrupted exercise of dominion over territory for a sufficient length of time by one State is deemed to destroy the value of adverse claims of sovereignty preferred by any other, and thus to clothe the occupant with such rights of property and control as may once have been vested in such a claimant.[1] These rights do not seem to come into being or derive their origin from prescription.[2] That term betokens rather the means by which they are transferred from a State not in fact exercising them to another which is in actual possession. It thus implies that when the existing occupant first entered into that possession, the territory was already subjected to a dominion which had been productive of rights of property and control, and was not, therefore, at that time *res nullius*, or available for acquisition by means of occupation.[3]

Respect for the principle of prescription prevents a State which may have long slept upon its rights, from retaining a solid claim to exercise them at the expense of a foreign occupant whose pos-

ment in a treaty designed to express the bare acknowledgment by a former sovereign of a transfer of rights of property and control already effected. After a successful revolution, the treaty of peace between the new State resulting therefrom and the former parent State logically suffices when it expresses recognition of the independence of the new State. See Revolution, *infra*, § 117.

[1] See, generally, Dana's Wheaton, 239, also Dana's Note No. 101; Hall, Higgins' 7 ed., § 36; Westlake, 2 ed., I, 94–96; Oppenheim, 2 ed., I, §§ 242–243; Eugène Audinet, "*De la Prescription Acquisitif en Droit International*", *Rev. Gén.*, III, 313; J. H. Ralston, in *Am. J.*, IV, 133; Rhode Island *v.* Massachusetts, 4 How. 591, 639; Handly's Lessee *v.* Anthony, 5 Wheat. 374, 376; Indiana *v.* Kentucky, 136 U. S. 479, 509–512; Virginia *v.* Tennessee, 148 U. S. 503, 522–524; Louisiana *v.* Mississippi, 202 U. S. 53–54; Maryland *v.* West Virginia, 217 U. S. 1, 41–44.

Cf. Mr. Olney, Secy. of State, to Sir Julian Pauncefote, British Ambassador, June 22, 1896, For. Rel. 1896, 232, 236, Moore, Dig., I, 297; Opinion of Mr. Ralston, Umpire in the Gentini Case, before the Italian-Venezuelan Commission, Ralston's Report of Venezuelan Arbitrations of 1903, 724; Opinion of Mr. Little, Commissioner, in Williams *v.* Venezuela, No. 36, United States and Venezuelan Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 4181.

"The doctrine of prescription is impliedly recognized in the various treaty stipulations which have been made for the joint occupation of disputed territory, one of their objects in such case being to negative the inference of title from long-continued possession by either party of a particular portion of such territory. See, as illustrations, the treaties between the United States and Great Britain of Oct. 20, 1818, Art. III, and Aug. 6, 1827, Art. I, in relation to Oregon." Moore, Dig., I, 296, note.

[2] *Cf.* Creation of Rights of Property and Control, In General, *supra*, § 98.

[3] British Guiana-Venezuela Boundary Arbitration, Counter-Case of Great Britain, British Blue Book, Venezuela, No. 2 (1899) [Cd. 9337], p. 114; Printed Argument presented on behalf of Venezuela, British Blue Book, Venezuela No. 6 (1899) [Cd. 9501], pp. 34–54.

session satisfies certain requirements which practice has demanded. The strength of the equities of the latter lies in the implied acquiescence in the condition of affairs which its own conduct in relation to the land concerned has produced.[1]

It is doubtless possible for a State to dispute actively the validity of its neighbor's claims of sovereignty over territory long in its possession and over which it was the first to establish a right of property and control by virtue of occupation never subsequently given up. Notwithstanding the ease or difficulty with which the occupant may be able to prove its case without recourse to the doctrine of prescription, the right to invoke and apply it may prove to be valuable as a means of barring a colorless adverse claim, and in discouraging its preferment.[2]

Recognition of the principle of prescription has been due to the importance attached to the maintenance of a stable condition of affairs among States. It has been deemed more desirable to the family of nations that an occupant long in possession should be suffered to remain in unmolested control, than that an adverse claimant, although unjustly deprived of possession, should retain its rights of sovereignty, unless it made constant and appropriate effort to keep them alive, and that by ceaseless protests against the acts of the wrongdoer.[3] Moreover, prior to The World War,

[1] Declared Field, J., in Indiana *v.* Kentucky: "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." 136 U. S. 479, 510. See, also, Argument of the United States before the Alaskan Boundary Tribunal (quoting Field, J., in Indiana *v.* Kentucky, 136 U. S. 479, 509–510, and Memorial of British Agent, June 11, 1817, in Proceedings of Commission under Article IV of the Treaty of Ghent, relating to the title to the islands in Passamaquoddy Bay), *Proceedings*, Alaskan Boundary Tribunal, V, 201–204; Oral Argument of Hon. Jacob M. Dickinson, in behalf of the United States, *id.*, VII, 831; Opinion of American Members of Tribunal, Messrs. Root, Lodge, and Turner, on Fifth Question, *id.*, I, 49 and 62–64. *Cf.* opinion of Lord Alverstone on Fifth Question, *id.*, I, 42.

[2] Don Luis de Onis, Spanish Minister, in a communication to Mr. Adams, Secretary of State, Jan. 5, 1818, concerning the disputed boundary of Florida, said in part: "The dominion of Spain in these vast regions being thus established, and her rights of discovery, conquest, and possession, being never disputed, she could scarcely possess a property founded on more respectable principles, whether of the law of nations, of public law, or any others which serve as a basis to such acquisitions as all the independent kingdoms and states of the earth consist of. The French themselves never disputed the rights of the Spaniards to possession and property, nor laid claim to these parts of the territories of the Spanish monarchy." Brit. and For. State Pap., 1817–1818, 425, 427, 436; Am. State Pap., For. Rel., IV, 455, 459.

[3] Grotius, *De Jure Belli ac Pacis*, *Lib.* II, *Cap.* IV, Secs. 1 and 9, Moore, Dig., I, 293; Vattel, Law of Nations, *Lib.* II, *Cap.* XI, Sec. 149; Moore, Dig., I, 294.

Declares Hall: "Instead of being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove their title,

neither the flagrancy of the injustice perpetrated through those acts, nor the methods employed, appeared to diminish respect for the claims of such a wrongdoer, provided it crushed opposition and silenced protest for a sufficiently long time.

It must be clear that it is uninterrupted and undisturbed possession implying full acquiescence on the part of the foreign and dispossessed claimant, which in theory serves to rob it of its rights and to lodge them in the actual occupant. What constitutes such possession must depend upon the circumstances of the particular case.[1]

There appears to be as yet no general and definite understanding among States concerning the length of time requisite for the establishment of a title by prescription. Grotius deemed a "possession beyond memory" (*possessio memoria excedens*) essential.[2] Possibly at the present day a possession well within the memory of living men might suffice. It has been wisely observed that, in view of the differing circumstances arising in the various cases where the doctrine is not unjustly invoked, no precise period of time can be fixed by international law.[3] In the rules agreed upon by Great Britain and Venezuela in 1897, in the adjustment of the boundary between British Guiana and Venezuela, it was declared that an adverse holding for a period of fifty years would establish a good title.[4]

or of persons purchasing in good faith from others not in fact in legal possession, the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right." Higgins' 7 ed., § 36.

[1] "Everything depends upon the merits of the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order." Oppenheim, 2 ed., I, § 243.

[2] *De Jure Belli ac Pacis, Lib.* II, *Cap.* IV, § 9; Moore, Dig., I. 293.

[3] "It is equally obvious and much more important to note that, even if it were feasible to establish such arbitrary period of prescription by international agreement, it would not be wise or expedient to do it. Each case should be left to depend upon its own facts." Mr. Olney, Secy. of State, to Sir Julian Pauncefote, June 22, 1896, For. Rel. 1896, 232, 236. "There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription; and no full definition of the degree of control which will confer territorial property on a nation has been attempted." Lord Salisbury to Sir Julian Pauncefote, May 18, 1896, *id.*, 228, 230.

[4] Art. IV, treaty between Great Britain and Venezuela, Feb. 2, 1897, Brit. and For. State Pap., LXXXIX, 57; Moore, Dig., I, 297.

In the Memorial, dated June 11, 1817, of the British Agent before the Commission under Article IV of the Treaty of Ghent, relating to the title to the Islands in Passamaquoddy Bay, it was said (p. 129): "The further uncontro-

Events leading up to The World War have sufficed to raise grave doubts whether respect for successions or transfers essentially wrongful to the inhabitants of the territories concerned can serve as a generally stabilizing influence conducive to peace; and the terms of final adjustment of that conflict have shown the determination of the successful belligerents to restore much that was deemed to have been unjustly taken by any process from a former sovereign and held by the enemy. The interval from 1871 to 1914 was all too brief to change the color of German sovereignty over Alsace-Lorraine; and the injustice wrought by the third and final partition of the Kingdom of Poland in 1795 was as keenly felt and as vigorously dealt with as if it had occurred a century later.[1]

In the future, opportunities for the acquisition of rights of property and control by virtue of prescription are likely to diminish in number and importance, partly because of the increasing opportunities open to an aggrieved State to voice formally its protests and so escape the charge of acquiescence, and partly also because of the tendency if not the resolution of enlightened States to attach little value to the equities of transferees whose claims are contemptuous of those of the inhabitants of the territory concerned despite long lapses of time. Thus the doctrine of prescription may be expected to be limited in its application and use to territorial differences involving comparatively narrow areas such as boundary disputes, and where the possessor invoking the principle relies upon a title which, although legally de-

verted fact, that under this mutual understanding of the treaty, the United States as well as the State of Massachusetts in the words of the late Agent of the United States before quoted '*remained silent spectators*' of the settlements and improvements made by His Majesty's Subjects upon these Islands with the above exception, during a period of more than twenty-three years with regard to one of them, and of more than thirty years with regard to all the others, will justly furnish an argument, that the United States have *no claim* at this day to any of those Islands." *Proceedings*, Alaskan Boundary Tribunal, V, 203.

[1] Thus in the formal reply of the Allied and Associated Powers of June 16, 1919, to the German counter-proposals relative to the treaty of peace, it was said in relation to the eastern frontiers of Germany, that two cardinal principles had been followed: first, the special obligation to reëstablish the Polish Nation in the independence of which it had been deprived more than a century before, and which, it was declared, was one of the greatest wrongs of which history had a record, and of which the memory and result had for a long time poisoned the political life of a large part of Europe, and was one of the essential steps by which the military power of Prussia had been built up, and the whole political life, first of Prussia and then of Germany, perverted. The second principle was that there should be included in the restored Poland those districts inhabited by an indisputably Polish population. Misc. No. 4 (1919) Cmd. 258, p. 12. See summary of text in *Current Hist. Mag.*, X, Part 2, 32–33. See also Art. 92 of the treaty of peace with Germany of June 28, 1919.

ficient in origin, is based upon something more respectable than conquest.

(4)

§ 117. Revolution.

Where by virtue of a successful revolution a new State comes into being, it necessarily succeeds to the rights of sovereignty over the territory which it occupies and which previously belonged to the parent State.[1] No act on the part of the latter is required in order to validate the succession. The new State is regarded as having perfected by its own achievement the transfer of rights of property and control. Thus ultimate recognition of its independence by the parent State, even if expressed in a treaty of peace and friendship, may not be deemed to constitute a cession or grant of the territory concerned. Through the operation of the American Revolution, the United States acquired for itself the rights of sovereignty previously exercised by Great Britain over the territories of its revolting colonies.[2]

c

Extinction

(1)

§ 118. Operation of Nature.

The loss by a State of its rights of property and control rarely involves their extinction. Commonly a State or a country deemed to possess the requisite capacity succeeds to what is given up. Under certain circumstances, however, these rights may become extinct. Such is the case when, for example, territory over which sovereignty has been exercised is, through the operation of nature, blotted out of existence or rendered forever uninhabitable by man.[3]

[1] "The United States regard it as an established principle of public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the parent country." Mr. Marcy, Secy. of State, to Mr. Dallas, July 26, 1856, MS. Inst. Great Britain, XVII, 1, 11, Moore, Dig., I, 303.

[2] Declared Johnson, J., in Harcourt *v.* Gaillard: "It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain by that treaty [of 1783]. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits, were as much theirs, at the declaration of independence as at this hour." 12 Wheat. 523, 527. Also, Henderson *v.* Poindexter's Lessee, 12 Wheat. 530; United States *v.* Repentigny, 5 Wall. 211; McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209, 212.

[3] Oppenheim, 2 ed., I, § 245.

(2)

§ 119. Abandonment.

Rights of property and control become extinct when, by a process known as abandonment, a State, as an incident of losing possession, gives them up, and no immediate successor is at hand to keep them alive. In such case the territory becomes *res nullius*, and is thereupon open to occupation by any other State.[1] In this respect abandonment differs, as has been observed, from relinquishment.[2] Circumstances indicating abandonment rarely occur.[3]

In 1895, the occupation by Great Britain of the Island of Trinidad was made the subject of protest by the Government of Brazil, on the ground that the latter's right of ownership of the island

[1] Hall, Higgins' 7 ed., § 34; Robert Lansing, "A Unique International Problem", *Am. J.*, XI, 763, in which there is discussed the legal situation applicable to the archipelago of Spitzbergen.

[2] At the Conference of Oct. 11, 1898, at Paris, of the Commissioners of the United States and Spain, appointed to conclude a treaty of peace, the Spanish Commissioners filed a memorandum maintaining that it was "imperative that the President of the United States should accept the relinquishment made by Her Catholic Majesty of her sovereignty over the Island of Cuba." Sen. Doc. No. 62, 55 Cong., part I, 40. This contention was based on the fact that the United States by the preliminary Protocol of Aug. 12, 1898, embodying the basis of the terms for the establishment of peace, had required Spain to agree to "relinquish" her title to Cuba, and had not demanded that she "abandon" it. *Id.*, 40. In their reply of Oct. 14, 1898, the American Commissioners said in part: "A distinction is thus made between a *relinquishment* and an *abandonment;* and it is argued that while '*abandoned territories*' become derelict, so that they may be acquired by the first occupant, '*relinquished territories*' necessarily pass to him to whom relinquishment is made. The American Commissioners are unable to admit that such a distinction between the words in question exists either in law or in common use. . . . The distinction thus drawn [by the Spanish writer, Escriche], not between *relinquishment* and *abandonment*, which are treated both in English and in Spanish as practically the same, but between *relinquishment* and *cession*, is written upon the face of the Protocol." *Id.*, 46, 47. It was the sole object of the American Commissioners to emphasize the fact that relinquishment and abandonment were alike, in that neither process required the acceptance of title by a grantee, and that in this respect both differed from cession. The Spanish Commissioners thereupon proceeded to argue that the relinquishment demanded by their adversaries involved all of the legal consequences of abandonment. *Id.*, 78–84. In later memoranda, however, the American Commissioners were careful to point out the fact that Cuba, upon the relinquishment of the Spanish title, would not become derelict and *res nullius*, and thus would not wholly resemble abandoned territory. *Id.*, 98–99. By implication, therefore, they recognized a distinction between abandonment and relinquishment, which was not shown in their earliest statement, quoted above. This distinction seems important.

[3] Concerning the dispute between France and Great Britain as to the Island of Santa Lucia, see Phillimore, 2 ed., I, 308, quoted in Moore, Dig., I, 298; Hall, Higgins' 7 ed., § 34. As to the controversy between Great Britain and Portugal, relating to territory at Delagoa Bay, see Hall, Higgins' 7 ed., § 34; also Award of Marshal MacMahon, July 24, 1875, Moore, Arbitrations, V, 4984–4985.

Respecting the claims against the United States by reason of its breaking up a piratical colony on the Falkland Islands in 1831, *cf.* Moore, Dig., I, 298–299, and documents there cited.

had never been given up. Abandonment, it was declared by the Brazilian Minister of Foreign Affairs:

> Depends on the intention of relinquishing, or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The fact of legal possession does not consist in actually holding a thing, but in having it at one's free disposal. The absence of the proprietor, neglect, or desertion does not exclude free disposal, and hence *animo retinetur possessio*. . . . Possession is lost *corpore* only when the ability to dispose of a thing is rendered completely impossible, after the disappearance of the status which permits the owner to dispose of the thing possessed.[1]

Evidence of either a definite intention of giving up the right of property and control with respect to territory at the disposal of the sovereign, or of a complete cessation of the effort to regain a control wrested from it by an uncivilized people not deemed capable of exercising such a right, would, on principle, seem to be necessary in order to prove abandonment. When the authorities of a State are expelled from territory belonging to it by the superior force of a native and uncivilized population, the loss of control doubtless minimizes the legal significance of intention. The hope and expectation entertained by the State of effecting a lodgment and regaining the mastery may not long suffice to keep alive any right of sovereignty. Even in such a case, however, a certain interval of time might fairly be allowed for the reëstablishment of actual dominion before regarding the right as extinct.

When a State appears voluntarily to have deserted territory the control of which constantly remains within its grasp, abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control.[2]

[1] Mr. Carvalho, Brazilian Minister of Foreign Affairs, to Mr. Phipps, July 21, 1895, For. Rel. 1895, I, 65, 66–67, Moore, Dig., I, 299–300. The acts on the part of Brazil indicating the continuance of its assertion of dominion over the Island, justified the concession of its rights therein by Great Britain.

[2] "But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete, an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following the withdrawal suggest the intention, or give grounds for reasonable hope, of return." Hall, Higgins' 7 ed., § 34.

Such a design might be established by evidence of long-continued and complete neglect of the territory, or of a formal and appropriate declaration of policy.

2

CERTAIN EFFECTS OF CHANGE OF SOVEREIGNTY

a

§ 120. In General.

The phrase "change of sovereignty" is here employed to describe the situation where one State succeeds to the right of exclusive control within and supremacy over territory possessed by another. Succession implies that rights of sovereignty are already in existence prior to the change, and their lodgment in a State, or a political community regarded as capable of exercising them, and whose title thereto is respected. When a State asserts dominion over territory occupied by an uncivilized people deemed to lack such capacity, no change of sovereignty is apparent. The occurrence is rather illustrative of the coming into being of rights of property and control through the act of an occupant.[1]

It is believed to be important to distinguish between the legal effect produced by a change of sovereignty and that resulting from the acquisition of what is gained by the transfer. Thus, for example, the question whether or not the cession of territory serves to terminate the operation of any laws within the ceded domain is wholly unrelated to that concerning the extent of the power of the grantee to legislate at will for the territory acquired. The one has reference to the direct consequence of the change of sovereignty itself, the other to the use of something attributable to what that change has already accomplished.

[1] Said Lord Kingsdown in the case of the Advocate General of Bengal *v.* Rance Surnomoye Dossee: "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of and subject to the same laws." 2 Moore's Privy Council, n. s. 22, Beale's Cases on Conflict of Laws, ed. of 1900, I, 67, 68.

"The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that so far as consistent with paramount necessities our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic Act of July 1, 1902, Ch. 1369, Sec. 12, 32 Stat. 691, all the property and rights acquired there by the United States are to be administered 'for the benefit of the inhabit-

It is necessary to observe with care the extent to which a change of sovereignty serves directly to burden the transferee of territory with the obligations of its predecessor. This is a problem of international law in the solution of which States have been confronted with a variety of considerations the influence of which has varied according to the circumstances of the particular case. The examination of existing practices may, therefore, tend to fortify belief that, save under a few narrowly defined circumstances, discord rather than harmony of view is still prevailing, and that there is lack of evidence of general agreement indicative of the nature and scope of duties to be regarded as possessing the character of law. The scientific value of any conclusions with respect to what interested States have deemed to be burdens legally imposed upon a new sovereign, or concerning the basis upon which rules of conduct should be formulated for future guidance, is believed to depend in no small degree upon the directness and persistence with which the attempt is made to perceive the immediate effect of a change of sovereignty, as distinct from that produced by other events.

b

§ 121. Effect on Legislative and Political Power.

A change of sovereignty serves directly to transfer to the new sovereign all legislative and political power with respect to the territory concerned.[1] Its predecessor is rendered incapable of performing any valid act in defiance of the supremacy of the transferee. Thus the former cannot lawfully alienate public lands or grant public franchises.[2] No valid disposition thereof can be made

ants thereof.' It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own." Holmes, J., in Cariño *v.* The Insular Government of the Philippine Islands, 212 U. S. 449, 458–459.

[1] "The mere acquisition by one country (A, for example) of the sovereignty over another country (B, for example) produces no other legal effect upon the latter than to give it a new sovereign, and consequently to substitute the legislature and the chief executive of A for those of B; but A and B will still be in strictness foreign to each other, each having its own government, laws, and institutions; and though the legislature and chief executive of each will be the same, yet they will act in an entirely different capacity when acting for B from that in which they act when acting for A." "The Status of Our New Territories", by Christopher C. Langdell, *Harv. Law Rev.*, XII, 365, 387.

[2] Harcourt *v.* Gaillard, 12 Wheat. 523; More *v.* Steinbach, 127 U. S. 70, 81; Ely's Administrator *v.* United States, 171 U. S. 220, 231; Alexander *v.* Roulet, 13 Wall. 386; opinion of Mr. Griggs, Attorney-General, 22 Ops. Attys.-Gen., 574, 577, where there is strangely attributed to the Supreme Court of the United States, in the case of Harcourt *v.* Gaillard, language not there employed by that tribunal.

except in pursuance of the authority of the new sovereign.[1] In applying this principle it may become expedient to provide in a treaty of cession that certain valid acts of the grantor prior to the transfer be not robbed of the effect which they were designed to produce, in consequence of circumstances attending or following the change of sovereignty.[2]

After the conclusion of a treaty of cession, and pending the actual transfer of possession to the grantee, the grantor is doubtless permitted to exercise authority necessary to maintain order and safeguard economic conditions within the territory concerned. During that interval (at least in the case of a treaty which is to take effect from the date of signature, and is ultimately confirmed by both parties) it may be regarded as burdened with the duty of impairing in no manner the value to its successor of its new domain. The Supreme Court of the United States has declared that while in such case "full sovereignty" does not pass to the State to which it is transferred until actual delivery, "it is also true, that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands."[3]

§ 122. Effect on Law.

"Law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty."[4] This principle has been recognized by American tribunals in its application to laws protecting the private rights

[1] More *v.* Steinbach, 127 U. S. 70, 81.

[2] See, for example, Art. VIII of treaty between the United States and Spain, of Feb. 22, 1819, providing for the cession of the Floridas, Malloy's Treaties, II, 1654.

[3] Davis *v.* Police Jury of Concordia, 9 How. 280, 289; United States *v.* Reynes, 9 How. 127; United States *v.* D'Auterive, 10 How. 609; Montault *v.* United States, 12 How. 47.

Concerning the authorization by the War Department, February 11, 1899, of persons holding the office of notary public in territories subject to military government by the military forces of the United States, to continue to hold such offices and perform the functions thereof, *cf.* Mr. Adee, Second Assist. Secy. of State, to Mr. Rooker, February 24, 1899, 235 MS. Dom. Let. 131, cited in Moore, Dig., I, 306, note.

Concerning the authorization of foreign consuls to continue to exercise their functions in the Hawaiian Islands, upon their acquisition by the United States, see Mr. Hay, Secy. of State, to Mr. Grip, Swedish Minister, November 17, 1898, MS. Notes to Swedish Legation, VIII, 109, Moore, Dig., I, 308. As to the provisional recognition of consuls in the Philippines and Porto Rico, upon their cession to the United States, *cf.* Moore, Dig., I, 309, note.

[4] Joseph H. Beale, Cases on Conflict of Laws, III. Summary, Sec. 9, *citing* Commonwealth *v.* Chapman, 13 Metc. 68.

"There can be no break or interregnum in law. From the time law comes into existence with the first-felt corporateness of a primitive people it must last until the final disappearance of human society. Once created, it per-

of the inhabitants of the territory concerned.[1] It is not believed that even the public laws of the former sovereign form an exception and are directly affected by the transfer. It is doubtless true that such laws as are at variance with the constitution and laws of the new sovereign cease to operate,[2] but the reason for such cessation is not to be ascribed to the bare change of sovereignty.

sists until a change takes place, and when changed it continues in such changed condition until the next change, and so on forever. Conquest or colonization is impotent to bring law to an end; in spite of change of constitution, the law continues unchanged until the new sovereign by a legislative act creates a change." J. H. Beale, Treatise on the Conflict of Laws, Cambridge, 1916, Sec. 131.

It must be clear that the construction placed upon the statutory law of the former sovereign by its tribunals prior to a change of sovereignty should be respected by those of its successor after the change. In this connection see Kealoha *v.* Castle, 210 U. S. 149.

[1] Marshall, C. J., in American Insurance Co. *v.* Canter, 1 Pet. 511, 542; Strother *v.* Lucas, 12 Pet. 410, 438; United States *v.* Power's Heirs, 11 How. 570, 577; Chicago & Pacific Ry. Co. *v.* McGlinn, 114 U. S. 452; Ortega *v.* Lara, 202 U. S. 339, 342; Vilas *v.* Manila, 220 U. S. 345, 357; Opinion of Mr. Griggs, Attorney-General, 22 Ops. Attys.-Gen., 526; In re Chavez, 149 Fed. 73; Note in *Harv. Law Rev.*, XIX, 131. *Cf.*, also, Calvin's Case, 4 Coke, Part VII, 3, 39; Blankard *v.* Galdy, 2 Salkeld, 411; Campbell *v.* Hall, 1 Cowp. 204.

"We take it to be a well-settled principle, acknowledged by all civilized States governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws regulating their social relations, duties, and rights are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority." Shaw, C. J., in Commonwealth *v.* Chapman, 13 Metc. 68, 71.

A law the operation of which is, in point of time, expressly or by implication limited to the life of a particular treaty, obviously ceases to exist upon the termination of the compact. That such termination may be brought about by a change of sovereignty over territory of one of the contracting parties, rather than by any other occurrence, is without significance. Doubtless it is possible for a law providing for the enjoyment of special privileges by a class of nationals of a foreign contracting party (such as its consular officers) to survive a treaty itself terminated through the operation of a change of sovereignty. *Cf.* For. Rel. 1896, lxvii, 117–135; *id.*, 1897, 152–154, respecting the steps taken by France, upon its annexation of Madagascar, to establish its judicial system in that Island and thereby to stop the exercise of judicial functions by American consular officers.

[2] "The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portion of the public domain, or to officers charged under the former government with that power." Field, J., in More *v.* Steinbach, 127 U. S. 70, 81.

"Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue." Fuller, C. J., in Ortega *v.* Lara, 202 U. S. 339, 442.

"That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution, or institutions of the substituted sovereign lose their force, is also plain." Lurton, J., in Vilas *v.* Manila, 220 U. S. 345, 357. See also, Holmes, J., in Panama R. R. *v.* Bosse, 249 U. S. 41, 44.

It is attributable rather to conditions which are in themselves consequences of that change. The very disappearance of the former sovereign with its distinctive and possibly arbitrary form of government leaves no room for the operation of laws designed to uphold it and contemplating its existence. Again, the fundamental law of the new sovereign may prevent it from accepting a grant of territory without either subjecting it to the application of certain organic institutions, or rendering inoperative existing statutes hostile to the spirit thereof.[1]

In such cases the change is due to circumstances which, operating simultaneously with the cession, produce an effect not unlike that of an amendatory legislative enactment; and it is to be assigned to the operation of the will of the new sovereign rather than to any other cause.[2]

The revenue laws of ceded territory do not appear to be affected by a change of sovereignty.[3] When, however, such territory is by

[1] A majority of the Supreme Court (consisting of Justices Gray, Brown, Shiras, White, and McKenna), in the case of Downes *v.* Bidwell, 182 U. S. 244, concurred in the proposition that — "The mere acquisition or cession of a region does not 'incorporate' it into the United States so as to subject it generally to those clauses of the Constitution which restrain and prohibit certain action by the Congress of the United States; but such regions may be temporarily governed, in some respects, at least, as seems most suitable for their own interests and those of the United States." James B. Thayer, "The Insular Tariff Cases in the Supreme Court", *Harv. Law Rev.*, XV, 164, 165.

See, also, the language of Mr. Justice White in Downes *v.* Bidwell, 182 U. S. 244, 306, 310–311, 314–315, 336; also that of Mr. Justice Brown, *id.*, 279, 285, 287; *compare* that of Chief Justice Fuller, *id.*, 373; and that of Mr. Justice Harlan, *id.*, 384.

Whether or not the constitution or public policy of a State which acquires territory by cession forbids the enforcement of a particular law of the former sovereign, is obviously not a question of international law, for the solution is dependent upon considerations wholly unrelated to the consequence of a change of sovereignty. New Orleans *v.* United States, 10 Pet. 662; Ortega *v.* Lara, 202 U. S. 339, 342.

[2] The supplanting of the Dutch control of Manhattan Island by that of the English in the seventeenth century was accompanied by a complete resettlement and change of laws by the latter in pursuance of the charter granted to the Duke of York by his brother, Charles II. Thus it became immaterial whether the Dutch possession was regarded as that of a military occupant temporarily suspending the common law of the *de jure* sovereign, or as that of an established government exercising fullest rights of sovereignty. Mortimer *v.* New York Elevated R. R. Co., 6 N. Y. Supp. 898.

"If territory containing a small body of people, not constituting a separate social community, is annexed to another country, the law of the latter country at once takes effect, since the new territory and inhabitants are by the annexation itself incorporated with the old, Chappell *v.* Jardine, 51 Conn. 64; but if the annexed territory contained a separate political society, their old laws would continue, as in the case of the annexation of Florida." Beale's Cases on Conflict of Laws, Summary, Sec. 10.

[3] Taney, C. J., in Fleming *v.* Page, 9 How. 603; Mr. Griggs, Attorney-General, 22 Ops. Attys.-Gen., 150. *Compare* Cross *v.* Harrison, 16 How. 164.

After France had acquired control over Madagascar in 1896, the new sov-

some domestic process incorporated into or united with the country of the grantee, those laws may be in fact changed. This is obviously due to the fact of incorporation however accomplished, rather than to the transfer of sovereignty.

In the case of Dooley *v.* United States, a majority of the Supreme Court of the United States concluded that the authority of the President as Commander in Chief of the Army, to exact duties in 1899, on imports from the United States to Porto Rico, ceased with the ratification of the treaty of peace with Spain, and that the right of free entry of goods into that island from the ports of the United States continued until Congress should properly legislate upon the subject.[1] The opinion of the Court made no reference to the legal effect of cession on the laws of ceded territory, although it was declared that the validity of the order of the President imposing duties upon goods imported into Porto Rico from foreign countries was not questioned.[2]

d

Effect on Public Debts

(1)

§ 123. In General.

Statesmen have found it an illusive task to determine what should be regarded as the effect produced upon the public debts of a State by a change of sovereignty over a part or all of its terri-

ereign enacted a law declaring Madagascar and its depending islands a French colony, and announcing that after the promulgation of that law French products imported into the island from France or one of her colonies would pay no duty, and that until the adoption of the definitive customs regulations, foreign goods would pay a duty of 10 per cent. *ad valorem*. It will thus be seen that it was by means of the act of the new sovereign and not as a consequence of a change of sovereignty, that the revenue laws of Madagascar were altered. U. S. For. Rel. 1896, 134–135.

[1] 182 U. S. 222. See, also, dissenting opinion of Mr. Justice White, *id.*, 236.

[2] The decision was due to the opinion that the President could not, for constitutional reasons, continue the exaction of duties imposed by him during the military occupation of Porto Rico after that island had been ceded to the United States pursuant to the ratification of the treaty. See well-considered note in *Harv. Law Rev.*, XV, 220.

The important opinions of the several Justices of the Supreme Court of the United States in the group of cases known as the Insular Cases, concern generally the relation of the Constitution of the United States to the territory ceded by Spain in the treaty of Dec. 10, 1898. They relate specifically to the extent of the legislative and administrative power of the new sovereign (Downes *v.* Bidwell, 182 U. S. 244; Dooley *v.* United States, 183 U. S. 151); or of its executive (Dooley *v.* United States, 182 U. S. 222); or to the application of existing revenue laws of such sovereign on imports from the newly acquired lands (De Lima *v.* Bidwell, 182 U. S. 1; Fourteen Diamond Rings *v.* United

tory. Divergent practices have been reflected in treaties of cession. Respecting the significance of those by which the successor to the sovereignty has assumed any measure of the burden of its predecessor, there has been controversy.[1] Writers who have denied that such agreements prior to The World War were indicative of a practice acknowledging a legal duty, have, nevertheless, admitted that the transfer of sovereignty oftentimes begets a moral obligation which may still be disregarded without impropriety. Such admissions reveal the course which the development of the law should follow. When it is perceived that a moral obligation rests upon a State to accept a particular burden with respect to any other of its nationals, there is at once apparent a solid reason for the claim that practice should shape itself accordingly and evolve a rule of law stamping evasion with an illegal character. It is appropriate, therefore, at the present time to observe with care not only what appears to be the evidence of legal duties recognized as such, but also the nature of equities which ought to affect the consciences and therefore limit the freedom of action of the transferees of territory.

The existence and extent of any duty causing a new sovereign to assume the public debt of its predecessor must be examined with reference to distinct lines of inquiry.[2] At the outset it is necessary to observe the relation which the territory subjected to transfer bears to the domain of the former sovereign; whether, for example, as in the case of the relinquishment by Spain of sovereignty over Cuba, the territory concerned is merely a part,

States, 183 U. S. 176). In one case, Dooley *v.* United States, 182 U. S. 222, the scope of the right of the President to exercise the powers of a military occupant preceding the ratification of a treaty of cession of territory, became a matter of adjudication.

[1] See, for example, Arthur B. Keith, Theory of State Succession, 60–65, in contrast with the views expressed by Max Huber in *Die Staatensuccession*. See, also, discussion in E. M. Borchard, Diplomatic Protection, § 83; Hall, Higgins' 7 ed., 94, note 1; Coleman Phillipson, Termination of War and Treaties of Peace, 322–326; Oppenheim, 2 ed., I, §§ 80–85.

[2] Documents in Moore, Dig., I, 334–385. See, also, in general, Henri Appleton, *Des effets des annexions de territoires sur les dettes de l'État démembré ou annexé, et sur celles des Provinces, Départements, etc., annexés*, Paris, 1894; Bonfils-Fauchille, 7 ed., §§ 222–228 (2); E. M. Borchard, Diplomatic Protection, § 83; Bluntschli, *Droit International Codifié*, 5 ed., French translation by Lardy, §§ 46–61; Arrigo Cavaglieri, *La Dottrina della Successione di Stato a Stato*, Pisa, 1910; Maurice Costes, *Des Cessions de Territoires*, Paris, 1914; Pasquale Fiore, International Law Codified, English translation by Borchard, §§ 157–158; Hall, Higgins' 7 ed., §§ 27–29; A. S. Hershey, "The Succession of States", *Am. J.*, V, 285; Max Huber, *Die Staatensuccession*, Leipzig, 1898, §§ 125–175; Arthur B. Keith, Theory of State Succession, London, 1907, Chap. VIII; Oppenheim, 2 ed., I, §§ 80–84; Coleman Phillipson, Termination of War and Treaties of Peace, London, 1916, 40–44, 322–326; Westlake, 2 ed., I, 74–83.

and a minor part, of that domain; or whether it is one of several parts into which the territory of a State has been split or divided; or whether, as in the case of the annexation of Texas, the territory transferred embraces the entire national domain of a State whose life as such is thus brought to an end.

As the character and design of a fiscal obligation will be found to play an important part, attention must be directed to the purposes for which a debt is incurred and to the steps taken for the benefit of the creditor to impress a debt upon a particular territorial area.

It must be clear that the validity of a debt is not decisive of the existence or scope of any duty to be borne by the transferee of territory. On the other hand, the circumstance that the laws and policy of the latter forbid the creation of a fiscal undertaking by the methods employed by its predecessor is not necessarily indicative of the obligation which may rest upon the new sovereign.[1]

Throughout the examination of theory and practice the inquiry presents itself whether there is an underlying principle which, regardless of the extent of its influence heretofore, marks the path which should be followed hereafter.

(2)

Change of Sovereignty over Part of the Territory of a State

(a)

§ 124. General Debts.

Where the territory of which the sovereignty has undergone a change is but a part of the domain of the State from which it is separated, it is commonly declared that the new sovereign is not burdened with any portion of the general indebtedness of its predecessor, and that because the personality of the latter is not extinct.[2] Doubtless this statement stands uncontradicted by any widely accepted and hence authoritative practice, especially where the territory transferred constitutes, according to any standard of measurement, a minor part of the domain of the former sovereign;

[1] Memorandum of the American Peace Commissioners at Paris, Oct. 27, 1898, Senate Doc. No. 62, 55 Cong., 3 Sess., Pt. II, 96, 100; Moore, Dig., I, 367.

[2] Hall, Higgins' 7 ed., § 27; Arthur B. Keith, Theory of State Succession, 60–62; Borchard, Diplomatic Protection, § 83; A. S. Hershey, "The Succession of States", *Am. J.*, V, 285, 289–291. *Compare* Fiore, International Law Codified, translation by Borchard, §§ 157–158.

and this may be admitted in the face of numerous treaties burdening the new sovereign with a portion of the obligation.[1] It is believed, however, that the underlying principle respecting the course which the new sovereign should follow has a broader basis than is thus disclosed.

There may be no extinction of the personality of a State by disintegration or dismemberment when a substantial portion of its territory amounting to as much as one quarter, one third or one half of its domain passes to a successor. In such case the general indebtedness may be normally deemed to be as closely and beneficially connected with the territory transferred as with that retained by the old sovereign.[2] It would be unjust to permit the

[1] For collections of treaties since the beginning of the nineteenth century where there has been an apportionment of the indebtedness of the former sovereign, see Max Huber, *Die Staatensuccession*, § 127; Moore, Dig., I, 339–343; Coleman Phillipson, Termination of War and Treaties of Peace, 324–326.

Among recent instances may be noted Art. X, of the Treaty of Lausanne, concluded between Italy and Turkey, Oct. 18, 1912, *Am. J.*, VIII, Supp. 58, 61, where it was declared that "The Italian Government pledges itself to pay annually to the treasury of the public debt for the Imperial Government a sum corresponding to the average of the sums which in each of the three years preceding that of the declaration of war have been assigned to the service of the public debt under the revenues of the two Provinces [Tripoli and Cyrenaïca]."

The Swedish-Norwegian agreements of October, 1905, providing for the separation of Sweden from Norway, made no provision for the debts of those countries. The texts of the treaties are published in *Am. J.*, I, Supp. 167.

The Treaty of Portsmouth between Russia and Japan of Aug. 23, 1905, providing for the cession to Japan of the Russian lease of Port Arthur, Talien and adjacent territory (Art. V), and of the southern part of the island of Saghalin and the islands adjacent thereto (Art. IX), made no mention of any public obligations of the grantor relating to what was ceded. The text of the treaty is contained in For. Rel. 1905, 824.

[2] In the case of Virginia *v.* West Virginia, 220 U. S. 1, the Supreme Court of the United States in determining the mode of apportioning the debt of Virginia between that State and West Virginia, reached the significant conclusion that where all expenditures for which the debt of a State is created have the ultimate good of the whole State in view, the whole State, and not the particular locality in which the improvements are made, should equally bear the burden. Declared Mr. Justice Holmes in the course of the unanimous opinion of the Court: "It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of

transferee to gain the benefits accruing to the territory acquired from the use of borrowed funds unless the obligation to make repayment were undertaken.[1] It will be seen that such a duty is acknowledged in certain cases where the debt is essentially a local one and the funds are employed for permanent improvements in the territory of which the sovereignty undergoes a change. This simply indicates that the evidence of the local benefit in a certain class of cases is sufficiently strong to make obvious the injustice of permitting the new sovereign to take the territory unburdened with the debt. It should not be admitted, that the evidence is necessarily inconclusive where the debt is a general rather than a local one. While there may be question as to which party should assume the burden of proof, it is believed that in the formulation of a rule of law designed to promote justice and, therefore, to command general approval, it should be laid down first, that the duty of the new sovereign to bear a portion of the debt of the old should be dependent upon the benefits accruing to the territory transferred; and secondly, that such benefits should not necessarily be deemed to be non-existent when the debt is general rather than local.[2]

value on hand. . . . All the expenditures had the ultimate good of the whole State in view." 29–30.

Cf. also, Coleman Phillipson, Termination of War and Treaties of Peace, 322.

[1] This principle which is believed to be accountable for the disposition of grantees on numerous occasions to apportion the general debt of a grantor, was given apparent recognition in Art. VI of the treaty of peace between Denmark on the one hand and Sweden, Great Britain and Russia on the other, concluded at Kiel, Jan. 14, 1814, in which it was declared that "as the whole debt of the Danish Monarchy is contracted as well upon Norway as the other parts of the Kingdom, so His Majesty the King of Sweden binds himself . . . to be responsible for a part of that debt, proportioned to the population and revenue of Norway. By public debt is to be understood that which has been contracted by the Danish Government, both at home and abroad. The latter consists of royal State obligations, bank bills, and paper money formerly issued under royal authority, and now circulating in both Kingdoms." *Rec. Supp.*, V, 666, 668–669. The translation is that given in Coleman Phillipson, Termination of War and Treaties of Peace, 324.

[2] It may be doubted whether the contention that the creditor must look to the State with which he contracts for repayment so long as its personality as such exists, is fairly responsive to the understanding of the contracting parties, at least in cases such as are suggested in the text.

The credit of a contracting State rests upon the sum total of its economic and political assets, of which its territorial domain and the resources thereof constitute the foundation. As that domain is essential to the very existence of the borrower as a State, and as the magnitude of the former determines the fiscal strength of the sovereign, it seems arbitrary to impute to a creditor an intention to look merely to the personality of that sovereign as a debtor for the repayment of a loan, when it is another circumstance, namely, the territorial possessions of the State which induced the creditor to lend. He might be fairly said to lend to territory as such controlled by governmental agencies, and to rely in special degree upon the indestructibility of the territory enabling those agencies to maintain a social organization and economic

Such a rule points itself to the situations where it would be inapplicable, and those, for sake of convenience, might well be agreed upon. Thus if a debt were incurred for a purpose essentially hostile to the interests of the territory transferred, as manifested by the opposition of a majority of the inhabitants or of the local authorities thereof to the creation of the fiscal obligation, or by the employment of the funds so obtained to hold in subjection those inhabitants, or to repress their endeavor to bring about the change of sovereignty actually resulting, the duty of apportionment would not arise. Again, where the territory transferred had previously been taken by the transferor from the transferee through conquest, there might be solid reason to contend that no part of the general indebtedness of that grantor incurred during the period while it was sovereign over the territory relinquished should be deemed necessarily beneficial to it.[1] In the case of a change of sovereignty over the territory of a distant colony or island constituting a relatively unimportant part of the domain of the parent State, or of which the fiscal system was an entity distinct from that of such State, it might be reasonable to deny that any part of the general indebtedness of the old sovereign should pass to the new.

These and other limitations, easily discernible and possibly

and political life therein. In this respect a loan to a State may perhaps be regarded differently from one to an individual where reliance is placed upon his general credit. It seems hardly reasonable to impute to a creditor a willingness to loan money to a State with no expectation of securing reimbursement from any source other than the original debtor in case a very large portion of its territory passes into the hands of a new sovereign.

In many cases the question as to the effect of a change of sovereignty does not enter the mind of the creditor at the time when the loan is concluded and the contract perfected. While this circumstance renders doubtful the wisdom of attempting to impute to him reasons which he did not then possess, although they might have exerted a decisive influence upon him had he been duly apprised of them, it does not forbid the inference that his conduct would have been surely affected in a definite way had he contemplated the contingency which later arose. It ought to be clear that it is unjust to presume that a creditor possessed an intention at the time the loan was contracted, both adverse to his interests, and one which in a particular case no prudent lender would have been likely to entertain. Illustrative of a contract indicating no contemplation of a change of sovereignty by the parties to the arrangement, see Serralles' Succession *v.* Esbri, 200 U. S. 103.

[1] This limitation would seem to apply in a case such as that respecting Alsace-Lorraine, especially in view of the fact that there was no apportionment of the national debt of France upon the cession of that portion of the French domain to Germany by the Treaty of Frankfort of May 10, 1871. It should be observed, however, that by the additional convention of December 11, 1871, Brit. and For. State Pap., LXII, 92, "Germany agreed to assume all pensions, civil, military, and ecclesiastical, due to persons who should retain their domicile in the ceded territory; to repay moneys deposited as security; and to recognize and confirm concessions for ways, canals, and mines, as well as contracts for the renting or cultivating of demesnial property." Moore, Dig., I, 341.

susceptible of classification, do not weaken the applicability of the underlying principle, or rob of its inequitableness the contention that the general indebtedness of a former sovereign confers upon the territory transferred no appreciable benefit capable of fair appraisal or just apportionment.[1]

Since the American Revolution the United States has on several occasions succeeded to the sovereignty over territory constituting a portion of the domain of another State. Treaties of cession have been concluded with France (1803), Spain (1819 and 1898), Mexico (1848 and 1853), Russia (1867) and Denmark (1916). No one of these has purported to impose upon the United States the obligation to assume any portion of the public debt of its predecessor. In certain instances the grantee has undertaken to pay claims of its citizens against the grantor;[2] and in the treaty with Denmark providing for the cession of the Danish West Indies, the maintenance of certain specified concessions was undertaken.[3] The treaty with Panama of November 18, 1903, granting to the United States in perpetuity the use, occupation and control of a zone of land for the construction and maintenance of an interoceanic canal, declared that the rights and privileges conferred were understood to be free from all anterior debts, liens, trusts, or liabilities, or concessions, or privileges to other governments, corporations, syndicates, or individuals, and that consequently all claims arising therefrom should be preferred against the Government of Panama rather than against that of the United States "for any indemnity or compromise which may be required."[4]

[1] According to the declaration of independence of the Czecho-Slovak Nation adopted by its Provisional Government at Paris, Oct. 18, 1918, it was announced that "Our nation will assume its part of the Austro-Hungarian pre-war public debt; the debts for this war we leave to those who incurred them." Official Bulletin, Oct. 19, 1918, Vol. II, No. 441, p. 3. See, also, in this connection *Board of Trade Journal*, London, Dec. 5, 1918, Vol. CI, new series, No. 1149, p. 720.

[2] See, for example, Art. IX, treaty with Spain, Feb. 22, 1819, Malloy's Treaties, II, 1654; Art. VII, treaty with Spain, Dec. 10, 1898, *id.*, 1692; Art. XIII, treaty with Mexico, Feb. 2, 1848, *id.*, I, 1113.

[3] Art. III, convention of Aug. 4, 1916, Treaty Series, No. 629, *Am. J.*, XI, Supp. 53, 55. It may be observed that Section 3 of this Article declared: "The pecuniary claims now held by Denmark against the colonial treasuries of the islands ceded are altogether extinguished in consequence of this cession and the United States assumes no responsibility whatsoever for or in connection with these claims. Excepted is, however, the amount due to the Danish treasury in account current with the West Indian colonial treasuries pursuant to the making up of accounts in consequence of the cession of the islands; should on the other hand this final accounting show a balance in favor of the West Indian colonial treasuries, the Danish treasury shall pay that amount to the colonial treasuries."

[4] Art. XXI, Malloy's Treaties, II, 1355.

§ 125. The Same.

The treaty of peace with Germany, of June 28, 1919, appeared to heed the principle of apportionment above advocated. According to Article 254, the Powers to which German territory was ceded undertook, subject to qualifications made in Article 255, to pay:

> (1) A portion of the debt of the German Empire as it stood on August 1, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the ceded territory, and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payment;
>
> (2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged, to be determined in accordance with the principle stated above.[1]

Such portions were to be determined by the Reparation Commission. The method of discharging the obligation, both in respect of capital and of interest, so assumed was to be fixed by that Commission. It was declared that such method might take the form, *inter alia*, of the assumption by the Power to which the territory was ceded of Germany's liability for the German debt held by its nationals.[2] Article 255 provided for exceptions to the above provisions. Inasmuch as, in 1871, Germany had refused to undertake any portion of the burden of the French debt, it was declared that France should be, in respect of Alsace-Lorraine, exempt from any payment under Article 254. In the case of Poland, that portion of the debt which, in the opinion of the Reparation Commission, was attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland was to be excluded from the apportionment. In the case of all ceded territories other than Alsace-Lorraine, it was provided that that portion of the debt of the German Empire or German States, which in the opinion of the Reparation Commission, represented expenditures by the Governments of that Empire or of those States

[1] Senate Doc. No. 49, 66 Cong., 1 Sess.

[2] It was provided, however, in this connection that in the event of the method adopted involving any payments to the German Government, such payments should be transferred to the Reparation Commission on account of the sums due for reparation so long as any balance in respect of such sums should remain unpaid.

upon government properties referred to in a later Article (256), should be excluded from the apportionment.[1] In the case of the former German territories, including colonies, protectorates or dependencies, to be administered by a Mandatory pursuant to the treaty, it was declared that neither the territory nor the Mandatory Power should be charged with any portion of the debt of the German Empire or States.[2]

It is not without significance that the principle of apportionment was applied to the general as well as local indebtedness of Germany, a result doubtless attributable to the opinion of the principal Allied and Associated Governments that both forms of obligation were to be deemed as closely and beneficially related to the territory transferred as to that retained by the former sovereign. The problem of making equitable distribution of the burden of the German pre-war debt, both imperial and state, was, however, essentially difficult and hardly capable of immediate solution. Therefore, it was left to the Reparation Commission.[3]

(b)

§ 126. Local Debts.

It seems to be acknowledged that obligations which are impressed upon the territory transferred in such a way as to be specially associated with it, and as manifesting at least no unbene-

[1] The reason for this last exclusion was that such properties were to pass to the grantees of territories ceded, and be paid for by them to the Reparation Commission for the credit of Germany, on account of the sums due by Germany for reparation. Art. 256.

According to Art. XXI of the treaty signed in behalf of the United States, the British Empire, France, Italy, and Japan, on the one hand, and Poland on the other, of June 28, 1919, Poland agreed to assume responsibility for such portion of the Russian public debt and other Russian public liabilities of any kind as might be assigned to her under a special convention between the principal Allied and Associated Powers, on the one hand, and Poland on the other, to be prepared by a commission appointed by the above States. It was declared that should the Commission not arrive at an agreement, the point at issue should be referred to the League of Nations for immediate arbitration. British Treaty Series No. 8, 1919, Cmd. 223.

[2] Art. 257.

[3] In the Reply of the Allied and Associated Powers of June 16, 1919, to the Observations of the German Delegation at Versailles, on conditions of peace, it was said: "The partition of the pre-war debt of the German Empire and of the German States will be made in proportion to the contributory power of the various ceded territories. The determination of this contributory power is obviously very delicate, in view of the diversity of fiscal systems in the different German confederated States. Therefore it has not been thought desirable to settle this question at present, and it has been left to the Reparation Commission to estimate which of Germany's revenues will make it possible to compare the resources of the ceded territories and those of the Empire." Misc. No. 4, 1919 [Cmd. 258], p. 38.

ficial connection therewith, pass to the new sovereign.[1] Difficulties arise, however, in determining what debts are to be deemed to possess such a character.

Where the proceeds of a debt are devoted to the erection of permanent improvements in the territory transferred, the connection with the place and the purpose of the expenditure suffice to indicate the reason for the assumption of the obligation by the new sovereign.[2] In such case the mode by which the change of sovereignty is effected is believed to be unimportant.

A State may loosely associate a public debt with the territory of a particular portion of its domain over which sovereignty is subsequently relinquished, as a means of raising funds for purposes unrelated to any definite local interest. In such a case where the funds are not locally employed, the debt is not to be regarded as peculiarly a local one. Any duty on the part of the transferee of the territory concerned must depend upon whether this item as a portion of the general indebtedness of the former sovereign is to be regarded as subject to apportionment. There may be great difficulty in concluding that it should be so treated.

There would clearly be no fiscal burden imposed upon the new sovereign in case the debt were incurred for a purpose distinctly

[1] "It seems to be the consensus of opinion among authorities on international law, that, upon the separation of part of a country from the sovereignty over it, debts created for the benefit of the departing portion of the country go with it as charges upon its government." Opinion of Attorney-General Griggs, July 26, 1900, 23 Ops. Attys.-Gen., 181, 187, *citing* Hall's Int. L., 4th ed., p. 98; Rivier, *Droit des Gens*, 1, pp. 70, 72; Calvo, *Le Droit Inter.*, 1, Sec. 101; 4, Sec. 2487; Phillimore's Int. L., 2 ed., Vol. 1, Part 2, Secs. 136, 137; The Tarquin, Moore on Arbitrations, V, 4617; Lawrence's Wheaton, pp. 53, 54; Wharton's Int. L. Dig., Sec. 5; *Anglo Saxon Review*, June, 1899, Mr. Reed's article concerning the Philippine debt, etc.; Dana's Wheaton's Int. L., Sec. 30, note; Glenn's Int. L., Sec. 28; Field's International Code, Secs. 24 and 26; Gardner's Institutes of Int. L., p. 52; Senate Doc. 62, 55 Cong., 3 Sess., Part 2, p. 50.

Mr. Frelinghuysen, Secy. of State, December 29, 1883, in a communication to Mr. Phelps, American Minister to Peru, declared that "The opinion of the United States heretofore has been that as the foreign obligations of Peru, incurred in good faith before the war, rested upon and were secured by the products of her guano deposits, Chile was under a moral obligation not to appropriate that security without recognizing the lien existing thereon." MS. Inst. Peru, XVII, 33, 35; Moore, Dig., I, 335. Prof. Westlake, in commenting on this despatch says: "There was perhaps no necessity to qualify the obligation as moral, where the guano deposits had been pledged as security." Int. L., 2 ed., I, 63.

See, also, Mr. Blaine, Secy. of State, to Mr. Cowie, June 15, 1885, 156 MS. Dom. Let. 1; Moore, Dig., I, 336; correspondence between the British Minister in Chile and the Chilean Minister of Foreign Relations, contained in U. S. For. Rel. 1888, Part I, 182–186; Moore, Dig., I, 336, note; text of Chilean-Peruvian treaty of peace of Oct. 20, 1883, For. Rel. 1883, 731.

[2] Oppenheim, 2 ed., II, Sec. 84; Coleman Phillipson, Termination of War and Treaties of Peace, 42, 326.

hostile to the interests of the inhabitants of the territory transferred. The United States so regarded the design with which Spain incurred the so-called Cuban debt prior to the relinquishment of sovereignty over Cuba. It was contended by the Spanish peace commissioners at Paris in 1898, that the United States should not only accept the cession of Cuba, but also assume responsibility for the payment of the Cuban debt.[1] In denying that the debt passed to the successor to the sovereignty, still less to the United States, the American commissioners were able to show that:

> The debt was contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interests of Cuba; that in reality the greater part of it was contracted for the purpose of supporting a Spanish army in Cuba; and that, while the interest on it has been collected by a Spanish bank from the revenues of Cuba, the bonds bear upon their face, even where those revenues are pledged for their payment, the guarantee of the Spanish nation.[2]

[1] Annex 2 to protocol 3 of conference of Oct. 7, 1898, Senate Doc. 62, 55 Cong., 3 Sess., Part II, 26; Moore, Dig., I, 351–352. In view of the terms of the peace protocol of Aug. 12, 1898, providing for the relinquishment rather than the cession of Cuba, the American commissioners had no difficulty in showing that the United States was under no obligation to become the grantee of that island.

[2] Senate Doc. 62, 55 Cong., 3 Sess., Pt. II, 100; Moore, Dig., I, 367. In the course of their memorandum the American commissioners declared that the finances of the island were exclusively controlled by the Spanish Government; that the debt was in no sense created by Cuba as a Province or Department of Spain, or by the people of the island; that the "debt-creating power, such as commonly belongs to communes or municipal corporations, never was delegated to Cuba." In examining the origin and history of the debt the American commissioners called attention to the fact that prior to 1861, no Cuban debt existed; that the surplus revenues of the island were not expended for its benefit but sent to Madrid; that from 1866 to 1868, a so-called Cuban debt had been created for imperial rather than for insular purposes, such as to meet the expenses of the attempt to reincorporate San Domingo into the Spanish dominions, and of the expedition to Mexico; that from 1868 to 1878, occurred the 10 years' war for Cuban independence, the expenses of which were imposed upon the island, so that in 1880, the so-called Cuban debt amounted to upwards of $170,000,000; that an attempt to consolidate these debts resulted in the creation of the so-called "*Billetes hipotecarios de la Isla de Cuba*", amounting to $124,000,000; that the Spanish Government undertook to pay the principal and interest of this out of Cuban revenues, but that on the face of the bonds "the Spanish nation" (*la Nación española*) guaranteed their payment; that the interest charge for the debt, amounting to $7,838,200 annually, was collected through a Spanish fiscal agency in Cuba, collecting daily from the custom-house at Habana upwards of $33,000; that in 1890, a new issue of bonds was authorized by the Spanish Government, amounting to $175,000,000, and similarly guaranteed for the purpose of refunding the existing debt, and to incur new indebtedness contracted after 1886; that only a portion of this last issue had been disposed of when the insurrection broke out in 1895; that the Spanish Government then proceeded to issue these bonds in order to raise funds with

Replying to the contentions of the Spanish commissioners that the bonds were mortgage bonds, the American commissioners called attention to the distinction between a pledge of revenues yet to be derived from taxation, and a mortgage of property. They adverted to the fact that the Spanish Government had itself always regarded the pledge of Cuban revenues as within its own control and capable of modification or withdrawal at will, without affecting the obligation of the debt. In proof of this they quoted the language of a decree of autonomy signed by the Queen Regent on November 25, 1897. Therefore, they concluded:

> No more in the opinion of the Spanish government, therefore, than in point of law, can it be maintained that that Government's promise to devote to the payment of a certain part of the national debt revenues yet to be raised by taxation in Cuba, constituted in any legal sense a mortgage. The so-called pledge of those revenues constituted in fact, and in law, a pledge of the good faith and ability of Spain to pay to a certain class of her creditors a certain part of her future revenues. They obtained no other security, beyond the guarantee of the "Spanish Nation", which was in reality the only thing that gave substance or value to the pledge, or to which they could resort for its performance.[1]

By reason of the nature of the debt, together with the known purposes for which it was created, it is believed that the position of the United States was unassailable.[2]

A State may endeavor to impress a debt upon territory of which the sovereignty subsequently undergoes a change, by making a definite pledge of revenues to be derived therefrom. The debtor may observe all of the requirements of its own law in the attempt to place irrevocably beyond its reach for any other purpose the source of revenue on which it is agreed that the creditor should rely as security for the loan. The creation of the lien may be in fact

which to overcome the revolution; that those outstanding Jan. 1, 1898, amounted to $171,710,000; that an additional war loan known as the "Cuban War Emergency Loan", amounting to $169,000,000 of 5 per cent. bonds, was thereupon floated; that although in these bonds no mention was made of the Cuban revenues, the issue was regarded as constituting a part of the Cuban debt, "together with various unliquidated debts, large in amount, incurred by the Spanish authorities in opposing by arms the independence of Cuba." Senate Doc. 62, 55 Cong., 3 Sess., Part II, 48–50; Moore, Dig., I, 356–359.

[1] See Senate Doc. 62, 55 Cong., 3 Sess., Part II, 201; Moore, Dig., I, 384.

[2] Declares Westlake: "When Cuba was emancipated from Spain by the Spanish-American War, it could scarcely be expected that either she or the United States should recognize the loans which Spain had charged on her for the cost of repressing the Cubans, during the long and intermittent struggle of which her emancipation was the close." Int. L., 2 ed., I, 78–79.

definitely manifested in the formal and valid undertaking of the obligor. The question presents itself whether upon the change of sovereignty such acts suffice to bind the transferee regardless of the purposes for which the funds are employed, and irrespective also of the consent of the inhabitants of the territory concerned. If it be admitted in a given case that such territory is sought to be utilized by the sovereign creating the debt because its resources offer a basis of credit, and without any design of employing the funds received within that territory, there is ground for the contention that the debt is a distinct detriment thereto. The detriment may be more obvious where those funds are used for a purpose sharply adverse to the interests of that territory, as in the attempt to suppress a revolution which proves successful and leads to the transfer of sovereignty which ensues. The issue in such cases is simply whether the endeavor to mortgage the resources of the territory subjects it to a burden otherwise not fastened upon it after the pledgor relinquishes its sovereignty.

The value of any pledge as such depends upon the success of the pledgor in putting beyond his own reach and contingently within that of the pledgee the valuable asset relied upon for the purpose of effecting the loan. A pledgor State necessarily encounters difficulty in following such a course, and that for the reason that its territory, if occupied by human beings, is not, like a mere chattel, to be subjected to such fiscal or other use as may suit the convenience or caprice of the existing governmental authority. On principle the resources of that territory should not be regarded as capable of complete hypothecation save under conditions which do not appear to be essentially adverse to the welfare of the occupants. Thus it is not believed that a pledgor State should be deemed to possess the power to fasten upon a portion of its own domain a financial burden admittedly hostile to the interests of the inhabitants thereof beyond the time when the territory ceases to be under the sovereignty of the pledgor.[1]

In applying such a principle great caution should be exercised in concluding that a pledge sought to be created is hostile to local interests. In each case the problem should be approached without bias. It must be assumed to be as reasonable for a sovereign to create a lien favorable to territory affected by it as to do otherwise. Possibly no habit on the part of impoverished States generally, if one should be found to exist, should suffice to justify any

[1] It is believed that this principle is likely to secure general recognition notwithstanding difficulties which may attend its application.

sinister presumption. Doubtless every circumstance shedding light on the fiscal policy of the pledgor State with respect to that portion of its domain upon which a lien was sought to be fastened, should be subjected to scrutiny, and particularly any evidence of the actual as well as avowed purpose of the borrower in incurring the debt.

It may be doubted whether a lack of proof of actual expenditures of the funds obtained within the territory burdened with payment should be regarded as a necessary indication of hostile design. It is conceivable that there might have been general local consent to a pledge of local revenues for the sake of the necessities of the country at large. Although it might be urged that in such case any local benefits derived from the pledge should be deemed to be limited in point of time to the period within which the burdened territory constituted a part of the domain of the pledgor, there might be reason for hesitation in acknowledging that the change of sovereignty should, in such a case, free the transferee of the territory from the obligation sought to be attached to it.[1]

It is not believed that the permanence of the association of a debt with a particular territory is necessarily affected by the mode by which a change of sovereignty is accomplished. In case a transfer is caused by the strong arm of a conqueror or by the success of a revolution, the principle applicable to the fiscal obligations of the new sovereign would not appear to differ from that obtaining in case of a cession not induced by force. The fact of conquest or revolution may, however, prove to be of significance as showing that a particular debt was incurred for the purpose of overcoming such manifestation of force, and should, therefore, be looked upon as adverse to the interests of the territory of which the sovereignty was changed by force. It may be that territory wrung by conquest from a weaker foe is burdened with a debt distinctly beneficial to local interests. In such event it is not believed that the new sovereign should escape the burden thereof.

(c)

§ 127. Certain Conclusions.

The distinction frequently laid down between the general and local debts of a contracting State has not always served a useful

[1] It would be logical in such a case, as has already been observed, to regard the debt as a part of the general debt of the former sovereign, and thereupon to inquire whether as a part of such an obligation there was evidence of such a local benefit as would give rise to a duty of apportionment.

purpose, for it has tended, in the case of the former, to encourage an assumption unduly favorable to the new sovereign, and in that of the latter, to suggest the imposition of an unjust or excessive burden. In neither case has it reflected closely the practice of States.

As the foregoing discussion has indicated, a general public debt may be not unreasonably deemed beneficial rather than otherwise to that portion of the national domain which is transferred by cession to a foreign State. Conversely, a public local debt may be distinctly hostile to the interests of the territory with which it is supposedly associated, and that regardless of the method employed to fix the burden of payment.

The conscience of the transferee of territory cannot be affected by fiscal burdens justly deemed harmful thereto; and whenever the evidence establishes that a public debt is of such a character, there is no solid reason for the assumption of the burden by the new sovereign. If the evidence shows that such a debt, however general, is not detrimental to the interests of the territory transferred, the situation is otherwise, and the transferee cannot evade the obligation without violating justice. In a word, the underlying reason for burdening the new sovereign with any portion of the fiscal obligation incurred by its predecessor depends upon proof of the benefits which have accrued to the territory transferred in consequence of the debt.

There is need of general agreement respecting the application of this fundamental test. There is required some understanding, possibly necessitating the formulation of rules for special guidance, indicative of what circumstances should be deemed to cause a debt to possess a character hostile to the interests of territory transferred, and what also should be regarded as certain tokens of a locally beneficial aspect.[1] The advantages derivable from an adequate response to this requirement, through the enhancement of the credit of borrowing States, and the safeguarding of the equities of prospective creditors, might be fully commensurate with the burden entailed by such an achievement.

[1] The success of the effort to formulate any rules worthy of general acceptation would seem to depend upon the opportunity offered to permit each factor in a particular case to be examined with reference to its bearing upon the question of local benefits. If there remains a tendency to place, for example, all so-called local debts in the same category, or to test the obligation of a new sovereign by the presence or absence of a single circumstance not itself decisive of the question of benefit, confusion of thought must result and grounds of disagreement be multiplied.

(3)

§ 128. Total Absorption of a State.

Where one State succeeds to territory constituting the entire domain of another, it is said that the new sovereign succeeds also to the general fiscal obligations of its predecessor.[1] The question arises, however, whether the liability so transferred is an unlimited one. Professor Westlake reached the conclusion that

> If the territory changing masters is merged for revenue purposes in that of the annexing State the liability of the latter will be unlimited, but if it is maintained as a separate fiscal unit, the obligations of the extinguished State, or those of the ceding State connected with the territory, will not pass over beyond the value of the assets received, including such taxation of the territory as it can reasonably bear without reference to the political convenience of the annexing State.[2]

The soundness of this distinction may be tested by the case of the Texan bonds.

The independent State of Texas became incorporated into the United States on terms providing that Texas should retain all the

[1] Hall, Higgins' 7 ed., § 29; A. S. Hershey, in *Am. J.*, V, 285, 286. Concerning the terms of the surrender of the forces of the South African Republic and the Orange Free State to the commander of the British forces in 1902, see Westlake, 2 ed., I, 80–82.

Hawaiian Debt: By a joint resolution of the Congress approved July 7, 1898, it was declared that — "The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States, but the liability of the United States in this regard shall in no case exceed $4,000,000. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said government shall continue to pay the interest on said debt." Senate Doc. 231, 56 Cong., 2 Sess., p. 7, 1016. According to a report of the Senate Committee on Foreign Relations on May 14, 1900, it was said: "This obligation upon the Hawaiian government [to pay interest] ceases when the government of July 7, 1898, is superseded by the government provided for in 'An act to provide a government for the Territory of Hawaii', approved April 30, 1900 — that is to say, 45 days after the approval of said act, to wit, June 15, 1900. See Sec. 104 of Act of Apr. 30, 1900. The interest after that date is left unprovided for, and should be assumed by the United States, if, indeed, it is not assumed by fair construction of the act of July 7, 1898." *Id.*, 1018–1019.

[2] Int. L., 2 ed., I, 77. The Treaty of Brussels of Nov. 28, 1907, providing for the cession to and annexation by Belgium of the Independent State of the Congo, declared in Art. I that — "The Belgian State hereby accepts this cession, takes over and accepts the obligations of the Independent State as set forth in Schedule A, and undertakes to respect the existing interests in the Congo, together with the legally acquired rights of third parties, native and non-native." *Am. J.*, III, Supp., 74.

See For. Rel. 1910, 677–685, respecting the succession by Japan to the sovereignty of Korea pursuant to the treaty of Aug. 22, 1910.

vacant and unappropriated lands lying within its limits, which should be applied to the payment of its debts and liabilities; and the residue of the lands, after discharging such debts and liabilities, were to be disposed of as the State might direct, the debts and liabilities of the State in no event to become a charge upon the United States.[1] The then existing indebtedness of Texas comprised bonds for the payment of which the former Republic, by appropriate legislation in 1836 and 1839, had pledged its national faith and its revenues.[2] Obviously no arrangement between the new sovereign and the old could affect the duty of the United States to foreign bondholders. That duty, whatever might have been its scope, was fixed by the law of nations.[3] Legislation in the United States of 1850 and 1855, was an attempt, for the protection of bondholders, to shift for a valuable consideration, from the State of Texas to the Union, the direct burden of the debt.[4] The method by which this was sought to be accomplished is without international significance. The American commissioners at Paris were justified in declaring in their memorandum of October 27, 1898, that:

> Texas was an independent State which yielded up its independence to the United States and became a part of the American Republic. In view of this extinction of the national sovereignty, the United States discharged the Texan debt.[5]

[1] 5 Stat. 798; Moore, Dig., I, 455.

[2] Moore, Arbitrations, IV, 3591–3594.

"Provision was also made by an act of January 22, 1839, that a certain portion of the sales of the public lands should be annually reserved as a sinking fund for the payment of the debt until the whole should be paid." Moore, Dig., I, 343.

[3] Westlake, 2 ed., I, 79.

[4] Act of Sept. 9, 1859, 9 Stat. 446, Moore, Dig., I, 344. Concerning the difficulty in carrying this law into effect, see Opinion of Mr. Cushing, Attorney-General, 6 Ops. Attys.-Gen., 130, Moore, Dig., I. 344–346. *Cf.* Act of Congress of Feb. 28, 1855, 10 Stat. 617–619; Moore, Arbitrations, IV, 3591–3594.

The failure of an English holder of a Texan bond in 1854, to establish a claim against the United States before the mixed commission organized under the convention of February 8, 1853, signified little, as the umpire dismissed the claim on technical grounds, "it being for transactions with the independent Republic of Texas prior to its admission as a State of the United States." Moore, Arbitrations, IV, 3591, 3594.

[5] Senate Doc. 62, 55 Cong., 3 Sess., Part II, 96, 104; Moore, Dig., I, 367, 372.

Attorney-General Griggs, Sept. 20, 1899, in reply to an inquiry of the Secretary of State whether certain claims against Hawaii, arising prior to its annexation and thereafter presented to the United States, were claims against the United States, and whether they should be referred to the Court of Claims, expressed opinion to the effect that an exception to the general doctrine of international law imposing upon the new sovereign the debts of the absorbed

The admission of Texas into the Union as a State thereof, subjected it to those provisions of the Constitution enjoining upon a State not to "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." [1] By that instrument those powers were conferred on the General Government.[2] Thus, the scope of the duty of the United States to foreign creditors, was not determined by the "mere extinction of the national sovereignty of Texas", but rather by impressing upon that State a character which absolutely forbade its maintenance as a separate fiscal unit, and which resulted in the merging of its revenue system into that of the General Government. The liability, therefore, of the new sovereign, could not

territory exists "where the Federal idea obtains." He said in part: "Nor is the attribute of sovereignty to be regarded as the sole test throughout the whole situation of the nature of the relation to the General Government or the rest of the world. If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future. . . . And the dilemma by which, under the separated governmental entities, the Federal authority is not liable for the demand, and the State authority has no international relations and therefore escapes a perfect obligation, is apparent rather than real. The historic complaint as to this situation is not in reality well founded, and in the forum of nations the just liabilities to claimants and obligations to civilization of a State of this Union have been for the most part met by the State or recognized by the United States in its sovereign grace. But the legal liability is that of the inferior member of the federation rather than of the federation itself. . . . It is beyond question that a claim on foreign behalf against a State or Territory of the Union would be presented through, rather than to, the State Department; that is, it would be presented to the local and not to the Federal Government, and would be finally adjusted and recognized or denied by the former, although the Federal Government is the international representative, and in various ways, short of coercion of a State — as unnecessary, ordinarily, as it is impossible — admits a certain international liability." 22 Ops. Attys.-Gen., 583, 585, 586, 587, given in part in Moore, Dig., I, 336–337.

The new sovereign may require the territory absorbed to satisfy directly from its own treasury the existing debt, or to reimburse the general government of that sovereign for paying it. The existence and exercise of such a right are matters of domestic law. It may be doubted, however, whether an exception to the general international liability of the new sovereign to a foreign obligee may be justly founded on the degree of freedom from control in domestic affairs retained by the governmental authorities of the country whose territory has been absorbed by the new sovereign, even in a case where the so-called "federal idea" obtains. Ultimate responsibility for any international obligation, fiscal or otherwise, rests upon the authority capable of dealing with the outside world. When a State becomes extinct through its absorption or annexation by another, such capacity is necessarily transferred to the new sovereign. With it alone foreign States may enter into negotiation. With respect to them it is alone accountable for the continued performance of any obligation undertaken by the former sovereign and which, according to international law, is deemed to pass to its successor.

[1] The Constitution, Art. I, Sec. 10. [2] *Id.*, Art. I, Sec. 8.

in justice be limited to the amount of duties paid in Texan ports.[1]

It may be urged that the duty of the new sovereign should be measured by the benefits accruing to the territory concerned in consequence of the debt. As between creditor and debtor the scope of the duty of the latter is always tested by the extent of the detriment sustained by the former in lending its funds. So long as the debt is validly contracted, the extent of the benefits accruing to the borrower, whether small or great, are of no concern, in estimating the scope of the duty to repay. There is no deviation from this principle in attempting a fair apportionment in the case where the territory transferred is but a part of the domain of the original debtor. The reason for the attempt is due to the equitableness of the claim that territory definitely benefited by a loan should bear its portion of the burden of payment when it is separated from the domain of the sovereign which incurred the debt. Where a State is completely absorbed by another, no question of apportionment can arise. There is no need of an endeavor to ascertain whether portions of the newly acquired domain have or have not gained in some special degree from the use of the funds received. Hence the full detriment to the lender or creditor as duly manifested by the terms of the original agreement affords the basis of estimating the extent of the burden passing to the new sovereign.

Nevertheless, there may be circumstances when that sovereign may fairly challenge the claim that it is burdened with the obligation assumed by its predecessor. Thus the former might contend that a debt incurred for the known and actual purpose of preventing by force or otherwise the transfer of the entire domain, and of which in spite of such attempt the sovereignty was changed, should be regarded as voidable. In such case it might be fairly contended by the transferee of the territory that the creditor assumed the risk that the design for which the debt was incurred would be achieved, and that the failure thereof was a contingency had in contemplation when the loan was made.[2]

[1] Dana's Wheaton, Sec. 30, note 18; Lawrence's Wheaton (ed. 1863), 54, note; Scott's Cases on Int. L., 95, note.

It is urged with force that where a State absorbed by another is bankrupt, the extent of the fiscal obligation of the new sovereign should be limited by the actual value of the resources acquired through the transfer. Coleman Phillipson, Termination of War and Treaties of Peace, 322–323; Arthur B. Keith, Theory of State Succession, 60, 65.

[2] "Those who lend money to a State during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made themselves voluntary enemies to the other State, and can no more expect consideration on the failure of the side which they have espoused than a

It is possible for a State validly to incur a debt for a purpose which, in the estimation of the inhabitants thereof, is essentially hostile to the national interests although unrelated to any probable change of sovereignty.[1] Upon the absorption of the State by another there is difficulty in perceiving the ground on which the new sovereign can escape the burden created by its predecessor, unless it be admitted that any debt incurred without the consent or against the will of the inhabitants of the debtor State may fairly be regarded as voidable whenever they win control of the reins of government. Until, however, the right to annul a public debt on such a ground is firmly established,[2] the new sovereign would not seem to possess the privilege of exercising such a condition subsequent, even though it might sincerely profess the desire to respond fully to the popular will expressed within the territory acquired.

(4)

§ 129. Extinction of the Personality of a State by its Disintegration.

In what Hall describes as "the rare case of a State so splitting up that the original State person is represented by no one of the fractions into which it is divided",[3] the general indebtedness

neutral ship which has entered the enemy's service can expect to avoid condemnation if captured." Westlake, 2 ed., I, 78, quoted in Coleman Phillipson, Termination of War and Treaties of Peace, 43. See, also, opinion of Lord Alverstone, C. J., in West Rand Central Gold Mining Co. *v.* the King (1905), 2 K. B. 398; *Am. J.*, I, 217.

[1] Thus, for example, a monarchical government might lawfully incur a debt for the purpose of raising funds to assist a foreign government in suppressing a revolution, and that directly against the will of the inhabitants of the territory burdened with payment. The debt might be fairly regarded as conferring no direct benefit whatever upon the State in whose name it was contracted. Nevertheless, the law of that State might be such as to impose no prohibition of such action and thus fortify the claim of a creditor that the transaction was not invalid.

[2] It is not intimated that the law of nations may not ultimately demand that the validity of a national debt should depend upon some recognized manifestation of popular approval on the part of and within the domain of the debtor State. See, however, memorandum of the American Peace Commissioners at Paris, Oct. 27, 1898. Senate Doc. 62, 55 Cong., 3 Sess., Part II, 96, 100, Moore, Dig., I, 367, where it was declared: "The American commissioners, therefore, are not required to maintain, in order that they may be consistent, the position that the power of a nation to contract debts or the obligation of a nation to pay its debts depends upon the more or less popular form of its government. They would not question that validity of the national debt of Russia, because, as the Spanish memorandum states, an autocratic system prevails in that country."

[3] Higgins' 7 ed., p. 94, note 1, *citing* with approval Halleck, I, 97.

A. B. Keith, in his Theory of State Succession, 99–100, while acknowledging that there is a "remarkable consensus of opinion" favorable to the proposition that there is a division of the debts of the original State, declares that he

of the former sovereign is said to be divided among its several successors.[1] Even though the situation be regarded as one in which the personality of the original debtor State has become extinct, it may be doubted whether any one of its several successors should not be free to claim that it should be unburdened by any portion of the debt shown to have been incurred for a purpose adverse to its interests. Thus where a debt is incurred for the purpose of suppressing a revolution which results in the disintegration of the borrowing State, and there is pledged as security for repayment the revenues to be derived from a particular portion of the national domain constituting the territory of one of the new States so brought into being, it is not conceived that the change of sovereignty should serve to transfer also the debt.[2]

In a word, the extinction of the state life of the original obligor is not believed to deprive any of its successors of the right to invoke the principle that the duty to assume a portion of the burden of the old sovereign depends upon the existence of benefits locally resulting from the debt. Perhaps, however, it should be presumed that normally the general indebtedness of the former sovereign is locally beneficial, and hence subject to apportionment. Nevertheless, the new sovereign should not be denied the right to rebut the presumption.

§ 130. The Same.

The provisions of the treaty of peace concluded between the Principal Allied and Associated Powers and Austria, September, 1919, are significant. According to Article 203, each of the States to which territory of the former Austro-Hungarian Monarchy was transferred, and each of the States arising from the dismemberment of that Monarchy, including Austria, was to assume responsibility for a portion of the debt of the former Austrian Gov-

has been "unable to discover any evidence for the rule except in the case of special treaty arrangements." He adds: "There is no recent practice to show what would happen if a State broke up into two fragments, both not representing the real State. I am inclined to think that neither would be under any legal obligations to meet the debt of the old State."

[1] Declares Oppenheim: "When a State breaks up into fragments which themselves become States and international persons, or which are annexed by surrounding States, it becomes extinct as an international person, and the same rules are valid as regards the case of absorption of one State by another." 2 ed., I, § 83.

[2] Here again the creditor may be said to have assumed the risk of the disintegration of the debtor. As between him and a successor to the rights of sovereignty, the equities are not with one who knowingly sought to profit by the attempt to prevent the very coming into being of the State against which the claim for repayment is preferred.

ernment which was specifically secured on railways, salt mines or other property, and which was in existence on July 28, 1914. The portion to be so assumed by each State was to be such portion as, in the opinion of the Reparation Commission, might represent the secured debt in respect of the railways, salt mines and other properties transferred to that State under the terms of the treaty or conventions supplementary to it.[1] Again, each of the States of the type and class above described, including Austria, was to assume, by the terms of the same Article, responsibility for a portion of the unsecured bonded debt of the former Austrian Government which was in existence on July 28, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the distributed territory and the average for the same years of such revenues of the whole of the former Austrian territories as, in the judgment of the Reparation Commission, should be best calculated to represent the financial capacity of the respective territories. In making such calculations, the revenues of Bosnia and Herzegovina were not to be included.[2] It was also provided that the Austrian Government should be solely responsible for all the liabilities of the former Austrian Government incurred prior to July 28, 1914, other than those evidenced by the bonds, bills,

[1] It was further provided that the amount of the liability in respect of the secured debt so assumed by each State, other than Austria, should be valued by the Reparation Commission, on such basis as it might deem equitable, and that the value so ascertained should be deducted from the amount payable by the State in question to Austria in respect of property of the former or existing Austrian Government which the State acquired with the territory. Each State was to be solely responsible in respect of that portion of the secured debt for which it assumed responsibility under the terms of Article 203, and the holders of the debt for which responsibility was assumed by States other than Austria were to have no recourse against the Government of any other State.

It was declared in the same Article that "any property which was specifically pledged to secure any debt referred to in this Article shall remain specifically pledged to secure the new debt. But in case the property so pledged is situated as the result of the present treaty in more than one State, that portion of the property which is situated in a particular State shall constitute the security only for that part of the debt which is apportioned to that State, and not for any other part of the debt."

It was added that for the purposes of the Article there should be regarded as secured debt, payments due by the former Austrian Government in connection with the purchase of railways or similar property; and it was provided that the distribution of the liability for such payments should be determined by the Reparation Commission in the same manner as in the case of secured debt. Careful provision was also made with respect to the currency in which debts for which the responsibility was transferred should be payable, as well as the basis of rates of exchange.

[2] The responsibilities in respect of bonded debt to be assumed under the terms of this Article were to be discharged according to the terms of an elaborate annex attached thereto.

securities and currency notes which were specifically arranged for under the terms of the treaty.[1]

In case the new boundaries of any State, as laid down by the treaty, should divide any local area which had been a single unit for borrowing purposes and which had had a legally constituted public debt, it was agreed that such debt should be divided between the new divisions of the area in a proportion to be determined by the Reparation Commission in accordance with the principles previously announced for the reapportionment of government debts.[2] The States arising from the dismemberment of the Austro-Hungarian Monarchy, with the exception of Austria, were to be free from any obligation in respect of the war debt of the former Austrian Government, wherever that debt might be held; and neither the Governments of those States nor their nationals were to have recourse under any circumstances against any other States including Austria in respect of the war debt bonds of which they or their nationals might be the beneficial owners.[3]

The foregoing provisions illustrate the mode by which the Principal Allied and Associated Powers dealt with the public debt of the Austro-Hungarian Monarchy which in spite of its dismemberment left intact, in the case of Austria, a State which kept alive the personality of one of the States embraced in the Dual Monarchy. In spite of the disintegration of Austria-Hungary, and of the transformation of the Austrian Empire into a republican State of smaller territorial extent, the new Republic retained a

[1] It was added that neither the provisions of the Article nor those of the annex attached to it should apply to securities of the former Austrian Government deposited with the Austro-Hungarian Bank as security for the currency notes issued by it.

[2] See Art. 204, where it was also provided that the public debt of Bosnia and Herzegovina should be regarded as the debt of a local area and not as part of the public debt of the former Austro-Hungarian Monarchy.

[3] Art. 205, where it was added that the war debt of the former Austrian Government which was, prior to the signature of the treaty, in the beneficial ownership of nationals or governments of States other than those to which territory of the former Austro-Hungarian Monarchy was assigned, was to be a charge upon the government of Austria only. It was declared, however, that this Article was not to apply to the securities of the former Austrian Government deposited by it with the Austro-Hungarian bank as security for its currency notes. It was declared also that the existing Austrian Government should be solely responsible for all the liabilities of the former Austrian Government incurred during the war, other than those evidenced by the bonds, bills, securities and currency notes which were specifically provided for under the terms of the treaty.

See, in this connection, Letter of the Allied and Associated Powers, Sept. 2, 1919, transmitting to the Austrian Delegation the treaty of peace with Austria, together with the reply of those Powers to the Austrian note of July 20, 1919, requesting certain modifications of the terms. Treaty of Peace with Austria, Senate Doc. No. 121, 66 Cong., 1 Sess., 25–27.

different relation to its predecessor than that possessed or acquired by the other States arising from the dismemberment of the Austro-Hungarian Monarchy.

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§ 131. Effect on Contracts and Concessions.

No problem arises concerning the effect of a change of sovereignty upon contracts or concessions alleged to have been concluded or granted, respectively, if, at the time of transfer, no contractual relationship was completed, or if for any reason, the arrangement was void.[1]

Doubtless a concessionaire may be required to take certain steps to establish the validity of a concession granted by a former sovereign. Non-compliance may be regarded as amounting to renunciation of any claim against its successor. Such a requirement does not involve inquiry into the legal effect of the change of sovereignty. Nor is it at variance with the principle on which rests the duty of the new sovereign to respect rights previously granted. The purpose is merely to enable that sovereign to ascertain the truth as to the foundation of the claim set up by the concessionaire.[2]

[1] Opinion of Mr. Griggs, Attorney-General, July 27, 1899, in the Matter of the Application of Ramon Valdez for a revocable license to occupy and utilize the water power of La Plata River, Porto Rico, 22 Ops. Attys.-Gen., 546; also Magoon's Reports, 495; Opinion of Mr. Griggs, Attorney-General, July 28, 1899, concerning a concession for the construction of an electric tramway in Porto Rico, 22 Ops. Attys.-Gen., 551; also cases in Magoon's Reports, 448 and 630.

"We have come to the conclusion that the cancellation of a concession may properly be advised when —

"(*i*) The grant or the concession was not within the legal powers of the late government; or,

"(*ii*) Was in breach of a treaty with the annexing State; or,

"(*iii*) When the person seeking to maintain the concession acquired it unlawfully or by fraud; or,

"(*iv*) Has failed to fulfill its essential conditions without lawful excuse.

"In any case falling within these categories, where there has either been no 'duly acquired' right, or there has been a non-fulfillment of essential conditions by the concessionaire, cancellation or modification without compensation, appears to us, in the absence of special circumstances to be justifiable." Report of Transvaal Concession Commission, Apr. 19, 1901, Blue Book, South Africa, June, 1901 [Cd. 623], 6–8, Moore, Dig., I, 411, 413.

[2] In the case of Botiller *v.* Dominguez, the United States Supreme Court, in sustaining an Act of Congress requiring presentation for confirmation to a board of land commissioners of grants in California completed by the former sovereign of that country, declared: "Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid. . . . Every person owning land or other property is at all times liable to be called into a court

It may be doubted whether a change of sovereignty necessarily serves to terminate a contract or concession granted by a former sovereign.[1] That change may, however, cause the substitution of the new sovereign for the old as a party to the agreement. Such a result seems to follow when the entire domain of one State is transferred to another and the former becomes extinct.

When there is a transfer of a part of the territory of a State which retains its life as such, the succession of the transferee to the contracts of the transferor depends upon their special relation to the territory of which the sovereignty has undergone a change. If the exercise of the entire privileges of a concession requires the commission of acts wholly within that territory, such as the construction of permanent improvements or the operation of public utilities therein, the contract would appear to be one contemplating such a substitution in the event of a change of sovereignty.[2] There would be difficulty, moreover, in reaching a different conclusion even though the undertakings of the original grantor demanded the performance on its part of executory acts in the shape of payments from its general funds rather than from those of the territory immediately concerned and subsequently transferred. It is believed that the connection of the concession in the light

of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whosoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them." 130 U. S. 238, 250.

See, also, United States *v.* Clarke, 8 Pet. 436; Glenn *v.* United States, 13 How. 250; Ainsa *v.* New Mexico & Arizona Railroad Co., 175 U. S. 76; Florida *v.* Furman, 180 U. S. 402; Barker *v.* Harvey, 181 U. S. 481; Mr. Root, Secy. of War, to Maj. Gen. Wood, Military Governor of Cuba, June 21, 1901, Magoon's Reports, 602, 603; Moore, Dig., I, 392–394.

Compare position of Mr. Sherman, Secy. of State, in 1897, with respect to the orders of the French Government for the establishment of the validity of concessions in Madagascar granted prior to the acquisition of that country by France. For Rel. 1897, 154–157, Moore, Dig., I, 387–389.

[1] "Concessions of the nature of those which were the subject of our enquiry presented examples of mixed public and private rights: They probably continue to exist after annexation until abrogated by the annexing State, and as matter of practice in modern times, where treaties have been made on the cession of territory, have been often maintained by agreement." Report of Transvaal Concession Commission, Apr. 19, 1901, Blue Book, South Africa, June, 1901 [Cd. 623], 6–8, Moore, Dig., I, 411, 412. See generally G. Gidel, *Des effets de l'annexion sur les concessions*, Paris, 1904.

[2] Cases may arise where the concessionaire is required to perform acts in territory of the grantor retained by itself, as well as in that which is transferred. These acts may involve the construction or operation of industrial plants and public utilities in both. In such a situation the problem arises whether the contract should be deemed to be divisible so as to justify the substitution of the new sovereign with respect to mutual undertakings concerning solely the territory transferred. This question is distinct from that relating to the effect of substitution when it is admitted to take place.

of its location and operation and design, with the territory transferred, should, rather than any other circumstance, be the test of substitution.[1] Doubtless the contractual obligations of the former

[1] The relation of the United States, upon the acquisition of the Philippine Islands, to a contract previously concluded between the Spanish Government and the Manila Railway Co. (Ltd)., a British corporation, and providing for the construction and operation of a railway in the Island of Luzon, became the subject of an opinion by Mr. Griggs, Atty.-Gen., July 26, 1900. See 23 Ops. Attys.-Gen., 181, Moore, Dig., I, 395; also Opinion of Mr. Knox, Atty.-Gen., 23 Ops. Attys.-Gen., 451. The Spanish Government had granted to the corporation a concession for 99 years, and had guaranteed 8 per cent. per annum on the total investment made, payable in quarterly installments. The entire sum guaranteed was to be paid from the Philippine treasury, two thirds of which, according to the understanding of the Attorney-General, were to be paid wholly from moneys belonging to the local funds of the Philippines and one third from the royal or peninsular funds of Spain in the Philippine treasury, as a subsidy recognized by the general policy of Spain as chargeable to itself. Upon the cession of the islands to the United States the company demanded of it payment of the quarterly installments of the guaranty, beginning with that due Mar. 1, 1899. The Attorney-General was of opinion "that an identical contract beween the United States and the company was not created by the ratification of the treaty of Paris", and did not then exist, for the following reasons: (*a*) that the agreement was the personal and indivisible contract of Spain and the concessionaire; (*b*) that it was of an executory character, "not concerning the public domain owned by Spain, but containing many personal obligations of Spain and of other parties"; (*c*) that it was entered into, not for the exclusive local benefit of the Island of Luzon, but also to enable the Spanish Government "to govern more easily and conveniently the subject colonies, for the general benefit of Spain as well as their own." The Attorney-General declared, however, that as the Provinces of the Philippines had retained and would continue to retain the chief benefits of the railway, and as the local revenues out of which the guaranty was to be paid were in the hands of the Philippine Government, and as the road was a most necessary piece of property, two thirds of which were bought, as it were, by a guardian for the use of his ward, the price to be paid as to two thirds from the funds of the ward, there was a "general equitable obligation" upon the Philippine Provinces to make some fair arrangement with the company as to the two thirds benefit. He declared that they could not justly take advantage of the disappearance of Spain to retain what she had procured for them on the credit of their funds, and deny all liability for the price.

The law officer, Division of Insular Affairs, War Department, was of opinion that the United States was not, in the absence of any stipulation in the treaty of peace, bound by the contract, because he regarded it as the personal obligation of Spain, and one which had not been made a lien upon the revenues of the Island of Luzon. Magoon's Reports, 177.

The argument of the Attorney-General that because the railway was beneficial to Spain as an instrument for the retention of military control over the Philippines and not of exclusive benefit to the country traversed, there was reason to deny an obligation on the part of a new sovereign to accept the burden of its predecessor, is not convincing. The implication that a possible use of the line for a purpose deemed adverse to local interests made the railway a detriment rather than a benefit is not satisfactory. Nor is the circumstance that the concession possessed an executory character calling for the performance of acts by the grantor, believed to have been decisive of the question of substitution. It is difficult to accept the suggestion that the contract was one designed to impose upon the grantor any fiscal obligations in case of loss of sovereignty over the territory within which the railway was to be operated. An undertaking so obviously adverse to its own interests is one which it would hardly be reasonable to impute to Spain a willingness or purpose to have assumed.

sovereign towards private parties within and especially associated with a particular portion of its domain may obviously be of a character such as to survive a change of sovereignty. This is true when, for example, a State becomes the trustee of funds for the benefit of religious or philanthropic work conducted by a particular organization within the bounds of territory ceded to a foreign State.[1]

When in consequence of a transfer the new sovereign is deemed to be substituted for the old, the problem presents itself respecting the terms on which the transferee may reasonably terminate the contract. The precise question is whether the new sovereign stands in this respect on a better footing than its predecessor.

The acceptance of the burden of an existing contract or concession implies that the exercise of any right to terminate the agreement is fettered with a corresponding obligation to make full response to every equitable demand of the other contracting party. The measure of its loss due to the act of termination, whether or not to be deemed a breach of contract, would seem to require judicial or other impartial scrutiny and fair estimation.[2] The very scope of such a burden must raise doubt as to whether the transferees of territory have acknowledged a duty so to respect generally even those contracts and concessions which have been peculiarly associated with the newly acquired domain. Instances where the new sovereign has regarded itself free to terminate at will and on its own terms certain classes of concessions have their significance; and they raise the question whether there is to be

[1] In the so-called Pious Fund Case between the United States and Mexico, the arbitral award of Sir Edward Thornton as umpire, Nov. 11, 1875, was based upon the theory that the Mexican Government being the successor to a trust fund for the maintenance of Roman Catholic missions in the Californias was obliged, upon the cession of Upper California to the United States, to pay an equitable portion of the proceeds of the fund to the Bishop of Upper California, the successor within American territory to the previous beneficiary. See J. B. Scott, Hague Court Reports, 48–53; Moore, Arbitrations, II, 1348–1352. In the arbitration of the Pious Fund Case before a Court of Arbitration assembled at the Hague under the Convention of 1899, and pursuant to a protocol of May 22, 1902, counsel for the United States relied upon the same principle. See Replication of the United States, 12-13; also supplemental brief in behalf of the United States, by G. W. McEnerney, 33–34. The award of the Tribunal did not touch upon this point, inasmuch as the application of the principle of *res adjudicata* sufficed for the grounds of the decision. For the text of the award *cf.* J. B. Scott, Hague Court Reports, 3.

[2] In the estimation of damages the difficult question as to prospective losses may present itself. This gives rise to inquiry respecting the correct test to be applied in measuring the damages arising from a breach of contract, the sufficiency of evidence in support of an alleged loss, as well as the interpretation of the agreement.

found in practice or theory a reasonable and just basis for such freedom of action.[1]

Numerous conventions concluded within the one hundred and twenty-five years prior to The World War have announced the acceptance by the transferee of concessions and contracts granted or undertaken by the transferor.[2] These instances have recorded a trend of practice distinctly favorable to the contention that a sense of obligation has induced such action. Probably the reason impelling even a conqueror so to burden itself in a treaty of peace has been the belief that the public interests of the territory transferred would be thereby benefited rather than harmed, and that rights analogous to those of private property would likewise be respected.[3] There does not, however, appear to have been habitual

[1] One aspect of American procedure may here be observed. In construing the relevant Acts of Congress (the Act of Mar. 3, 1887, Ch. 359; 24 Stat 505), the Supreme Court of the United States has declared that the Court of Claims is without jurisdiction in cases where the liability of the United States on a contract entered into by its predecessor as sovereign over territory transferred is asserted by a claimant as a result of an express provision of an assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty. The latter tribunal is deemed, however, to possess jurisdiction of claims based on contracts originally made with the former sovereign of the ceded territory, and assumed by the United States after the transfer, either expressly or by implication. Eastern Extension, Australasia and China Telegraph Co., Ltd. *v.* United States, 231 U. S. 326, *reversing* 48 Ct. Cls. 33. Declared Mr. Justice Hughes in the course of the unanimous opinion of the court: "But, if the claim of the appellant were deemed to rest exclusively upon the transfer of sovereignty, upon the theory that thereby under the principles of international law an obligation in its favor was imposed upon the United States, the claim would still, in our judgment, be excluded by the statute from the consideration of the court below." (333.)

In the course of the opinion of the lower court it was declared by Chief Justice Peelle that "when the United States succeeded to the sovereignty of Spain over the [Philippine] islands they were under no more obligation to continue the contracts for public or private service of individuals or corporations than they were to continue in office officials appointed by the Spanish Government." 48 Ct. Cl. 33, 45. Inasmuch as that tribunal lacked and did not seek to exercise jurisdiction to adjudicate on the question as to the effect of the change of sovereignty produced by the treaty of cession, the language quoted may be regarded as merely a dictum.

See also Eastern Extension, Australasia & China Telegraph Company, Ltd. *v.* United States, 251 U. S. 355, 362.

Concerning the inability of a British court to determine the effect of annexation of territory by Great Britain upon concessions granted by the prior sovereign, see Cook *v.* Sprigg (1899), A. C. 572; Moore, Dig., I, 410.

[2] See group of treaties from that of Campo Formio of October, 1797, to that of Constantinople of Sept. 16 (29), 1913, contained in Coleman Phillipson, Termination of War and Treaties of Peace, 326–330; also collection in Moore, Dig., I, 385–387. Also see discussion in A. B. Keith, Theory of State Succession, 66–72; A. S. Hershey, in *Am. J.*, V, 285, 294–296; E. M. Borchard, Diplomatic Protection, § 83; West Rand Central Gold Mining Co. *v.* the King (1905), 2 K. B. 391; *Am. J.*, I, 217.

[3] After the Spanish-American War in 1898, the American peace commissioners at Paris rejected certain Articles tendered by the Spanish commis-

recognition by treaty or otherwise of any duty to accept and maintain contractual obligations regarded by the new sovereign as certainly detrimental to the territory transferred. Practice has thus indicated soundly although roughly the basis of a useful distinction. Without attempting classification of the situations in which a contract has been regarded as locally detrimental, attention is called to the significance of various pleas by which a new sovereign may urge that an agreement possesses such a character.[1]

sioners in respect to contracts entered into for public works and services. They did so for the reason that the "extent and binding obligation of these contracts are unknown", at the same time disclaiming any purpose of the Government "to disregard the obligations of international law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory." Senate Doc. 62, 55 Cong., 3 Sess., Part II, 240, 241, 262, Moore, Dig., I, 389–390.

The treaty of peace with Germany of June 28, 1919, sheds little light on the solution of the general problem, doubtless because of the circumstance that contracts and concessions granted by German authority within and with respect to territory ceded by Germany, were almost entirely held by nationals of Germany, or possibly by those of its allies in the war. Thus the provisions of that treaty permitting the Allied and Associated Powers to retain and liquidate the interests, rights and properties of German nationals within territories detached by cession, served to place those powers in the position of obligees as well as obligors, according to their election. Art. 297 (b); also Section 2 of Annex following Art. 303. It may be observed that Germany also, by Art. 258, renounced all rights of its own or its nationals by virtue of any agreement, to representation upon or participation in the control or administration of commissions, State banks, agencies or other financial or economic organizations of an international character, exercising powers of control or administration, and operating in any of the States of its enemies or in Austria, Hungary, Bulgaria or Turkey, or in the dependencies of those States, or in the former Russian Empire. Moreover, by Art. 260, Germany undertook, upon the demand of the Reparation Commission, to possess itself of any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary and Bulgaria, or in the possessions or dependencies of those States or in any territory formerly belonging to Germany or its allies to be ceded by it or them to any Power, or to be administered by a Mandatory under the Treaty, and within six months of such demand to transfer such rights and interests to the Reparation Commission. Provision was also made in the same Article for German indemnification of German nationals thus dispossessed, and for crediting Germany on account of sums due by it for reparation with the value of what might be transferred to the Commission. See also Arts. 211 and 212 of the treaty of peace with Austria, of Sept. 10, 1919.

[1] Numerous treaties of the nineteenth century containing provision for the maintenance of contracts and concessions of the old sovereign have made clear the design to confine the obligation of the transferee to bear burdens deemed beneficial to the territory concerned, by referring to the arrangements to be respected as those contracted for the "public interests" of what was ceded. See, for example, Art. VIII of the Treaty of Zurich of Nov. 10, 1859, Brit. and For. State Pap., XLIX, 366; Moore, Dig., I, 385. The numerous provisions for the maintenance of contracts relating to railroads seem to confirm the opinion that the construction and operation thereof is not to be regarded as other than beneficial to the territory which they traverse. *Cf.*, for example, Art. XVI, treaty between Turkey and Bulgaria Sept. 16 (29), 1913, *Am. J.*, VIII, Supp. 27, 35; Coleman Phillipson, Termination of War and Treaties of Peace, 440, 445.

A contract or concession may be deemed adverse to the territory transferred because of the purposes of the undertaking, or by reason of the terms of the agreement, or on account of the method by which performance is contemplated. On any one of these grounds the new sovereign may differ from the opinion entertained by its predecessor in a given case. The reasonableness of such a difference may not, however, suffice to indicate the existence or scope of the duty to be imposed upon the transferee.[1] If the detriment to the territory concerned is to permit the transferee as a successor to the contract to enjoy complete freedom of action in the matter of cancellation, it must be due to the fact that the very nature of the agreement is such as to forbid the conclusion that it could be reasonably deemed beneficial if a change of sovereignty took place. The detrimental aspect of the contract must be an obvious and certain result of the change of sovereignty. In such case it is not unjust to charge the concessionaire with anticipation of the character which his concession would necessarily assume upon a transfer of the territory, and, therefore, with contemplation of the natural and logical attitude of any transferee. On the other hand, if the detriment to the territory is one attributable solely to the special public policy of the particular transferee, in contrast to that of the transferor, rather than to the failure of the latter to retain its sovereignty or to a circumstance indissolubly connected with the change thereof, the situation is otherwise.

The application of the foregoing distinction is easily illustrated. A contract the object of which is to frustrate or impede the attempt by force or otherwise to effect the change of sovereignty which actually results, is one which must be regarded as hostile to the territory transferred as soon as that change takes place. Doubtless other classes of agreements may be fairly placed in the same category.

A concession for a purpose distinctly beneficial to the territory transferred may have been lawfully granted on terms which in the judgment of the new sovereign appear to have been unduly advantageous to the concessionaire and correspondingly burdensome to

[1] "In this last case, however [respecting the cancellation or modification of a concession deemed injurious to the public interest], the question of compensation arises, inasmuch as it would be inequitable that a concessionaire should lose without compensation a right duly acquired, and whose conditions he had duly fulfilled, because the new government differed from the old in its view as to what was, or was not, injurious to public interest, even though the opinion of the new government were obviously the true one." Report of Transvaal Concession Commission, Apr. 19, 1901, Blue Book, South Africa, June, 1901 [Cd. 623], 6-8, Moore, Dig., I, 411, 413.

the grantor. This circumstance may encourage the attempt to modify or cancel the arrangement. In such case it may be urged that the new sovereign ought not to be obliged to stand by the bad bargain of its predecessor. It is believed, however, that if the good faith of the concessionaire was beyond question, and the terms of the contract not such as to indicate the perpetration of fraud, any termination of the agreement should still make provision for the existing equities of the concessionaire. Again, a concession for a reasonable purpose may have assumed the form of a monopoly which in the estimation of the new sovereign is essentially adverse to the economic interests of the territory concerned. In such case the divergence of opinion as to the propriety of the means of accomplishing what the concession was designed to achieve, ought not to justify cancellation save on terms responsive to the equities of the concessionaire.[1] Doubtless in every case the reality and extent of those equities should be judged by the actual or constructive knowledge of the concessionaire at the time when he acquired the concession, with respect to the precariousness of his venture if a change of sovereignty should occur.[2]

In the formulation of any general scheme indicative of a mode

[1] Declared Mr. Griggs, Attorney-General, in an opinion of June 15, 1899, with respect to concessions for the operation of submarine cables: "The mere fact that the Western Union Telegraph Co. is enjoying, under a grant of exclusive right, what amounts to a monopoly is no reason of itself why it should be deprived of its concession. It is easy to say that monopolies are odious, but there are concessions which amount to monopolies which are lawful and cannot be disturbed except by a violation of public faith. . . . The granting of such concessions and their operation have, in many instances, been of great advantage to commerce and to the countries from which the concessions were derived. . . . Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States, 1 Wall. 352, Mr. Justice Field said: 'The United States have desired to act as a great Nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government they superseded.' If, therefore, the Western Union Telegraph Co. has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company." 22 Ops. Attys.-Gen., 514, 516, 518; Moore, Dig., I, 409–410. See, also, opinion of law officer, Division of Insular Affairs, War Department, concerning the concession to canalize the Matadero River from the Cristina Bridge to the Bay of Atares, Magoon's Reports, 571. Also decision by the Swiss Federal Court concerning the duty of a succeeding State to recognize the concessions granted by its predecessors, published in *Am. J. Int. L.*, I, 235 (translated from *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1906); also opinion of Prof. Max Huber on the case, *id.*, I, 245 (translated from *id.*).

[2] This idea is emphasized in the Report of the Transvaal Concession Commission above cited.

of determining the nature of concessions to be regarded as detrimental rather than beneficial to territory transferred, it is believed that care should be taken to permit no presumptions of a hostile or injurious purpose to be derived from or attributed to circumstances equally capable of sustaining an opposing inference.[1]

Inasmuch as there seems to be a solid foundation for the claim that a new sovereign should maintain and respect the locally beneficial contracts and concessions of its predecessor, and should oftentimes heed the equities of adverse parties, even when the arrangements are deemed in certain respects locally detrimental and subject to modification or cancellation, there is much reason why the treaty recording the transfer of sovereignty should specify the course to be followed. In order to safeguard the rights of all concerned, it should make announcement of the particular concessions to be maintained, or of the nature of those to be respected, or of the principle to be observed in effecting cancellation or modification.[2]

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§ 132. Effect on Private Rights.

Rights of private property validly created remain unaffected by a change of sovereignty over the territory to which they may be said to belong. Declared Chief Justice Marshall in the case of the United States *v.* Percheman:

[1] See, in this connection, the argument of Mr. Griggs, Attorney-General, in his opinion in the case of the Manila Railway Co., 23 Ops. Attys.-Gen., 181, Moore, Dig., I, 395.

A concession not unbeneficial to the territory transferred may involve consecutive payments by the original grantor which at the time of transfer was insolvent, and against which, therefore, the claims of the concessionaire for compensation pursuant to the contract were at that time of slight value. In such case it may be fairly contended that the new sovereign may set up in excuse for non-payment or partial payment, the disability of its predecessor, and in any scheme of rehabilitating the finances of the territory, may demand that its liability as transferee and as successor to the contract be measured by the actual power of the old sovereign to satisfy its obligation at the time of transfer. See, in this connection, E. M. Borchard, Diplomatic Protection, § 83.

In his paper entitled "Change of Sovereignty and Concessions", *Am. J.*, XII, 705, 742–743, Prof. Francis B. Sayre expresses opinion that concessions, to be binding, must have been granted with a view to the general improvement or benefit of the *locus* ceded, and states that such a theory is the peculiar contribution of America.

[2] Thus, in the convention with Denmark of Aug. 4, 1916, for the cession of the Danish West Indies, the United States agreed to maintain nine specified grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they had been granted. Art. III, U. S. Treaty Series, No. 629; *Am. J.*, XI, Supp. 53, 55. Denmark guaranteed that the cession was free and unencumbered by any reservations, privileges, franchises, grants or possessions other than were mentioned in the treaty. Art. II.

> It may not be unworthy of remark, that, it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.[1]

Cases may arise, however, where the underlying principle is inapplicable. Thus the right of property may take the form of a grant the duration of which by necessary implication is dependent upon the possession of political power by the existing sovereign. In such case it has been held that no property as such survives the loss of sovereignty.[2]

The United States has demanded that the private property

[1] 7 Pet. 51, 86–87; Moore, Dig., I, 416. See, also, Wilcox *v.* Henry, 1 Dall. 69; Mutual Assurance Society *v.* Watts's Ex'r., 1 Wheat. 279; De la Croix *v.* Chamberlain, 12 Wheat. 599, 601; United States *v.* Arredondo, 6 Pet. 691; United States *v.* Clarke, 8 Pet. 436; Delassus *v.* United States, 9 Pet. 117, 133; Mitchel *v.* United States, 9 Pet. 711, 734; Smith *v.* United States, 10 Pet. 326; Strother *v.* Lucas, 12 Pet. 410, 436; United States *v.* Heirs of Clarke, 16 Pet. 228, 231–232; United States *v.* Moreno, 1 Wall. 400; Coffee *v.* Groover, 123 U. S. 1; Astiazaran *v.* Santa Rita Land and Mining Co., 148 U. S. 80; United States *v.* Chaves, 159 U. S. 452, 547; Rio Arriba Land and Cattle Company *v.* United States, 167 U. S. 298, 309; Ely's Adm. *v.* United States, 171 U. S. 220, 223; Ainsa *v.* New Mexico and Arizona Railroad Co., 175 U. S. 76, 79; Barker *v.* Harvey, 181 U. S. 481, 486; Ponce *v.* Roman Catholic Church, 210 U. S. 296, 324; Panama R. R. Co. *v.* Bosse, 249 U. S. 41, 44.

See, also, Mr. Bayard, Secy. of State, to Mr. Roberts, Mar. 20, 1886, MS. Inst. Chili, XVII, 196, 200, Moore, Dig., I, 421, 422, where it was said: "The Government of the United States therefore holds that titles derived from a duly constituted prior foreign Government to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws. The rights of a resident neutral — having become fixed and vested by the law of the country — cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another Government. His remedies may be affected by the change of sovereignty, but his rights at the time of the change must be measured and determined by the law under which he acquired them."

[2] O'Reilly de Camara *v.* Brooke, 209 U. S. 45, where it was held that the holder of a heritable office in Cuba which had been abolished prior to the extinction of Spanish sovereignty, but who, pending compensation for its condemnation, was receiving the emoluments of one of the grants of the office, "had no property that survived the extinction of the sovereignty of Spain." See, also, decision of Mr. Root, Secy. of War, Dec. 24, 1900, Magoon's Reports, 209, Moore, Dig., I, 429; also Magoon's Reports, 194. See, also, Alvarez y Sanchez *v.* United States, 216 U. S. 167, *affirming* 42 Ct. Cl. 458. See in this connection Percy Bordwell, "Purchasable offices in ceded territory", *Am. J.*, III, 119; also F. B. Sayre, *id.*, XII, 705, 717–718.

of its nationals in countries not possessed of European civilization, and not belonging to States recognized as such, should, nevertheless, be respected, upon the establishment of rights of sovereignty therein by an acknowledged member of the family of nations.[1]

The general principle enunciated in the Percheman case has received repeated recognition in treaties of cession concluded by the United States, and pursuant to which it became the grantee of territory.[2] These agreements have been looked upon as merely declaratory of the law of nations.[3]

[1] Mr. Bayard, Secy. of State, to Mr. Pendleton, Feb. 27, 1886, MS. Inst. Germany, XVII, 602, Moore, Dig., I, 422–423; same to Mr. Morrow, Feb. 26, 1886; 159, MS. Dom. Let. 177, Moore, Dig., I, 423, note; same to the Portuguese Minister, Mar. 3, 1886, For. Rel. 1886, 772, Moore, Dig., I, 424; same to Mr. von Alvensleben, German Minister, Mar. 4, 1886, For. Rel. 1886, 333, Moore, Dig., I, 424; Mr. Foster, Secy. of State, to Mr. White, Chargé at London, Nov. 5, 1892, For. Rel. 1892, 237 239, Moore, Dig., I, 425–426. See, also, message of President Cleveland on Fiji Island claims against Great Britain, Feb. 14, 1896; report of Mr. Olney, Secy. of State, Feb. 14, 1896; report of George H. Scidmore, July 3, 1893, all contained in For. Rel. 1895, I, 739 *et seq.*

[2] See, for example, Art. III, treaty with France, April 30, 1803, providing for the cession of Louisiana, Malloy's Treaties, I, 509; Art. VIII, treaty with Spain, Feb. 22, 1819, *id.*, II, 1654; Arts. VIII and IX, treaty with Mexico, Feb. 2, 1848, *id.*, I, 1111–1112; Art. III, treaty with Russia, Mar. 30, 1867, *id.*, II, 1523; Arts. IX and XIII, treaty with Spain, Dec. 10, 1898, *id.*, 1693–1694.

It is believed that the following provision contained in Art. II of the convention between the United States and Denmark of Aug. 4, 1916, providing for the cession of the Danish West Indies, contains significant recognition of the underlying principle involved: "But it is understood that this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality, by municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and to possess property in the islands ceded." Treaty Series No. 629; *Am. J.*, XI, Supp. 54. Also, Art. X, treaty of peace between Russia and Japan, Aug. 23 (Sept. 5), 1905, For. Rel. 1905, 826; Art. XI, treaty between Turkey and Greece, Nov. 1 (14), 1913, Coleman Phillipson, Termination of War and Treaties of Peace, 452; *Am. J.*, VIII, Supp. 49.

Cf. Report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, Mar. 27, 1901, as to the protection under Arts. I and VIII, the treaty of peace with Spain, Dec. 10, 1898, of trade-marks in Cuba and the Philippines, previously registered at the Bureau for the Protection of Industrial Property at Berne, Magoon's Reports, 305. See, also, report of the same officer, Apr. 16, 1901, on the "Right of the municipality of Habana to exercise over property owned by said city the rights which by law belong to the peaceful possession of the property." *Id.*, 541; report of same officer, April 20, 1901, on "Certain rights of municipalities in Cuba." *Id.*, 374; report of same officer, May 22, 1900, on "Mining claims and appurtenant privileges in Cuba, Porto Rico, and the Philippines." *Id.*, 351. See, also, *in re* certain revocable licenses in Porto Rico. *Id.*, 650.

[3] Soulard *v.* United States, 4 Pet. 511; Delassus *v.* United States, 9 Pet. 117, 133; Dent *v.* Emmeger, 14 Wall. 308, 312; Ponce *v.* Roman Catholic Church, 210 U. S. 296, 324. Also Moore, Dig., I, 416. See A. B. Keith, Theory of State Succession, 79–84, concerning British practice and certain difficulties incidental thereto.

§ 133. The Same.

By the treaty of peace with Germany of June 28, 1919, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests belonging, at the date of the coming into force of the treaty, to German nationals, or companies controlled by them, within territory detached from Germany by cession (as well as within the territories, colonies, possessions and protectorates of those Powers).[1] This action was based upon the theory that it was necessary to utilize enemy private property within places subject to the control of the Allied and Associated Powers as a means of enabling them to recover a part of their claim against Germany. The application of measures of liquidation to private property within ceded territory was merely incidental to the broader claim enforced against the grantor. Nor did it appear to have any bearing upon the principle of international law with respect to the effect of transfer of sovereignty. It should be observed that Germany undertook to compensate its nationals in respect of the sale or retention of their property, rights or interests "in Allied or Associated States",[2] and that those States did not admit that their action was confiscatory.[3]

As the grantee of territory the United States has been regarded by the Supreme Court as having assumed the duty to treat as property requiring protection under the terms of appropriate treaties, equitable as well as legal titles to lands, and such as would have been a charge upon the conscience of the former sovereign.[4] Thus the absence of a legal title at the time of cession has not

[1] Arts. 297, 298, and Annex following the latter. Also Arts. 249, 250, and Annex following the latter, of the treaty of peace between the Principal Allied and Associated Powers, and Austria, of Sept. 10, 1919.

[2] Art. 297 (i) of treaty of peace with Germany.

[3] Reply of the Allied and Associated Powers, of June 16, 1919, to Observations of the German Delegation on conditions of peace. Misc. No. 4, 1919, (Cmd.) 258, 51–54. Also provisions of Art. 253 saving from prejudice in any manner from the operation of previous provisions "charges or mortgages lawfully effected in favour of the Allied or Associated Powers or their nationals respectively, before the date at which a state of war existed between Germany and the Allied or Associated Power concerned, by the German Empire or its constituent States, or by German nationals, on assets in their ownership at that date." *Cf. infra*, §§ 621–622.

[4] Strother *v.* Lucas, 12 Pet. 410, 436, where it was stated: "This court has defined property to be any right, legal or equitable, inceptive, inchoate or perfect, which, before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign 'with a trust', and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district; according to the principles of justice, and rules of equity."

been fatal to a claimant, when he had received an unconditional grant, valid according to the law of the former sovereign, and from which he might have obtained a legal title had not the transfer taken place.[1] Where the former sovereign imposed a condition precedent which was not performed by the claimant either prior to the cession or thereafter, and no excuse for non-performance was shown, no equitable title has been deemed to survive the change of sovereignty and burden the grantee.[2] The situation has been otherwise regarded, however, where the condition imposed by the grantor State was a condition subsequent, of which performance was rendered impossible by the act of the grantor (through its cession of territory) and was a matter of no importance to the grantee State.[3]

The United States has been unwilling to admit that the cession to itself of territory has served to lessen the duty of the grantee of land, or so to diminish the burdens of an individual claimant as to transform an equitable into a legal title.[4] It has frequently been declared by the Supreme Court that the duty of providing a mode or system for the establishment of rights of private and immovable property, and of ascertaining thereby the extent of the obligation of the new sovereign, rests upon the political department

[1] Delassus *v.* United States, 9 Pet. 117, 133–135. See, also, Mitchel *v.* United States, 9 Pet. 711, 734; United States *v.* Clarke, 9 Pet. 168; United States *v.* Heirs of Clarke, 16 Pet. 228, 231–232.

[2] United States *v.* Kingsley, 12 Pet. 476, 485; also United States *v.* Mills's Heirs, 12 Pet. 215.

[3] United States *v.* Arredondo, 6 Pet. 691, 745–746.

"The true rule of law would seem to be that the receiving State should have the right at the time of cession to declare that it will not allow under its jurisdiction and law the further completion of title by the performance of unfulfilled conditions, and will therefore grant titles only to such claimants as are at the time of cession substantially owners of the interest claimed. Where no such declaration is made, however, it would seem that the receiving State should be compelled to perfect the titles of claimants who have in good faith performed after cession the unfulfilled conditions of their grants before the expiration of the time allowed in the condition." Francis B. Sayre, "Change of Sovereignty and Private Ownership of Land", *Am. J.*, XII, 475, 488.

[4] Thus, it was said in De la Croix *v.* Chamberlain: "It may be admitted, that the United States were bound, in good faith, by the terms of the treaty of cession, by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet, it would not follow, that the legal title would be perfected until confirmation. The Government of the United States has, throughout, acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the Government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained, that the legal title remained in the United States, until, by some act of confirmation, it was passed, or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity." 12 Wheat. 599, 601. See, also, Cessna *v.* United States, 169 U. S. 165, 186–187.

of the Government,[1] and that that department may reasonably demand that the validity of a title derived from a prior sovereign be judicially determined.[2]

The validity of any act attributable to the former sovereign as such must be obviously tested according to its laws.[3] The new sovereign may, however, exercise its own judgment in determining what shall be required as proof of the validity of acts of its predecessor.[4]

The law of nations imposes no duty upon a State to permit nonresident aliens to retain title to immovable property within the national domain. The new sovereign may, therefore, not unreasonably demand that the retention of ownership of such property be dependent upon the continued residence of the owners therein, and upon the severing of any existing ties of allegiance to the former sovereign. Thus treaties of cession not infrequently provide that the existing owners of immovable property desirous of retaining their national character, be given reasonable opportunity to dispose of their holdings.[5] The terms of a treaty may not,

[1] De la Croix *v.* Chamberlain, *supra;* Astiazaran *v.* Santa Rita Land and Mining Co., 148 U. S. 80, 81; United States *v.* Santa Fé, 165 U. S. 675, 714; Ainsa *v.* New Mexico and Arizona Railroad Co., 175 U. S. 76, 79.

[2] See Ainsa *v.* New Mexico and Arizona Railroad Co., *supra.* The opinion of the court by Mr. Justice Gray contains a summary of the several acts of Congress providing for the confirmation of titles of claimants to lands in Louisiana, the Floridas, California and New Mexico, granted by the former sovereigns of those territories. See, also, Florida *v.* Furman, 180 U. S. 402; Barker *v.* Harvey, 181 U. S. 481.

[3] Mr. Bayard, Secy. of State, to Mr. Roberts, Mar. 20, 1886, MS. Inst, Chili, XVII, 196, 200, Moore, Dig., I, 421–422; United States *v.* Clarke, 8 Pet. 436, 450, with reference to Art. VIII of the treaty with Spain of Feb. 22, 1819, providing for the protection of certain Spanish grants of land in the territories ceded. Also Kealoha *v.* Castle, 210 U. S. 149.

[4] Hayes *v.* United States, 170 U. S. 637, 647, with reference to the Act of Congress of March 3, 1891, creating a Court of Private Land Claims for the adjustment of land titles in Mexico and Arizona, as compared with certain earlier legislation of Congress; also Ely's Admr. *v.* United States, 171 U. S. 220, 224; United States *v.* Elder, 177 U. S. 104; Whitney *v.* United States, 181 U. S. 104, 114. *Compare* the statutes construed in United States *v.* Arredondo, 6 Pet. 691, with reference to grants by the Spanish Crown in Florida, and United States *v.* Peralta, 19 How. 343, with reference to prior grants in California.

In his paper on "Change of Sovereignty and Private Ownership of Land", *Am. J.*, XII, 475, 495, Prof. Francis B. Sayre concludes: "There can be no question that United States courts will not allow a mere cession of territory to the United States to injure or abrogate vested rights of land ownership, legal or equitable, held by individuals at the time of cession. It is equally clear that United States courts will feel free to disregard mere expectant rights which could not have been enforced as of right in the courts of the ceding State. Grants which were unenforceable before cession either because of unperformed conditions, or because of the indefiniteness of the grant, or because of the want of power in the granting officer or imperfection in the grant itself, will clearly not be upheld by United States courts."

[5] See, for example, Art. IX, treaty between the United States and Spain,

however, intimate that residence within the territory transferred and allegiance to the new sovereign thereof are essential to the retention of title.[1]

3

NATURE AND LIMITS OF RIGHTS

a

Extent of the National Domain

(1)

§ 134. In General.

The territory of a State consists of the area, both land and water, confined by definite boundaries, and over which an exclusive right of sovereignty is claimed and enjoyed.[2] The extent of the area is in a broad sense limited by the requirements of the law of nations. The extent of the control which the State is permitted to exercise therein is likewise so held in restraint or determined.[3]

The extent of both the right and the duty of a State to do justice within its own domain, as well as elsewhere, is also fixed by

Dec. 10, 1898, Malloy's Treaties, II, 1693. *Cf.* United States *v.* Repentigny, 5 Wall. 211.

[1] According to Art. VI of the convention between the United States and Denmark of Aug. 4, 1916, providing for the cession of the Danish West Indies: "Danish citizens residing in said islands may remain therein or may remove therefrom at will, retaining in either event all their rights of property, including the right to sell or dispose of such property or its proceeds; in case they remain in the islands, they shall continue until otherwise provided, to enjoy all the private, municipal and religious rights and liberties secured to them by the laws now in force. If the present laws are altered, the said inhabitants shall not thereby be placed in a less favorable position in respect to the above-mentioned rights and liberties than they now enjoy.

"Danish citizens not residing in the islands but owning property therein at the time of the cession, shall retain their rights of property, including the right to sell or dispose of such property, being placed in this regard on the same basis as the Danish citizens residing in the island and remaining therein or removing therefrom, to whom the first paragraph of this article relates." Treaty Series No. 629, *Am. J.*, XI, Supp., 57–58.

In the treaty of peace with Germany of June 28, 1919, there was frequent provision that persons habitually resident in territory transferred, who elected to opt for the nationality of the transferor, and in consequence were obliged to transfer their residence to its domain, should still be entitled to retain their immovable property in the ceded territory. See, for example, Arts. 37 and 106.

[2] Hall, 5 ed., 100, quoted in Moore, Dig., I, 615. See, also, Bonfils-Fauchille, 7 ed., §§ 483–489; Calvo, 5 ed., I, 382–384; Oppenheim, 2 ed., I, §§ 168–171; Rivier, I, 135–143; Pradier-Fodéré, II, 144–151; Martens, I, 451–459; Woolsey, 6 ed., 67–68; Beale's Cases on Conflict of Laws, III, Summary, § 19.

[3] *Cf.* Reg. *v.* Keyn, 13 Cox C. C. 403, 2 Ex. D. 63; Beale's Cases on Conflict of Laws, I, 1.

international law. Inasmuch, however, as the scope of what may be described as the privileges and obligations of jurisdiction is not always to be ascertained or measured by reference to the territorial limits of a State, or by the degree of control which it may lawfully exercise within those bounds, the subject is discussed elsewhere.[1]

(2)

Various Territorial Limits

(a)

§ 135. Artificial Lines.

A treaty may provide that the boundary between two States shall follow certain imaginary lines, such as a parallel of latitude or a meridian of longitude, or a straight line connecting two given points.[2]

(b)

§ 136. Mountains and Hills.

A range of mountains or hills may be the boundary between two States. In such case the line of demarcation follows the watershed.[3] Professor Moore has observed that "this rule, while

[1] Rights of Jurisdiction, *infra*, §§ 218–265; Duties of Jurisdiction, *infra*, §§ 266–269.

[2] See, for example, Art. I of the treaty between the United States and Mexico, Dec. 30, 1853. This Article also provided for the survey and establishment of the boundary line by a mixed commission, and declared that "the dividing line thus established shall in all time be faithfully respected by the two Governments." Malloy's Treaties, I, 1121. Mr. Cushing, Attorney-General, was of opinion that in view of the language of the treaty, the monuments and other descriptions of the line as established by the Commission should be regarded as the true line of demarcation, even though it should afterwards appear that "by reason of error of astronomical observations or of calculation, it varied from the parallel of latitude where that was the line, or in the other part did not make exactly a straight line." 8 Ops. Attys.-Gen., 175–176, Moore, Dig., I, 615.

Concerning the error in the original demarcation of the Northeastern Boundary of the United States at Rouse's Point, see Moore, Dig., I, 615, note, *citing* Moore, Arbitrations, I, 70–71, 80, 112, 119, 129, 135–136, 149–153.

See United States *v.* Texas, 162 U. S. 1; also Moore, Dig., I, 616, concerning the interpretation of Art. IV, of the treaty between the United States and Spain of Feb. 22, 1819. See treaty between the United States and Great Britain, April 11, 1908, providing for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, Malloy's Treaties, I, 815, *Am. J.*, II, Supp., 306. Also Lord Curzon of Kedleston, "Frontiers", Roumanes Lecture, Oxford, 1907.

[3] Mr. George Canning, British Foreign Secretary, wrote to Mr. S. Canning, Dec. 8, 1824, with reference to the establishment of a line of demarcation between British and Russian Possessions in Alaska: "It is quite obvious that the boundary of mountains, where they exist, is the most natural and effectual boundary." *Proceedings*, Alaskan Boundary Tribunal, Appendix

simple enough in principle, is often exceedingly difficult of application." [1]

(c)

Rivers

(i)

§ 137. Preliminary.

In the Middle Ages, rivers which separated alien peoples or tribes were looked upon as neutral barriers rather than areas susceptible of nice division and capable of ownership.[2] There gradually arose, however, a sense of the necessity for the assertion of control over such waters; but there was confusion of thought as to the nature and extent of that control. Rivers served as natural arteries of commerce as well as natural boundaries. The matter of navigation was of as great moment as that of territorial limits. For that reason, early writers announced the principle of co-dominion, which assigned to the opposite riverain proprietors rights of sovereignty over the entire stream.[3] Men found it difficult to reconcile the claim of exclusive sovereignty asserted by one State over any portion of the stream, with the claim of another to exercise privileges of navigation therein. No doubt the latter claim had a marked effect upon the scope of the former. Nevertheless, the requirements of navigation were not decisive of the problem whether a line of division might be drawn through the waters of a river in recognition of sovereign rights of the States on either side of such a boundary. It came to be understood

to Case of the United States, Vol. II, 210. See line of demarcation between the Russian and British Possessions in North America, contained in the Anglo-Russian Convention of February 28 (16), 1825, and embodied in Art. I of the Convention between the United States and Russia of March 30, 1867, providing for the cession of Alaska, Malloy's Treaties, II, 1521.

[1] Moore, Dig., I, 616, note. As evidence of the truth of his statement Professor Moore refers to the question as to the "Highlands" in the Northeastern Boundary dispute between the United States and Great Britain, *citing* Moore, Arbitrations, I, 65–68, 78, 100, 109, 114, 131, 158–161.

Concerning the controversy between Chile and the Argentine Republic, whether the boundary between their respective territories should, according to existing conventions, be determined by the watershed or by the highest peak of the Andes, and the agreement to adjust the difference by arbitration, see For. Rel. 1896, 32–34; also Moore, Arbitrations, V, 4854–4855.

See, also, award of the arbitrator January 30, 1897, in the Manica Arbitration between Great Britain and Portugal, where the boundary followed a plateau, the watershed of which was not, for reasons given, regarded as the true line of demarcation, Moore, Arbitrations, V, 4985–5015.

[2] See historical review by E. Nys, in his *Droit International*, 2 ed., I, 423–437, *citing*, at 424, H. Helmolt in *Historisches Jahrbuch*, 1896, pp. 235 *et seq.*

[3] *Id.*, I, 425.

that such a line could be drawn. In accordance with the views of Grotius and Vattel, nations were agreed that it should pass through the middle of the stream.[1] This method of division proved, however, to be unsatisfactory in the case of navigable rivers; for, in disregarding the course of the principal channel, it was likewise heedless of the equities of the State which happened to be the more remote therefrom. Nor did it adapt itself to gradual changes which such channel might undergo.[2] As a result, at the beginning of the nineteenth century, riparian States began to conclude treaties, which proposed a different method of division, and which has since become the accepted mode of indicating the frontier. There has thus developed a practice manifesting general adherence to a particular doctrine.[3]

(ii)

§ 138. Thalweg.

It has long been agreed that when a navigable river forms the boundary between two States, the dividing line follows the thalweg of the stream.[4] The thalweg, as the derivation of the word in-

[1] *De Jure Belli et Pacis*, Book II, Chap. 3, Secs. 7 and 8; Chitty's Vattel (1859), Chap. 22, Sec. 266, p. 120.

[2] E. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, Paris, 1879, 73; Pierre Orban, *Étude de Droit Fluvial International*, Paris, 1896, 342–346.

[3] Art. VI of Treaty of Luneville, Feb. 9, 1801, De Clercq, *Traités*, I, 426, following the views expressed by the French plenipotentiaries at the Congress of Rastadt in March and April, 1798.

[4] Numerous treaties since the beginning of the nineteenth century make express provision that the frontier along navigable rivers shall follow the thalweg. See, for example, Art. V of the definitive treaty between France and the Allies of May 30, 1814, Brit. and For. State Pap., I, Pt. I, 156; also collection of treaties containing similar provisions, in the argument of the United States in the Chamizal Arbitration (Washington, 1911), 10–21. Among recent conventions to the same effect may be noted that between the Argentine Republic and Brazil of Oct. 6, 1898, Brit. and For. State Pap., XC, 85; also that between Great Britain and France of June 14, 1898, for the delimitation of possessions west of the Niger, Brit. and For. State Pap., XCI, 38, 45. *Cf.* also Art. I, Treaty of Constantinople, between Turkey and Bulgaria, of Sept. 16/29, 1913, Brit. and For. State Pap., CVII, 706, 709.

The treaties of the United States concerning river boundaries lack uniformity of expression. Art. II of the definitive treaty of peace with Great Britain of Sept. 3, 1783, provided that the frontier should follow the "middle" of boundary rivers as well as of water communications between the Lakes. Malloy's Treaties, I, 587. Art. I of the Webster-Ashburton Treaty of Aug. 9, 1842, provided that the frontier along the river St. John should follow the "middle of the main channel." *Id.*, I, 651. The treaty of April 11, 1908, concerning the Canadian international boundary, provided in Art. II respecting the St. Croix River, that the line should "follow the center of the main channel or thalweg as naturally existing, except where such course would change or disturb or conflict with the national character of islands as already established by mutual recognition and acquiescence." *Id.*, I, 818. This is

dicates, is the downway, or the course followed by vessels of largest tonnage in descending the river.[1] That course frequently, if not commonly, corresponds with the deepest channel. It may, however, for special reasons take a different path. Wheresoever that may be, such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the thalweg.[2]

the first boundary convention of the United States in which the term thalweg was employed.

Art. II of the treaty with Spain of Oct. 27, 1795, provided that the boundary along St. Mary's River should follow the "middle thereof"; while Art. IV declared that the "western boundary of the United States which separates them from the Spanish colony of Louisiana is the middle of the channel or bed of the river Mississippi." *Id.*, II, 1641, 1642. Art. III of the treaty with Spain of Feb. 22, 1819, provided that the boundary should follow the "course" of the Red River between specified points, all islands therein being assigned to the United States. *Id.*, II, 1652–1653.

Art. II of the treaty with Mexico of Jan. 12, 1828, declared that between specified points the boundary should follow the "course" of the Rio Roxo or Red River. *Id.*, I, 1083. According to Art. V of the Treaty of Guadalupe-Hidalgo of Feb. 2, 1848, the boundary was to proceed up the "middle" of the Rio Grande, "following the deepest channel where it has more than one"; also down the "middle" of a specified branch of the river Gila. *Id.*, I, 1109. Art. I of the Gadsden Treaty with Mexico of Dec. 30, 1853, referred to the "middle" of the Rio Grande, and likewise to that of the Colorado. *Id.*, I, 1122. In the preamble of the boundary convention with Mexico of Nov. 12, 1884, it was declared that according to the provisions of the two last-mentioned treaties the dividing line follows the "middle of the channel of the Rio Grande and Rio Colorado"; and it was, therefore, provided in Art. I that the dividing line should forever "follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium, and not by the abandonment of an existing river bed and the opening of a new one." *Id.*, I, 1159–1160.

[1] Declares Westlake: "When a river forms the boundary between two States it is usual to say that the true line of demarcation is the thalweg, a German word meaning literally the 'downway'; that is, the course taken by boats going downstream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats. *Thal* in the sense of valley enters into thalweg only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French." Int. Law, 2 ed., I, 144, and note 1.

Declared the Supreme Court of the United States in the case of Louisiana *v.* Mississippi, 202 U. S. 1, 49: "The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled 'fairway' or 'midway' or 'main channel', the word itself has been taken over into various languages. Thus, in the treaty of Luneville, Feb. 9, 1801, we find 'le Thalweg de l'Adige', 'le Thalweg du Rhin', and it is similarly used in English treaties and decisions, and in the books of publicists in every tongue."

According to Art. III of the Draft of International Regulations for the Navigation of Rivers, adopted by the Institute of International Law in 1887, "The boundary of the States separated by the river is marked by the thalweg; that is, the median line of the channel." *Annuaire*, IX, 182, J. B. Scott, Resolutions, 78.

[2] Minnesota *v.* Wisconsin, 252 U. S. 273, 282; Baker's 4th ed. of Halleck, 182, § 23.

The Supreme Court of the United States, recognizing the doctrine of thalweg, has declared that in the case of navigable boundary rivers the line follows the "middle of the main channel of the stream." [1]

The boundary line is subject to the gradual and imperceptible changes of the thalweg due to accretion or erosion, and produced by natural causes.[2] If from any cause the change is perceptible and sudden by a process known as avulsion, the boundary con-

[1] Iowa *v.* Illinois, 147 U. S. 1, 7–14; Handly's Lessee *v.* Anthony, 5 Wheat. 374; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535; Keokuk & Hamilton Bridge Co. *v.* The People, 145 Ill. 596; Same *v.* Same, 167 Ill. 15; Keokuk & Hamilton Bridge Co. *v.* Illinois, 175 U. S. 626; Bellefontaine Improvement Co. *v.* Niedringhaus, 181 Ill. 426; Louisiana *v.* Mississippi, 202 U. S. 1; Iowa *v.* Illinois, 202 U. S. 59; Washington *v.* Oregon, 211 U. S. 127, 134; 214 U. S. 205, 215; Arkansas *v.* Tennessee, 246 U. S. 158; 247 U. S. 461; Arkansas *v.* Mississippi, 250 U. S. 39, 45. *Compare* opinion of Mr. Crittenden, Attorney-General, 5 Ops. Attys.-Gen., 412.

The Supreme Court of the United States, in the case of Iowa *v.* Illinois, 147 U. S. 1, 7–14, declared that, according to international law and the usage of European States, the terms "middle of the stream" and the "mid-channel", as applied to a navigable river, are synonymous and interchangeably used; and that the former was employed in the latter sense in the treaty of peace concluded by Great Britain, France and Spain at Paris in 1763. There is room for doubt whether the quotations made from Wheaton, Creassy, Twiss, Halleck, Woolsey and Phillimore sustain such a conclusion. It is believed that prior to the Treaty of Luneville of 1801, States commonly employed the term "middle of the stream" or "midstream" in boundary conventions for the reason that a line other than one drawn midway between the banks of a river was rarely contemplated. After that treaty, States having become familiar with the principle of thalweg, seem to have employed either that term, or some other clearly synonymous with it, whenever the new mode of demarcation was intended. The principal boundary treaties concluded since the beginning of the nineteenth century afford abundant evidence of the fact that States have generally taken great care to express their acceptance of the principle of thalweg, and have avoided the use of words the literal meaning of which might encourage the inference that the contracting parties sought to retain the old method of establishing a frontier.

Art. 30 of the treaty of peace with Germany of June 28, 1919, provided that "in the case of boundaries which are defined by a waterway, the terms 'course' and 'channel' used in the present treaty signify: in the case of non-navigable rivers, the median line of the waterway or of its principal arm, and in the case of navigable rivers, the median line of the principal channel of navigation."

[2] See opinion of Mr. Cushing, Attorney-General, 8 Ops. Attys.-Gen., 175; Nebraska *v.* Iowa, 143 U. S. 359; McBaine *v.* Johnson, 155 Missouri. 191; Bellefontaine Improvement Co. *v.* Niedringhaus, 181 Illinois, 426; Argument of the United States in the Chamizal Arbitration, p. 26. Also Art. I of the boundary convention between the United States and Mexico of Nov. 12, 1884, which is believed to express with exactness the correct rule of law in the requirement, that in order to subject the boundary to variations of the thalweg, the changes in the latter must be "effected by natural causes." Malloy's Treaties, I, 1159–1160.

In the case of Washington *v.* Oregon, 211 U. S. 127, 136, the Supreme Court of the United States declared: "When, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel,

tinues to follow the line indicated by the previous channel.[1] This is true whether the river leaving its former bed thereby makes for itself a new course, or simply alters by enlargement or otherwise the path of the principal channel.[2]

If a State which is the territorial sovereign over lands on both sides of a river makes a grant of territory on one side of the stream, "it retains the river within its own domain, and the newly

although the latter in the course of years becomes the most important and properly called the main channel of the river."

[1] *Cf.* opinion of Mr. Cushing, Attorney-General, 8 Ops. Attys.-Gen., 175; Cooley *v.* Golden, 52 Mo. App. 229; Nebraska *v.* Iowa, 143 U. S. 359; Missouri *v.* Nebraska, 196 U. S. 23; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 546; Arkansas *v.* Tennessee, 246 U. S. 158, 173; Arkansas *v.* Mississippi, 250 U. S. 39, 44.

In Arkansas *v.* Tennessee, 246 U. S. 158, at 175. Mr. Justice Pitney, in the course of the opinion of the Court, adverting to the results of avulsion in causing the boundary to remain in the middle of the former channel, said: "An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel." See, also, Whiteside *v.* Norton, 205 Fed. 5.

[2] In the case of Nebraska *v.* Iowa, 143 U. S. 359, the Supreme Court of the United States held that while there might be an instantaneous and obvious erosion on one side of the Missouri River, if the accretion to the other side was gradual and imperceptible by alluvial deposits, the boundary would follow the changes in the channel thus effected notwithstanding their rapidity.

In the case of the Chamizal Arbitration before the Special International Boundary Commission, under the convention between the United States and Mexico of June 24, 1910, a grave problem arose concerning the interpretation of the boundary convention between those countries of Nov. 12, 1884, relating to the Rio Grande and Rio Colorado. Art. I of that convention provided that the dividing line should follow the center of the normal channel of those rivers irrespective of any alterations in their banks or courses, provided that such alterations were "effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." The presiding commissioner, Prof. La Fleur, and the Mexican commissioner, Mr. Puga, who constituted a majority of the tribunal, were of opinion that the language quoted signified that the boundary should not vary with alterations in the course of the Rio Grande in case of a rapid and obvious erosion even though there might be no abandonment of the river bed. The American commissioner, Gen. Mills, was, however, of opinion that it was impossible to impute to the contracting parties an intention to prevent the boundary from following changes in the course of the river in the case of rapid and perceptible erosion unless there was also an abandonment of the existing river bed. For the text of the award of the court and the dissenting opinion of the American commissioner, see *Am. J.*, V, 782.

Art. 30 of the treaty of peace with Germany of June 28, 1919, entrusted to the boundary commissions provided by the treaty "to specify in each case whether the frontier line shall follow any changes of the course or channel which may take place, or whether it shall be definitely fixed by the position of the course or channel at the time when the present treaty comes into force."

erected State extends to the river only." [1] Treaties have oftentimes recognized the fact that a river, instead of forming the boundary between two States, may be itself a part of the national domain of one riparian proprietor, the limit of whose territory is the further edge of the stream.[2]

When a river forms the boundary between two States, neither of them possesses the right to change, by means of artificial works or otherwise, the natural course of the thalweg, and so alter the line of demarcation or affect the navigability of the stream. It would be unjust, as was early perceived by Vattel,[3] for one riparian proprietor so to promote its own advantage at its neighbor's expense. Numerous treaties give recognition to this principle. While they announce that lawful modification of a boundary by artificial means requires the consent of both the States concerned, they sometimes contemplate uses, obstructions or diversions to be made in accordance with the approval of a joint commission.[4] It must be clear that no agreement of the States whose territories are divided by a river can render lawful acts on the part of either sovereign

[1] Handly's Lessee *v.* Anthony, 5 Wheat. 374.

Writes Hall: "Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier." 5 ed., 123, quoted in Moore, Dig., I, 617, note.

[2] *Cf.*, for example, Art. III of the treaty between the United States and Spain of Feb. 22, 1819, relative to the boundary along the river Sabine, Malloy's Treaties, II, 1652; also texts of boundary conventions in the Argument of the United States in the Chamizal Arbitration, 21–24.

In the Argument of the United States in the Chamizal Arbitration there is noted (p. 24) a small group of European boundary treaties, which provide that the thalweg shall be designated at fixed points, which shall thereafter be regarded as forming a fixed line of demarcation, notwithstanding subsequent changes of the channel. The text of the boundary convention between Russia and Westphalia of May 14, 1811, is quoted.

[3] Chitty's ed., § 271, p. 122. See, also, Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten*, § 299; Calvo, 5 ed., I, § 342, p. 466.

[4] See, for example, Arts. II, III, and IV of treaty between the United States and Great Britain respecting the boundary waters between the United States and Canada, Jan. 11, 1909, Charles' Treaties, 40–41, *Am. J.*, IV, Supp., 239; Art. VII of treaty between the United States and Mexico, Feb. 2, 1848, Malloy's Treaties, I, 1111; Art. III of boundary convention between the United States and Mexico, Nov. 12, 1884, *id.*, 1160; Art. V of boundary convention between the United States and Mexico, Mar. 1, 1889, *id.*, 1168; Art. III of convention of limits between France and Prussia, Oct. 23, 1829, Brit. and For. State Pap., XVI, 907; convention between Sweden and Norway concerning common lakes and watercourses, Oct. 26, 1905, *Nouv. Rec. Gén.*, 3 ser., XXXIV, 710, quoted in Bonfils-Fauchille, 7 ed., p. 358.

Cf., also, MS. Memorandum by William C. Dennis on "The effect of a gradual change in the thalweg of the Rio Grande caused by an artificial construction authorized by the Governments of the United States and Mexico, upon the international boundary line under the treaties between the two countries."

productive of changes in the thalweg where the stream forms the boundary between other States, or serves to impair the value of their rights of navigation. Obviously the lawfulness of such conduct depends upon the consent of all concerned.[1]

If a non-navigable river constitutes an international boundary, it appears to be accepted doctrine that the dividing line follows the middle of the stream.[2]

(iii)

§ 139. Islands.

Islands existing or arising within a boundary river belong to the domain of the State on whose side of the thalweg or middle line (in case the stream is not navigable) they may be located.[3] If an island arises in the middle of a non-navigable stream the frontier, in the absence of special agreement, doubtless follows an imaginary line drawn through the middle of the newly formed land. If, however, the river is navigable, as the boundary is indicated by the principal channel, the island necessarily comes into existence on one side or the other thereof, and hence should belong exclusively to one riparian proprietor.[4] Division of the island might, however, be fairly claimed if its formation was sudden and perceptible.

If by slow and imperceptible change of the thalweg the boundary is altered in such a way as to separate an island from the State to which it may have belonged, the right of ownership of the latter is not lost. This fact has been frequently recognized in European treaties.[5] The right of sovereignty is, however, believed to change with the alterations of the thalweg. Thus the former sovereign, although retaining its title, would appear to lose the right of supreme control.[6]

[1] This is recognized in the rules respecting the International Regulation of the Use of International Streams adopted by the Institute of International Law at Madrid in 1911. *Annuaire*, XXIV, 365, J. B. Scott, Resolutions, 168, 169.

[2] Hall, Higgins' 7 ed., § 38.

[3] Such is the common provision of boundary conventions which refer to the matter. See, for example, Art. IV of treaty between the Argentine Republic and Brazil, Oct. 6, 1898, Brit. and For. State Pap., XC, 85; agreement between Great Britain and Portugal, Nov. 6–30, 1911, respecting the boundary on the Ruo and Shiré Rivers, *id.*, CIV, 194.

Cf., also, Rivier, Int. Law, I, 168.

[4] Blatchford, J., in St. Louis *v.* Rutz, 138 U. S. 226, 249.

[5] See, for example, definitive treaty of peace between the Allies and France of May 30, 1814, Brit. and For. State Pap., I, Pt. I, 156; also statement of E. Nys concerning the treaties, 1801–1840, affecting islands in the Rhine, in his *Droit International*, 2 ed., I, 430–435; also St. Louis *v.* Rutz, 138 U. S. 226, 250.

[6] This principle is well expressed by Fiore (French translation by Antoine), II, § 781 and note. *Compare* Rivier, I, 168.

(iv)

§ 140. Bridges.

According to European treaties of the nineteenth century, the frontier on a bridge crossing a river forming an international boundary was fixed at the middle point of the structure.[1] This may have been a natural consequence of the early doctrine which referred to the middle rather than the principal channel of a navigable river as indicative of the boundary. The requirements which led to the adoption of the thalweg as the mode of establishing a frontier bore no relation to bridges. The latter continued to be built and maintained at the equal expense of the riverain States whose territories were thus connected. The middle point of such structures continued also to mark the true division of rights of sovereignty as well as of ownership. As these related to what was affected but slightly by alterations of the courses of the rivers spanned, riverain States appeared to agree that the frontier respecting bridges should not vary with changes of the thalweg. The boundary conventions which expressly or by implication refer to the matter seem to recognize this principle.[2]

If the frontier with respect to a bridge over a boundary river is to be fixed from the time of construction, it would be most reasonable to make the division of rights of sovereignty coincide with the line of demarcation then recognized in the river itself. Thus, when the latter is the thalweg, it is believed that the point where

[1] Treaty of Luneville of Feb. 9, 1801, between France and the Empire, De Clercq, *Traités*, I, 425; treaty between Baden and Argovie of Sept. 17, 1808, *Nouv. Rec.*, I, 140; Art. III of Treaty of Peace of Paris, Nov. 20, 1815, Brit. and For. State Pap., III, 280, 285; decree promulgating treaty of limits between France and Spain of Dec. 2, 1856, Brit. and For. State Pap., XLVII, 765; final act of delimitation of boundary respecting Sardinia, Austria and France of Nov. 10, 1859, Brit. and For. State Pap., LIII, 943; declaration of Jan. 26, 1861, respecting the limit of sovereignty over bridges of the Rhine, between France and Baden, De Clercq, *Traités*, VIII, 160; final act of delimitation of boundary between Austria and Italy, Dec. 22, 1867, Brit. and For. State Pap., LXIII, 840; final act of the powers fixing the Turco-Greek frontier, Nov. 27, 1881, Brit. and For. State Pap., LXXII, 738; E. Nys, *Le Droit International*, 2 ed., I, 437; Rivier, I, 168; G. Ullmann, *Völkerrecht*, 2 ed., § 30.

[2] Thus in the declaration of Jan. 21, 1861, respecting the limits of sovereignty over bridges of the Rhine between France and Baden, it was declared:

"1. The middle of the fixed bridge over the Rhine between Strasbourg and Kehl shall be regarded as the limit of sovereignty between France and the Grand Duchy of Baden.

"2. The same principle shall be adopted hereafter respecting the bridge of boats between Strasbourg and Kehl, as well as for all the bridges which shall be constructed in the future between France and the Grand Duchy of Baden.

"3. These provisions are independent of the limit of the waters, and shall be without prejudice as to that limit, such as is established annually, according to the thalweg of the Rhine." De Clercq, *Traités*, VIII, 160.

the line of the principal channel intersects the bridge should designate the frontier, and the division thus indicated be given permanent recognition.[1]

(d)

Marginal Seas

(i)

§ 141. Relation to Territorial Sovereign of Adjacent Land.

At the time when the United States came into being, maritime powers were fast relinquishing exorbitant pretensions to rights of control over wide areas of the sea contiguous to land constituting the national domain.[2] Such claims although based

[1] Such was the policy of the United States and Mexico, expressed in the boundary convention of Nov. 12, 1884, respecting the Rio Grande and the Rio Colorado, Art. IV of which provided that "If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention." Malloy's Treaties, I, 1159, 1160.

[2] See, generally, The Extent of the Marginal Sea, a collection of official documents and views of representative publicists, prepared by Henry G. Crocker, Dept. of State, 1919; Hugo D. Barbagelata, *Frontières*, Paris, 1911; T. W. Fulton, Sovereignty of the Sea, Edinburgh, 1911, Section II; Paul Godey, *La Mer Côtière*, Paris, 1896; Joseph Imbart de Latour, *La Mer Territoriale*, Paris, 1889; A. de Lapradelle, "*Le droit de l'État sur la mer territoriale*", *Rev. Gén.*, V, 264 and 309; Reinhard Leistikow, *Die Rechtslage in den Küstengewässern*, Greifswald, 1913; Antoine Nuger, *Des Droits de l'État sur la Mer Territoriale*, Paris, 1887; Ferdinand Perels, *Das Internationale öffentliche Seerecht der Gegenwart*, Berlin, 1903; Arnold Raestad, *La Mer Territoriale*, Paris, 1913; Walther Schücking, *Das Küstenmeer im internationalen Rechte*, Göttingen, 1897; Romée de Villeneuve, *De la Determination de la Ligne Séparative des Eaux Nationales et de la Mer Territoriale* (with bibliography), Paris, 1914; Lodewijk Ernst Visser, *De Territoriale Zee*, Amersfoort, 1894. Also Moore, Dig., I, 698–735, and documents there cited; Naval War College, Int. Law Topics, 1913, 11–35; Bonfils-Fauchille, 7 ed., §§ 490–494, with bibliography; Calvo, 5 ed., 477–480; Rivier, I, 145–150; Pradier-Fodéré, II, 147–148; Hall, Higgins' 7 ed., §§ 40–41; Oppenheim, 2 ed., I, §§ 185–187; Westlake, 2 ed., I, 187–191; Dana's Wheaton, §§ 178–179; Dana's Note, *id.*, No. 105; Woolsey, 6 ed., 76–77.

See, also, Report of Sir Thomas Barclay to the Institute of International Law, Aug. 6, 1892, *Annuaire*, XII, 104; Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law, 1894, *id.*, XIII, 328, J. B. Scott, Resolutions, 113; "*La Limite de la Mer Territoriale*" (Source — R. de Ryckère), *Clunet*, XLIV, 921; Sir J. W. Salmond, "Territorial Waters", *Law Quar. Rev.*, XXXIV, 235.

Instructions of American plenipotentiaries for negotiating a treaty of Commerce with Great Britain, Aug. 14, 1779, Secret Journals of Congress, II, 229, Snow, Topics on American Diplomacy, 55; Report of Committee of Congress, Aug. 16, 1782, Secret Journals of Congress, III, 161, Snow, *id.*, 57, 59, in

upon a variety of considerations, had commonly been partially attributable to the theory that the waters over which rights of sovereignty were asserted, by reason of what took place within them, bore such a relation to the nearest land as to be regarded as appurtenant to it.[1] To defend it from attack, to protect commerce entering and leaving its ports, to safeguard the fisheries along its borders, and to insure respect for the flag of its territorial sovereign had been decisive influences. With the advent of the nineteenth century it came to be understood that a State was capable of substantially occupying a narrow rim of the sea adjacent to its ocean coasts, and of dealing with it, for most purposes, as though it were a part of the national domain.[2] It was, therefore, generally recognized as advantageous to the international society, that each of its maritime members should exercise a right of control over such marginal sea within certain definite limits, and treat it for most purposes as a part of its territory. The international interest, although conserved by such action on the part of the individual State, was, however, also solicitous that the extent of the water area be narrowly limited and sharply defined. Thus it was not the extent or width of the marginal sea which an adjacent State was capable of occupying, but rather the amount which it could occupy without obvious detriment to the society of nations as a whole, which was, and yet remains, an object of concern.

Bynkershoek had, in 1703, declared that the extent of the area should be measured by the power of a State to control it from the

the course of which it was said: "Thus it appears, upon strict principles of natural law, that the sea is unsusceptible of appropriation; that a species of conventional law has annexed a reasonable district of it to the coast which borders on it; and that in many of the treaties to which Great Britain has acceded, no distance has been assumed for this purpose beyond fourteen miles."

[1] Thus in the course of the award of the arbitral tribunal at the Hague, under convention of March 14, 1908, between Sweden and Norway, to settle certain differences relating to the maritime boundary between those States, it was declared that by the fundamental principles of the law of nations, both ancient and modern, "Maritime territory is a necessary appurtenance of the land territory." Wilson, Hague Arbitration Cases, 103, 121.

[2] Declares Hall: "The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid. This principle may be taken as the formal expression of the results of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular State with those of the body of States." Higgins' 7 ed., 40.

"The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See Manchester *v.* Massachusetts, 139 U. S. 240; McCready *v.* Virginia, 94 U. S. 391." Fuller, C. J., in Louisiana *v.* Mississippi, 202 U. S. 1, 52.

land, and that the test of that power was the range of a cannon, then regarded as three marine miles, or one marine league.[1] Hence, that distance, as Westlake has declared, "measured from low-water mark, became a commonplace among authors for the width of the littoral sea." [2] Moreover, statesmen accepted the limit thus laid down, and continued to do so long after the theory on which it had been based became inapplicable; [3] for the constantly increasing range of heavy guns could afford no stable test, nor serve automatically to extend a limit which needed to be definite and constant.

(ii)

§ 142. Position of the United States.

Mr. Jefferson, as Secretary of State, announced in 1793, that the President, reserving for future deliberation the "ultimate extent" which might be claimed as territorial waters of the United States, saw fit to adhere to instructions already given to officers under his authority to consider "for the present" the distance as limited to "one sea league or three geographical miles from the seashore." [4]

The United States during the nineteenth century protested against the occasional efforts of certain other States to exercise rights of sovereignty over a broader area. With Great Britain it successfully opposed the attempt of Russia, announced in the Ukase of September 4, 1821, to prohibit foreign vessels from approaching within a hundred Italian miles of Russian possessions in the Pacific Ocean north of the 45th degree of latitude on the coast of Asia, and of the 51st degree on the coast of America.[5]

[1] "Bynkershoek's argument is in the dissertation *De Dominio Maris*, but the maxim, in the terse form quoted in the text [*Imperium terrae finiri ubi finitur armorum potestas*], occurs in the *Quæstiones Juris Publici*, L. 1, c. 8." Westlake, 2 ed., I, 188, note. It may be observed that the *Dissertatio de Dominio Maris* was published in 1703, and the *Quæstiones Juris Publici* in 1737. See O. W. S. Numan, Cornelis Van Bynkershoek, *Zijn Leven En Zijne Geschriften*, Leiden, 1869, 470.

[2] Int. Law, 188–189.

[3] Preamble of Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law, 1894, *Annuaire*, XIII, 328, J. B. Scott, Resolutions, 113.

[4] Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister, Nov. 8, 1793, British Counter Case and Papers, Geneva Arbitration, American reprint, 553, Moore, Dig., I, 702; also Mr. Pickering, Secy. of State, to the Lieut. Governor of Virginia, Sept. 2, 1796, 9 MS. Dom. Let. 281, Moore, Dig., I, 704.

[5] See documents in American State Pap., For. Rel., V, 432–471. Also Award in the Fur Seal Arbitration, Aug. 15, 1893, *Proceedings*, Fur Seal Arbitration, I, 77; Case of Great Britain, *Proceedings*, Alaskan Boundary Tribunal, III, 14; treaty between the United States and Russia, April 17, 1824, Malloy's Treaties, II, 1512.

In 1862, Spain asserted the right to regard as the territorial waters of Cuba, the waters surrounding that island to a distance of six marine miles therefrom, on the ground that such an area was within the range of a cannon from the shore, which was said to be the true test of the seaward limits of the Spanish domain. Secretary Seward made objection. He declared that the extent of the territorial waters of a State was not to be derived from its own decrees or legislative enactments, but from the law of nations, and that according to that law the limit was fixed at three marine miles from the coast.[1]

The United States appears generally to have taken a position in harmony with these views, at least with respect to the extent of territorial waters on the American continents.[2] In so doing

[1] Mr. Seward, Secy. of State, to Mr. Tassara, Spanish Minister, Dec. 16, 1862, MS. Notes to Spain, VII, 331, Moore, Dig., I, 706–707, where it was said: "This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet three points involved in the subject are insisted upon by the United States: First, that this limit has been generally recognized by nations; second, that no other general rule has been accepted; and third, that if any State has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the *range of a cannon shot* (when it is made the test of jurisdiction) at *three miles*. So generally is this rule accepted that writers commonly use the two expressions, of a *range of cannon shot* and *three miles*, as equivalents of each other."

[2] "This Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.

"We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a *marine league* from its coast." Mr. Fish, Secy. of State, to Sir Edward Thornton, British Minister, Jan. 22, 1875, For. Rel. 1875, I, 649, Crocker's Compilation, 664.

See, also, Mr. Fish, Secy. of State, to Mr. Boker, Minister to Russia, Dec. 1, 1875, MS. Inst. Russia, XV, 536, Moore, Dig., I, 705; Mr. Seward, Secy. of State, to Mr. Tassara, Spanish Minister, Aug. 10, 1863, MS. Notes to Spanish Legation, VII, 407, Moore, Dig., I, 709. Declared Mr. Bayard, Secy. of State, in the course of a communication to Mr. Manning, Secy. of the Treasury, May 28, 1886: "We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt." 160 MS. Dom. Let. 348, Moore, Dig., I, 718–720. *Cf.* Art. II, Stockton's Naval War Code of 1900 (withdrawn in 1904), Naval War College, Int. Law Discussions, 1903, 103.

In the course of the arbitration of the *C. H. White* Case, Mr. Pierce, Agent of the United States, in pursuance of authority from the Secretary of State, made a declaration to the effect that "The Government of the United States claims, neither in Bering Sea, nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

"The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a *marine league*,

it has invoked the practice of maritime States, which, in its judgment, has failed to indicate general acquiescence in the doctrine that the range of cannon should prescribe the test, or any indefinite extension of the traditional limit.[1]

In 1916, when the United States was a neutral, the Department of State, although expressing regret that British cruisers should patrol the waters adjacent to its ocean coast in close proximity thereto, and requesting a cessation of such action, took pains to declare that it advanced no claim that such vessels when "cruising off American ports beyond the three-mile limit" were not in so doing "within their strict legal rights under international law."[2] In the discussion which took place, it was assumed on both sides that three marine miles was the extent of the territorial waters of the United States.[3]

§ 143. The Same.

It may be observed that in June, 1918, the Norwegian Government, which had previously claimed that the territorial waters

unless a different rule is fixed by treaty between two States: even then the treaty States are alone affected by the agreement." For. Rel. 1902. Appendix I, 440, 461, Crocker's Compilation, 680.

Art. IV of the Suez Canal Convention of Oct. 29, 1888, prohibited the commission of hostilities within a radius of three marine miles of the ports of access to the Canal. Moore, Dig., III, 264, *Nouv. Rec. Gén.*, 2 ser., XV, 560. *Cf.*, also, Section 5, Art. III, of the Hay-Pauncefote Treaty of Nov. 18, 1901, to facilitate the construction of a trans-Isthmian ship canal, Malloy's Treaties, I, 782.

According to Art. V of the Treaty of Guadalupe-Hidalgo, concluded with Mexico Feb. 2, 1848, Malloy's Treaties, I, 1110, "The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande." The same seaward limit was expressed in Art. I of the Gadsden Treaty of Dec. 30, 1853, *id.*, 1122. In later years, in correspondence with Great Britain, the Department of State appeared to take the stand that this provision was solely applicable to the rights of the contracting parties, and did not necessarily imply more, or amount to an abridgment of the rights of other States under the law of nations. Mr. Buchanan, Secy. of State, to Mr. Crampton, British Minister, Aug. 19, 1848, MS. Notes to Great Britain, VII, 185, Moore, Dig., I, 730; Mr. Fish, Secy. of State, to Sir Edward Thornton, British Minister, Jan. 22, 1875, For. Rel. 1875, I, 649, Moore, Dig., I, 731. See Bolmer *v.* Edsall, 106 At. (N. J. Ch.), 646.

[1] *Compare*, however, Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., I, 705; also dictum of Mr. Martens in his award as Arbitrator in the case of the *Costa Rica Packet* to the effect that "the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from the low-water mark." Moore, Arbitrations, V, 4952. Also Arts. XII and XIX of unconfirmed convention with Great Britain, of Dec. 31, 1806, *Proceedings*, North Atlantic Coast Fisheries Arbitration, IV, Appendix, 42, Senate Doc. No. 870, 61 Cong., 3 Sess.: Crocker's Compilation, 642.

[2] Mr. Lansing, Secy. of State, to Sir Cecil Spring Rice, British Ambassador at Washington, April 26, 1916, American White Book, European War, III, 139, 140.

[3] See documents, *id.*, 131–141. Unanchored Mines, The Attitude of the United States, *infra*, § 715.

of Norway extended to four miles from the shore, announced its recognition of the difficulty of upholding such a claim during the existing war, since it was "not recognized by either the British or German Governments." Accordingly it was intimated to the British Government on May 3, 1918, that Norwegian naval officers had been instructed to confine their efforts to maintain the neutrality of the waters within the three-mile limit, and not to fire on belligerent ships operating outside of it.[1]

Since its earliest treaty with Great Britain, the United States seems to have been generally unwilling to admit that the presence of valuable fisheries bordering the ocean coast of a State and more than three marine miles distant therefrom, served to extend the limits of its territorial waters.[2] The chief problem, however, in

[1] Norwegian Regulations defining territorial waters and treatment of belligerent submarines, of June 18, 1918, Naval War College, Int. Law Documents, 1918, 118. Also Art. I of Neutrality Regulations of Morocco, July 18, 1917, *id.*, 116. *Compare* Art. I of Italian decree of Aug. 6, 1914, relating to the extent of jurisdictional waters, in regard to neutral rights and duties conventionally assumed, and declaring that "by territorial waters is understood the zone of water included between the coast line and a line 6 nautical miles (11,111 meters) due seaward of the said coast line", *id.*, 100. On March 5, 1915, the Swedish Minister at Washington announced to the Department of State that "according to a long tradition, the territorial waters of Sweden extend 4 nautical miles (4 minutes or 7,420 meters) from the coast or from the furthest outlying islets or skerries, which are not continually washed over by the sea." *Id.*, 153.

[2] "No general disposition has been manifested in recent years to restrict the right of all nations to take fish in the open sea. The three-mile rule, which defines the exclusive right of fishery on the Canadian coasts under the convention between the United States and Great Britain of 1818, may also be found in the convention of 1882 between Belgium, Denmark, France, Germany, and Great Britain for the regulation of the fisheries in the North Sea. The same rule is embodied in conventions between France and Great Britain of 1839 and 1843 for the regulation of the fisheries in the channel. It is also found in a law passed by the French legislature in 1885 for the exclusion of foreigners from fishing in the territorial waters of France and Algiers." Moore, Dig., I, 716.

See Mr. Fish, Secy. of State, to Mr. Boker, Minister to Russia, Dec. 1, 1875, MS. Inst. Russia, XV, 536, Moore, Dig., I, 717; Mr. John Davis, Asst. Secy. of State, to Mr. Osborn, Feb. 14, 1884, 150 MS. Dom. Let. 6, Moore, Dig., I, 718; Mr. Bayard, Secy. of State, to Mr. Manning, Secy. of the Treasury, May 28, 1886, 160 MS. Dom. Let. 348, Moore, Dig., I, 718. *Compare* claims of Norway over adjacent fisheries described in paper of Mr. G. Gram, one of the Arbitrators of the Fur Seal Arbitration, Moore, Arbitrations, I, 920, note.

Concerning the pearl fisheries protected by Great Britain off the coast of Ceylon, see Westlake, 2 ed., I, 190–191, 203; also Oppenheim, 2 ed., I, p. 348, note 2.

A State may in fact attempt to regulate fishing on the high seas. It may contract with other States whose nationals with its own are interested in fishing within certain areas thereof, and that with a view to regulating or checking the industry. See, for example, convention concluded by the United States, Great Britain, Russia and Japan, July 7, 1911, for the preservation and protection of fur seals frequenting the waters of the North Pacific Ocean, Charles' Treaties, 84. *Cf.*, also, in this connection, Oppenheim, 2 ed., I, §§ 281–285.

relation to the fisheries on the North Atlantic coast has concerned the extent of bays within which exclusive fishery rights might be exercised by the territorial sovereign, rather than the limits of the marginal sea within which they might be so enjoyed.[1]

(iii)

§ 144. Certain Acts Not Assertive of Territorial Claims.

It is believed to be important to observe that a State may endeavor to prevent, in times of peace or war, the commission of certain acts by foreign ships or the occupants thereof, at a distance of more than three marine miles from its coast, without claiming that the place where they occur is a part of its domain. This is true in the case of so-called hovering laws, designed to prevent smuggling by interference outside of territorial waters with foreign vessels about to enter them for an illegal purpose.[2] It is apparent also when a neutral State merely seeks to check the commission of hostile acts in dangerous proximity to its shores although more than three marine miles therefrom,[3] or when a belligerent undertakes to establish a defensive sea area off its ocean coast.[4] Such measures of prevention, which are taken with a view to safeguarding the national domain, are not indicative of the extent of the territorial limits of the State which has recourse to them.

(iv)

§ 145. Proposed Extension of Existing Limit.

There has been a disposition on the part of publicists of distinction to advocate an extension of three marine miles as the

[1] Bays, The North Atlantic Coast Fisheries Arbitration, *infra*, § 147.

[2] See the British Hovering Act of 1736 (9 Geo. II, 35), Moore, Dig., I, 725; also Act of Congress of March 2, 1799, Secs. 26 and 27, 1 Stat. 647 and 648. *Cf.* Jurisdiction, The High Seas, Revenue or Hovering Laws, *infra*, § 235.

[3] See, for example, the effort of France in 1864 to prevent the engagement between the *Kearsarge* and the *Alabama* at a distance within such proximity to the French coast, although more than three marine miles therefrom, as would "be offensive to the dignity of France." Dip. Cor. 1864, III, 104–121, Moore, Dig., I, 723–724. Also, in this connection, Mr. Bayard, Secy. of State, to Mr. Manning, Secy. of the Treasury, May 28, 1886, 160 MS. Dom. Let. 348, Moore, Dig., I, 718–721.

[4] Concerning the defensive sea areas established by the United States in 1917 and 1918, see Access to Ports, *infra*, § 187.

It may be observed that the outer limit of the defensive sea area established by the executive order of April 5, 1917, with respect to the entrance to Chesapeake Bay, was a "line parallel to that joining Cape Henry Light and Cape Charles Light and four nautical miles to eastward thereof, and the lines from Cape Charles Light and from Cape Henry Light perpendicular to this line."

limit of territorial waters.[1] The ease with which a State may occupy an area far beyond such a distance from its ocean coasts, the advantages accruing to it from such occupation, as well as the frequent attempts to assert various forms of control over a wider zone, may be in fact relied upon as grounds justifying a change. It should be observed, however, that in judging of the reasonableness of any particular extension, the general interest of the society of nations must be given precedence over the claims of the individual State, and that the measure of its power to occupy effectively a wide expanse of the sea must be subordinated to those geographical and economic considerations which still render it generally beneficial to the society of nations that no one of its members become the territorial sovereign over a broad tract of the ocean. In balancing these opposing equities, the significant fact is that as an incident of The World War, the interests of that society are more clearly perceived than heretofore, and, in consequence, the relative value of them newly and amply appraised.

(e)

Bays

(i)

§ 146. The General Principle. Certain Applications.

The individual State has in practice enjoyed much latitude in determining what bays or arms of the sea penetrating its territory may be regarded as a part of the national domain and dealt with accordingly.[2] This is partly due to the fact that a bay of wide expanse, the entrance to which is far more than six marine miles

[1] According to Art. II of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894: "The territorial sea extends six marine miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts." *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114, Moore, Dig., I. 734. Also Report of Sir Thomas Barclay, with draft of proposal, to the Institute of International Law, 1912, *Annuaire*, XXV, 375; Report of Prof. Oppenheim, to the Institute, 1913, *id.*, XXVI, 403. See, also, conclusions of Naval War College in 1913, Naval War College, Int. Law Topics, 1913, 34.

See Mr. Olney, Secy. of State, to Mr. de Weckherlin, Dutch Minister at Washington, Feb. 15, 1896, MS. Notes to the Netherlands, VIII, 359, Moore, Dig., I. 734.

[2] See, generally, documents in Moore, Dig., I. 735–743; Naval War College, Int. Law Situations, 1904, 138–140; *id.*, Int. Law Topics, 1913, 35–42, 46–47; *Proceedings* of Alaskan Boundary Tribunal, Counter Case of Great Britain, Vol. IV, Part 3, 24–30; Territorial Waters Brief of Great Britain, *Documents and Proceedings* of Halifax Commission, II, 1887–1906, Moore, Arbitrations, I, 744, Moore, Dig., I. 806. *Compare*, Brief of the United States, *Proceedings*, Halifax Commission, I, 119–167, Moore, Arbitrations, I, 743, Moore, Dig., I. 805; Report of Mr. Edmunds from Senate Committee on Foreign Relations,

in extent, may still be subjected to control and practically occupied by the territorial sovereign of the surrounding land, and that without interference with any channel of communication between States generally, or with any other definite interest of the society of nations.[1] It may be doubted whether international law has as yet limited with precision the dimensions of bays which may be fairly deemed by the individual State to constitute its territorial waters.

Delaware Bay, some ten marine miles wide at its entrance, and forty miles in length from its entrance to the Delaware River (as measured in a straight line to Liston Point), was in 1793, regarded by Attorney-General Randolph as an American bay.[2] In his opinion, the seizure within its waters of the British ship *Grange* by a French vessel of war was an illegal act within neutral territory.[3] Some years later, Chesapeake Bay, nine and a half nautical miles wide at its entrance (as measured between Cape Henry and The Isaacs), and one hundred and seventy miles in length to the mouth of the Susquehanna River (following mid-channel), was regarded by the Court of Commissioners of Alabama Claims in the case of the *Alleganean*, as within the territorial waters of the United States. In the course of its opinion the Court said:

> Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands

Jan. 19, 1887, Sen. Rep. No. 1683, Reports of Senate Committee on Foreign Relations, V, 615, 619.

See A. H. Charteris, "Territorial Jurisdiction in Wide Bays", *Yale Law Journal*, XVI, 471; Int. Law Association, 23d Report, Berlin Conference (1906), 103; Charles Noble Gregory, "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen More Than Three Miles from Shore", *Am. Pol. Sc. Rev.*, I, 410; "Territorial Jurisdiction in Wide Bays", *Harv. Law Rev.*, XXI, 65; *id.*, XVI, 150. See also T. W. Fulton, Sovereignty of the Sea, Edinburgh, 1911, Chap. III; W. Schücking, *Das Küstenmeer im internationalen Rechte*, Göttingen, 1887, § 4; Romée de Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale spécialement dans les baies*, Paris, 1914; Bonfils-Fauchille, 7 ed., § 516; Hall, Higgins' 7 ed., § 41; Oppenheim, 2 ed., I, §§ 191–193; Rivier, I, 153–157; Westlake, 2 ed., I, 191–192.

[1] "In practice, States deal with their own bays in their own way, and in so doing suffer, as Schücking (*Das Küstenmeer*, p. 21) points out, the less interference from their neighbours, since bays are not usually channels of communication on the highway of the ocean which every maritime nation is concerned to keep open, but are merely means of access to ports lying within them." A. H. Charteris, "Territorial Jurisdiction in Wide Bays", *Int. Law Association, Proceedings*, 23d Conference, 103, 107.

[2] The measurements of bays as stated in the text, under this title, have been furnished the author by the Hydrographic Office.

[3] Opinion of Mr. Randolph, Atty.-Gen., May 14, 1793, in the course of which he said: "The corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea." Am. State Pap., For. Rel., I, 148; 1 Ops. Attys.-Gen., 32, Moore, Dig., I, 735, 736.

> are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high Seas' within the meaning of the term as used in Section 5, of the act of June 5, 1872.[1]

In 1877, the Judicial Committee of the Privy Council was of opinion that Conception Bay in Newfoundland, having a width of ten and a quarter nautical miles at its entrance (at Broad Cove Head), and a length of thirty-two and a quarter miles, as measured from the center of the entrance (on a line from Spit Point to Cape St. Francis) to the mouth of Holy Rood Bay, was a British bay. Reliance was placed upon the long exercise of British dominion over and exclusive occupation of the waters in question, and upon acquiescence of other States.[2]

[1] Second Court of Commissioners of Alabama Claims, Stetson *v.* United States, No. 3993, class 1; Moore, Arbitrations, IV, 4332–4341; Moore, Dig., I, 741–742. In Commonwealth *v.* Manchester, 152 Mass. 230, it was held that Buzzards Bay, the distance between the headlands of which is less than two marine miles, was in the territorial limits of Massachusetts. Also, Dunham *v.* Lamphere, 3 Gray, 268, 270. With reference to Long Island Sound, see Mahler *v.* Transportation Company, 35 N. Y. 352; also Shively *v.* Bowlby, 152 U. S. 1. With respect to Hudson Bay, see Thomas W. Balch, "Is Hudson Bay a Closed or an Open Sea?" *Am. J.*, VI, 409.

[2] Direct United States Cable Co. *v.* Anglo-American Telegraph Co. (1877), L. R. 2 App. Cas. 394; Beale's Cases on Conflict of Laws, I, 37; Moore, Dig., I, 740.

Although unnecessary for the decision of the case it was stated by the Court in Reg. *v.* Cunningham, Bell's C. C. 72, 86, with respect to the Bristol Channel: "That the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded." Moore, Dig., I, 739–740.

In the opinion of Mr. Bates, Umpire in the case of *The Washington* under convention between the United States and Great Britain of February 8, 1853, the Bay of Fundy was not a British bay by reason of the fact that one of its headlands was in the United States. Moore, Arbitrations, IV, 4342, 4344.

The United States and Bering Sea. By the terms of the convention concluded with Great Britain Feb. 29, 1892, providing for the so-called Fur Seal Arbitration before an international tribunal at Paris, it was agreed that there should be submitted to the arbitrators five points with a view to securing a distinct decision on each of them. Malloy's Treaties, I, 748–749. The first of these raised the question as to what exclusive jurisdiction in Bering Sea and what exclusive rights in the seal fisheries therein had been asserted and

In the more recent Scotch case of Mortensen *v.* Peters, the Danish master of a trawler, registered in Norway, was convicted in Scotland of having violated the Sea Fisheries and Herring Fisheries (Scotland) Act, by reason of his having used a method of otter-trawling in Moray Firth, at a point more than three marine miles from the Scottish coast, but, nevertheless, within a line drawn from Duncansby Head in Caithness-shire to Rattray Point in Aberdeenshire, where the employment of such a method of trawling was prohibited under a by-law of the Scottish Fishery Board.

exercised by Russia prior and up to the time of the cession of Alaska to the United States. A majority of the Arbitrators (embracing all of them except Senator John T. Morgan) declared in response, that while Russia had claimed in 1821 jurisdiction to Bering Sea to the extent of one hundred Italian miles from the coasts and islands belonging to her, she had subsequently admitted in the course of concluding treaties with the United States, in 1824, and with Great Britain, in 1825, that her jurisdiction should be restricted to the reach of cannon shot from shore and that it appeared that, "from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters." Malloy's Treaties, I, 753. The second question related to the extent to which any Russian claims of jurisdiction as to the seal fisheries had been recognized and conceded by Great Britain. The same majority of the arbitrators declared in response, that Great Britain had not recognized or conceded any claim upon the part of Russia, to exclusive jurisdiction as to those fisheries within that sea, outside of ordinary territorial waters. The third question was in part whether the body of water known as Bering Sea had been included in the phrase "Pacific Ocean" as used in the treaty of 1825, between Great Britain and Russia. The arbitrators were of unanimous opinion that Bering Sea had been included in the phrase "Pacific Ocean" as used in that treaty. In response to the fourth question, whether all of the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the treaty between the United States and Russia of 1867, passed unimpaired to the United States under that treaty, the arbitrators were of unanimous opinion that all of those rights did so pass. In response to the fifth question, whether the United States had any right, and if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea, when such seals were found outside of the ordinary three-mile limit, all of the arbitrators, except Senator Morgan and Mr. Justice Harlan, were of opinion that the United States had no right of protection or property in those seals when they were found outside of that limit.

It seems important to observe that the United States in asserting a right of protection or property in the fur seals frequenting its islands in Bering Sea, when outside of the ordinary three-mile limit, did not purport to rest its case altogether upon any jurisdictional claim (or territorial claim, if it could be called such) over Bering Sea. See Case of the United States, Fur Seal Arbitration, *Proceedings*, II, 85. This point was emphasized in the Counter Case of the United States, where it was stated: "The distinction between the right of exclusive territorial jurisdiction over Bering Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or sea, is so broad as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves." *Proceedings*, Fur Seal Arbitration, VII, 19.

With respect to the claims of the United States concerning the fisheries in Bering Sea and in relation to the Fur Seal Arbitration, see Moore, Arbitrations, I, Chap. VII, and documents there cited.

In sustaining the conviction, the High Court of Justiciary, according to the opinion of the Lord Justice General, believed that its single duty was to give effect to an Act of the British Parliament, and not to consider whether that Act violated the law of nations.[1]

The exercise, however, by Great Britain of rights of sovereignty over the waters of Moray Firth within the limits stated was not without significance, inasmuch as the distance between Duncansby Head to Rattray Point is seventy-four and a half nautical miles.[2] Possibly the British claim would have aroused less interest than it did, had the water area thus enclosed resembled in form that embraced in Chesapeake Bay, rather than an equilateral triangle with a seaward base as long as the sides indenting the land.[3] It is understood that Great Britain did not persist in maintaining exclusive fishery rights within these broad limits.[4]

Where a bay, by reason of its general configuration, is well surrounded, except at its entrance, by land constituting the terri-

[1] Mortensen *v.* Peters, 8 Fraser, 93; *Am. J.*, I, 526, at 533. The learned Lord Justice General took occasion to observe that: "International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland."

[2] "To international lawyers the interest of this case lies less in the decision than in the legislation on which it turned. And here one cannot help feeling that the British Parliament, without perhaps being fully aware of what it was doing, has made, in reference to the Moray Firth, a claim to jurisdiction to which there is almost no parallel." A. H. Charteris, Report, 23d Conference Int. Law Assn., Berlin, 1906, 130. See, also, *Harv. Law Rev.*, XXI, 65; Charles Noble Gregory, "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore." *Pol. Sc. Rev.*, I, 410.

[3] Declared Sir Robert Finlay in the course of his oral argument before the Alaskan Boundary Tribunal: "What I am going to submit as a general proposition of international law is this, that there is no necessary limit as regards the width of the estuary or inlet which is to be regarded as territorial waters; but where you have got a very deep inlet which is deep out of all proportion of its breadth, that must be regarded as being territorial waters." *Proceedings*, Alaskan Boundary Tribunal, VI, 219. See Beale's Cases on Conflict of Laws, III, Summary, § 19; For. Rel. 1908, 677–680 with respect to the claims of the United States that the waters of Manzanillo Bay should be regarded as territory of the Canal Zone, and, therefore, subject to the jurisdiction of the United States.

[4] "The debate arose upon the arrest of certain Norwegian fishermen in the waters of Moray Firth. . . . Norway protested against the arrest of her citizens in that water, which Norway claimed to be the free sea. . . .

"Upon this debate the Foreign Office of Great Britain allowed the protest of Norway and released the Norwegian citizens who had been arrested for violating this statute upon that water; and accepted the situation that this statute, which in terms covered this water, was to be construed as the Courts of England have always construed statutes, that by their terms extend beyond the limits of British jurisdiction, as applying only to British subjects, and not applying to Norwegian subjects." Oral Argument of Mr. Root in behalf of the United States, North Atlantic Coast Fisheries Arbitration, *Proceedings*, XI, 2168–2169.

See, also, statement by Lord Fitzmaurice in behalf of the British Government, in the House of Lords, Feb. 21, 1907, *quoted* by Mr. Root in his argu-

tory of a State, so as to be fairly regarded as geographically a part thereof, it is believed that the water area may be not unreasonably deemed a part of the national domain, notwithstanding the distance between the opening headlands.[1] No principle of

ment. *id.*, 2166. In this connection, see Thomas Wemyss Fulton, The Sovereignty of the Sea, Edinburgh, 1911, 720–738, with reference to the Moray Firth case, and later Parliamentary discussions. *Cf.* The Trawling in Prohibited Areas Prevention Act, 1909 (9 Edw. VII, c. 8); also Oppenheim, 2 ed., I, § 192.

[1] According to Art. III of the Rules for the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894: "For bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is twelve marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth." *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114. See, also, 25th Report, Int. Law Association, Budapest Conference (1908), 547.

The extent of territorial waters in bays has frequently been the subject of international agreement. Thus, Article I of the Fishery Convention between Great Britain and France, of 1867, reserves an exclusive right of fishing within bays not exceeding ten miles in width, measured from headland to headland. *Nouv. Rec. Gén.*, XX, 466. The North Sea Convention of May 6, 1882, to which Great Britain, Germany, Belgium, Denmark, France and Holland were signatories, reserving exclusive fishing rights within three miles from the low-water mark, provides in Article II, "as to bays, the distance of three miles shall be measured in a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles." *Nouv. Rec. Gén.*, 2 ser., IX, 556, 557. Section I, Article II, of the treaty between Spain and Portugal of October 2, 1885, reserves exclusive fishery rights in bays the openings of which do not exceed twelve geographical miles. *Nouv. Rec. Gén.*, 2 ser., XIV, 77, 78. See, also, A. H. Charteris, 23d Report, Int. Law Association, Berlin Conference, 1906, 115–119.

According to Article I of the protocol annexed to the Russo-Japanese Fisheries Convention of July 15 (28), 1907, granting to Japanese subjects fishing rights along the coast of the Russian possessions in the seas of Japan, Okhotsk and Bering, such privileges were expressly excluded in specified bays and inlets. It was provided, for example, that between certain points in the Sea of Okhotsk, with the exception of Penjinsky Gulf, the reservation should apply to "Bays which cut into the continent a distance three times as great as the width of their entrance." It was also agreed that for strategical reasons, all foreigners should be prohibited from fishing within the "territorial waters" of De Castries Bay, St. Olga Bay, Peter the Great Bay "from Cape Povorotony to Cape Gamov, including the islands within this bay." *Am. J.*, II, Supp., 274, 279–280. The distance in an air line between those Capes "as measured on Hydrographic Office Chart No. 1780, is 81.45 nautical miles." Mr. Tittmann, Supt. Coast and Geodetic Survey, to the author, June 18, 1909.

"Art. II. In bays, inlets, and gulfs the territorial waters, for the purposes stated in the preceding article, are those included within the external (seaward) straight-line tangent to the two circumferences of 6-mile radius struck with the extreme outer points of the bay, inlet, or gulf as centers, provided that the distance between the said points does not exceed 20 nautical miles (37,040 meters).

"If the distance between the extreme outer points of the opening exceeds 20 nautical miles, the territorial waters are those included within the straight line drawn between the two most seaward points of the bay, inlet, or gulf distant from each other at least 20 nautical miles." Italian decree relating to jurisdictional waters, Aug. 6, 1914, Naval War College, Int. Law Documents, 1918, 100.

law as yet acquiesced in by maritime powers appears to offer any obstacle.

(ii)

§ 147. The North Atlantic Coast Fisheries Arbitration.

In its award in the case of the North Atlantic Coast Fisheries Arbitration, pursuant to a convention between the United States and Great Britain of July 27, 1909,[1] the Tribunal assembled at the Hague declared that,

> admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but . . . *no principle of international law recognizes any specified* relation between the concavity of the bay and the requirements for control by the territorial sovereignty.[2]

The Tribunal was called upon to interpret Article I, of the convention between the opposing States, concluded October 20, 1818, and was confronted with the precise question from where should be measured the "three marine miles of any of the coasts, bays, creeks, or harbours", on or within which (according to that Article) the United States had renounced forever, any "liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure, fish." The Tribunal, having utmost regard for what, in view of all the evidence, was deemed to have been in the minds of the negotiators, in 1818, concluded that the description of the coast was expressed throughout the treaty in geographical terms, and not by reference to political control, and decided that the measurement in the case of bays should be from a straight line across the body of water at the place where it ceased to have the configuration and characteristics of a bay, and that at all other

[1] Malloy's Treaties, I, 835. It should be observed that this special agreement assumed the form of a convention concluded Jan. 27, 1909, and which was submitted to the Senate for approval. The Senate having advised and consented to ratification (subject to certain interpretative reservations acceptable to Great Britain) on Feb. 18, 1909 (*id.*, 843), the agreement was confirmed by an exchange of notes March 4, 1909, *id.*

[2] *Proceedings*, North Atlantic Coast Fisheries Arbitration, I, 94, Senate Doc. No. 870, 61 Cong., 3 Sess.

places the three marine miles should be measured following the sinuosities of the coast.[1]

Declaring, however, that this decision, although correct in principle, was not entirely satisfactory as to its practical applicability, and that it left room for doubts and differences in practice, the Tribunal recommended, in virtue of responsibilities imposed upon it by the terms of the special agreement, certain rules and methods of procedure for the determination of the limits of bays previously enumerated. It was thus declared that in every bay not thereafter specifically provided for, the limits of exclusion should be drawn three miles seaward from a straight line across the bay in the part nearest the entrance "at the first point where the width does not exceed ten miles."[2] It was further declared that in a number of bays specified, where the configuration of the coast and the local climatic conditions were such that foreign fishermen when within the geographic headlands might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion should be drawn in each case between the headlands thereafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

[1] The Tribunal was composed of Dr. H. Lammasch (Austria), President, Jonkheer A. F. de Savornin Lohman (Netherlands), Judge George Gray (United States), Sir Charles Fitzpatrick (Canada), and Dr. Luis M. Drago (Argentina). Dr. Drago dissented from the opinion of his colleagues with respect to the solution of the (fifth) question of measurement as stated in the text.

See, in this connection, Chandler P. Anderson, "The Final Outcome of the Fisheries Arbitration", *Am. J.*, VII, 1; Robert Lansing, "The North Atlantic Fisheries Arbitration", *Am. J.*, V, 1, 19–25; Thomas Willing Balch, "*La décision de la cour permanente d'arbitrage*", *Rev. Droit Int.*, 2 ser., XIII, 5; J. de Louter, "*L'arbitrage dans le conflit Anglo-Américain*", *id.*, 131; J. Basdevant, "*L'affaire des pêcheries des côtes septentrionales de l'Atlantique*", *Rev. Gén.*, XIX, 421.

[2] In making this recommendation the Tribunal adverted to British treaties with France, with the North German Confederation and with the German Empire, and to the North Sea Convention, in which there had been adopted for similar cases the rule that only bays of ten miles in width should be considered as those wherein the fishing was reserved to nationals. It considered also the fact that in the course of negotiations between the United States and Great Britain, a similar rule had been on various occasions proposed and adopted by Great Britain in instructions to naval officers stationed on the coasts concerned. It was declared that "though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule, with such exceptions, has already formed the basis of an agreement between the two Powers." *Proceedings*, I, 97.

Cf. Art. II of agreement concluded with Great Britain July 20, 1912, adopting, with certain modifications, the rules and methods of procedure recommended in the award in the North Atlantic Coast Fisheries Arbitration, Charles' Treaties, 69. Concerning the Fortune Bay case, involving an attack upon American fishermen while fishing within its waters, Sunday, Jan. 6, 1878, and the payment by Great Britain of claims arising therefrom, see For. Rel. 1881, 496–510, 514–515, 544–545; also Moore, Dig., I, 807–808.

It should be borne in mind that the award had a twofold aspect; first, as an arbitral decision interpretative of an old convention; and secondly, as an arbitral recommendation based upon the special circumstances of the case, in the light of the practices and equities of the opposing States with respect to the fisheries within the areas concerned. The failure of the United States to convince the Tribunal that it was the design of the negotiators of the treaty of 1818 that the distance of "three marine miles of any of the coasts, bays, creeks, or harbours", should be measured from low-water mark following the indentations of the coast,[1] seems to have been due in part to the following circumstances. The Tribunal did not believe that the so-called three-mile rule determining the limits of territorial waters on the high seas established the method or principle, as accepted in 1818, of determining the limits also of such waters within bays.[2] That the United States had long regarded certain wide bays, such as Delaware Bay, as within its domain was a circumstance which, however sought to be explained, doubtless weakened the influence of the American contention, and weighed upon the minds of the arbitrators.[3] As a principle of interpretation, the Tribunal declined to take cognizance of later practices of the nineteenth century concerning the territorial sovereignty over bays, as shedding light upon the sense in which particular terms were employed by the plenipotentiaries in 1818.[4]

[1] Such was the contention of the United States. Case of the United States, 248, *Proceedings*, II. In his dissenting opinion, Dr. Drago acquiesced in the American contention. *Proceedings*, I, 102, 104–106.

See Oral Argument of Mr. Elihu Root, Counsel for the United States, *Proceedings*, XI, 2139–2193; North Atlantic Coast Fisheries Arbitration at the Hague, Argument on Behalf of the United States by Elihu Root, edited by Robert Bacon and James Brown Scott, Cambridge, 1917.

[2] In the course of the award it was declared: "It has not been shown by the documents and correspondence in evidence that the application of the three-mile rule to bays was present to the minds of the negotiators in 1818, and they could not reasonably have been expected either to presume it or to provide against its presumption." *Proceedings*, I, 94–95. *Compare* dissenting opinion of Dr. Drago, *id.*, 104–106, 112.

[3] See the award, *Proceedings*, I, 95; also Robert Lansing, in *Am. J.*, V, 1, 22–23, where it was said: "in this connection they [British Counsel] relied upon the cases of Delaware Bay and Chesapeake Bay, over which, it was pointed out, the United States had claimed and successfully maintained jurisdiction, although each exceeded six miles in width at its entrance.

"The answer of the United States to this latter argument, which was undoubtedly difficult to meet, was that at the time the claim was made a condition of belligerency existed which gave to the United States extraordinary rights over those waters; and, that in any event, other nations having acquiesced in the claim, the rights of the United States rested upon a principle entirely different from the general rule and formed an exception to it."

[4] See award, *Proceedings*, I, 94; Agreements between States, Sources of Interpretation, The North Atlantic Coast Fisheries Arbitration, *infra*, § 533.

(iii)

§ 148. Certain Conclusions.

In the effort to secure general agreement among maritime States respecting the territorial limits of bays, consideration must be given the fact that in practice, the theory productive of the so-called three-mile rule for the measurement of the marginal sea has not been deemed applicable to bays, and that geographical and economic considerations, rather than any other, have been decisive of claims of sovereignty. Bays which, regardless of their size and possibly even of their configuration, have been long subjected to territorial control must be dealt with accordingly. The feasibility of specifying what indentations along the coastline of a continent should be acknowledged to constitute territorial waters must depend upon the degree of respect paid to claims of sovereignty long and reasonably exercised, rather than upon the application of a uniform linear test. Doubtless the problem is complicated by general claims of fishing rights in certain areas. It should be observed, however, that such claims, although doubtless to be adjusted according to the equities of the claimants in particular cases, are not decisive of the general principle involved. Above all, regard must be had for the circumstance that in the case of bays, in contrast to that of the marginal sea, the general interest of the society of nations still remains unopposed to broad assertions of territorial sovereignty by the individual State.

(f)

§ 149. Lakes and Enclosed Seas.

A lake or land-locked sea lying wholly within the body of a single State is deemed to be a part of the national domain.[1] This is true whether the water area is what has been described as an interior sea, such as the Dead Sea or Lake Winnipeg, or whether, like Lake Michigan, it forms a link in a chain of navigable waterways leading to the ocean.[2] Nor does it affect the right of sovereignty that the waters of a lake find their outlet through a strait

[1] Rivier, I, 143–145, translated in Moore, Dig., I, 669, and writers cited; Oppenheim, 2 ed., I, §§ 179–181; Bonfils-Fauchille, 7 ed., §§ 495–505.

[2] The geographical test of whether a lake or land-locked sea is an interior one, does not seem to be applied with uniformity or precision, and possibly on account of uncertainty as to what should be deemed to constitute a direct and sufficient connection with the ocean. Rivier mentions Lakes Erie, Ontario, Huron and Superior in his list of interior seas. I,.145. It is believed that the nature of the physical connection with the ocean should not be decisive of the territorial character of such bodies of water.

or river comprising the territorial waters of one or more foreign States. It is the fact that the water area is wholly within the territory of a single State which seems to be regarded as justifying the claim of control and sovereignty therein.

When a lake or interior sea is surrounded by the territories of two or more States, such as Lake Constance, it may, nevertheless, be regarded as belonging to them in proportional parts, if those States are so agreed, and provided no well-defined and grave international interest supervenes.[1] The Great Lakes of Ontario, Erie, Huron and Superior, and their water communications constituting the boundary between the United States and Canada, are wholly territorial. The line of demarcation passes through the middle of the area. Declared Mr. Uhl, Acting Secretary of State, in 1894:

> By the treaty of peace of 1783 the lakes were divided between the contracting parties and the boundary fixed as running through the middle of the lakes and of the waterways connecting them. The United States and Great Britain thus shared thenceforth, to the exclusion of any claim whatsoever of a third nation, the territorial sovereignty over the lake waters which had theretofore been wholly British, and it was competent for the two countries to treat with each other in respect to their relative rights in those lakes without encroaching on any possible right of another country.[2]

It must be clear that the Supreme Court of the United States in concluding in 1893, that the term "high seas", as used in a section of the Revised Statutes to denote places within which the commission of specified acts on a vessel was rendered criminal, embraced the unenclosed waters of the Great Lakes between which the Detroit River was a connecting stream, did not intimate that those waters were not territorial.[3]

[1] Rivier, I, 143; Oppenheim, 2 ed., I, § 179. *Contra*, Bonfils-Fauchille, 7 ed., § 495.

[2] Communication to Messrs. Laughlin, Ewell and Houpt, May 23, 1894, 197 Dom. Let. 118, Moore, Dig., I, 672, 673.

See Article II, treaty between the United States and Great Britain, 1783, Malloy's Treaties, I, 587. Concerning the demarcation of the water boundary in the Great Lakes under Articles VI and VII of the Treaty of Ghent, see Moore, Arbitrations, I, Chaps. V and VI. See, also, treaty between the United States and Great Britain for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, April 11, 1908, Malloy's Treaties, I, 815.

[3] United States *v.* Rodgers, 150 U. S. 249; also dissenting opinions of Mr. Justice Gray, *id.*, 266, and of Mr. Justice Brown, *id.*, 279. *Cf.* also Illinois Central Railroad Co. *v.* Illinois, 146 U. S. 387, 436–437. Also in this connection, see H. E. Hunt, "How the Great Lakes Became 'High Seas', and Their Status Viewed from the Standpoint of International Law", *Am. J.*, IV, 285, 300–301.

A special situation arises where a large inland sea, such as the Black Sea, having, nevertheless, a connection with the ocean, is surrounded by the territories of two or more States, and finds an outlet to the ocean through the territorial waters of one of them. In this particular case the magnitude of the water area involved, its connection with the ocean, its importance as a means of access to certain countries adjacent to it, and the resulting general interest of maritime powers that it be dealt with as the high seas, have combined to justify the insistent demand that the Black Sea be not partitioned among the surrounding States and regarded as territorial. Deemed, therefore, non-territorial, the right of Turkey to control the sole access thereto through the Bosphorus and the Dardanelles was, even before The World War, looked upon as proportionally limited.[1]

§ 150. Straits. (g)

Where a strait or narrow passage connecting two open seas constitutes the boundary between two States, the line of demarcation is said to be "governed by substantially the same principles as that of the limits of territorial jurisdiction in and over rivers." [2] It is believed, therefore, that the principle of thalweg is applicable in such case and that the boundary line should follow the middle of the main channel, if there be one.[3]

A strait may be a part of the territorial waters of the bordering States although it has a width of more than six marine miles at either terminus, or throughout its course. The United States and Great Britain exercise dominion over the waters of the Straits of Fuca, the breadth of which at its narrowest part is about ten marine miles.[4]

It may be doubted whether there is a practice marking a precise limit of the width of straits which may be regarded as territorial when the adjacent shores belong to different States. The society of nations is rather concerned with the matter of navigation through such waters as are acknowledged to belong to the

[1] Woolsey, 6 ed., 78–79; Dana's Wheaton, § 182; Oppenheim, 2 ed., I, § 181; Bonfils-Fauchille, 7 ed., §§ 499–503; Articles I, II, and III of treaty of London, of March 13, 1871, *Nouv. Rec. Gén.*, XVIII, 303, 305, annexing thereto Articles XI, XIII, and XIV of the Treaty of Paris, of March 30, 1856, *Nouv. Rec. Gén.*, XV, 770, 775–776.

[2] Statement in Moore, Dig., I, 658.

[3] Louisiana *v.* Mississippi, 202 U. S. 1, 50; Art. X of Rules adopted by the Institute of International Law, March 31, 1894, *Annuaire*, 330–331, Moore, Dig., I, 659, J. B. Scott, Resolutions, 115.

[4] Mr. Wharton, Acting Secy. of State, to Secy. of the Treasury, May 22, 1891, 182 MS. Dom. Let. 79, *citing* Hall, 3 ed., 140, Moore, Dig., I, 658.

littoral States.[1] The interests of that society might, however, be generally opposed to the claim that any strait, however broad, which could, at the present time, be subjected to control by means of guns placed on either or both shores, should be regarded as subject to the exercise of rights of sovereignty throughout its broad extent.

Where a strait, such as Long Island Sound, separates the territories of a single proprietor, and also forms no necessary channel of communication for international commerce between the bodies of water with which it forms a connection, the general maritime interest in the extent of the claim of that proprietor becomes relatively small, and does not appear to limit by any exact test its assertion of rights of sovereignty.[2] It should be observed that in the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894, it was declared that straits of which the shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State, always form a part of the territorial waters of that State, regardless of the distance between the coasts.[3]

(3)

§ 151. Determination of Boundaries.

A dispute between States respecting a boundary may be adjusted by any of the means, amicable or otherwise, by which international differences are settled.[4] If diplomacy fails, and recourse be had to arbitration or to the offices of a joint tribunal, the special agreement or *compromis* providing for the employment of such an agency usually defines with exactness the problems involved, and the nature of the duties of the tribunal. Sometimes that agreement announces certain principles of international law which the court is to respect.[5] As in other classes of cases, and

[1] Following the proposal of Sir Thomas Barclay in his report to the Institute of International Law in 1912, *Annuaire*, XXV, 375, 386, and in his Report to the International Law Association in 1895, Report of Seventeenth Conference at Brussels, 113, the Naval War College, in 1913, concluded that "Straits, when not more than twelve miles in width, are under the jurisdiction of the adjacent State or States." Int. Law Topics, 1913, 47.

[2] *Id.*, 46. See, also, in this connection, Mahler *v.* Transportation Co., 35 N. Y. 352, 355; also Dana's Wheaton, 262.

[3] *Annuaire*, XIII, 330, J. B. Scott, Resolutions, 115. The language of the original text with respect to the distance between the coasts is: "*quel que soit le rapprochement des côtes.*"

[4] Recourse to Arbitration by the United States, Territorial Differences, *infra*, § 563.

[5] See, for example, convention of Jan. 24, 1903, between the United States

subject to the same exceptions, an agreement to adjust a controversy relating to a boundary by reference to an international tribunal, serves to impose upon the contracting parties an obligation to abide by the award.

Even when there is no disagreement as to the principles governing the course of a boundary, or after a judicial tribunal has indicated how it should be drawn, the actual demarcation or delimitation of the line may give rise to special technical problems. For their solution it is not uncommon to arrange by convention for the appointment of experts to mark the boundary according to given directions, and to agree that the line thus established shall be deemed to be the true boundary.[1] Provision is sometimes made that in case such experts disagree, separate reports shall be made to the contracting States, which shall thereupon take further steps to reach an agreement.[2]

The decisions of domestic tribunals as to the extent of the national domain cannot affect the adverse claims of a foreign State; and they may also serve seriously to embarrass the proper department of the same Government in the assertion of rights of sovereignty. Matters of such a character are, therefore, regarded as raising questions essentially political rather than judicial. Hence the decisions of the political department of a State are, in the case of the United States, deemed to be binding upon the courts.[3] Of the extent of the territorial limits announced by the

and Great Britain for the settlement of the Alaskan Boundary dispute, For. Rel. 1903, 488, Malloy's Treaties, I, 787; also Article IV of Convention of Feb. 2, 1897, between Great Britain and Venezuela for the settlement of the British Guiana-Venezuelan Boundary Dispute, Brit. and For. State Pap., LXXXIX, 57; Moore, Dig., I, 297.

[1] See, for example, convention between the United States and Mexico, of July 29, 1882, providing for an international commission to re-locate the international boundary in certain places, Malloy's Treaties, I, 1141; also convention between the United States and Great Britain, of April 11, 1908, concerning the Canadian international boundary, *id.*, 815. *Cf.* Art. 35 of treaty of peace with Germany of June 28, 1919, relative to the settlement of the new frontier line between Belgium and Germany.

[2] See, for example, Article IX of convention between the United States and Great Britain, of April 11, 1908, for the more complete definition and demarcation of the boundary between the United States and the Dominion of Canada, Malloy's Treaties, I, 826.

[3] In Jones *v.* United States, 137 U. S. 202, 212–213, it was declared by Mr. Justice Gray in the course of the opinion of the Court: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. Gelston *v.* Hoyt, 3 Wheat. 246, 324; United States *v.* Palmer, 3 Wheat. 610; The Divina Pastora, 4 Wheat. 52; Foster *v.* Neilson, 2 Pet. 253, 307, 309; Keane *v.* McDonough, 8 Pet. 308; Garcia *v.* Lee, 12 Pet. 511, 520; Williams *v.*

former, the latter take judicial notice.[1] This is true whether a boundary is the subject of international controversy, or a question arises as to what State or authority therein is to be regarded as possessing rights of sovereignty over any particular geographical area.[2] The decisions of the political department in such matters are likewise binding upon the nationals of the same State.[3]

b

Certain Limitations of the Right of Control over What Pertains to the Territory of a State

(1)

§ 152. In General. Servitudes.

The supremacy of a State as sovereign over what constitutes the national domain, embracing the land and territorial waters

Suffolk Ins. Co., 13 Pet. 415; United States *v.* Yorba, 1 Wall. 412, 423; United States *v.* Lynde, 11 Wall. 632, 638. It is equally well settled in England. The Pelican, Edw. Adm. appx. D; Taylor *v.* Barclay, 2 Sim. 213; Emperor of Austria *v.* Day, 3 DeG., F. & J. 217, 221, 233; Republic of Peru *v.* Peruvian Guano Co., 36 Ch. D. 489, 497; Republic of Peru *v.* Dreyfus, 38 Ch. D. 248, 356, 359." *Cf.*, also, Pearcy *v.* Stranahan, 205 U. S. 257; Oetjen *v.* Central Leather Co., 246 U. S. 297.

[1] Jones *v.* United States, 137 U. S. 202, 214, where it was said: "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

[2] Foster *v.* Neilson, 2 Pet. 253, 307; Garcia *v.* Lee, 12 Pet. 511; Williams *v.* Suffolk Ins. Co., 13 Pet. 415, 420; United States *v.* Reynes, 9 How. 127; United States *v.* Texas, 143 U. S. 621; Jones *v.* United States, 137 U. S. 202, 212–213; In re Cooper, 143 U. S. 472, 502–505; Reg. *v.* Keyn, 2 Ex. D. 63; Pearcy *v.* Stranahan, 205 U. S. 257, 265. *Compare* concurring opinion of Mr. Justice White, *id.*, 273.

In the course of the opinion of the Court in In re Cooper, *supra*, at 503, it was declared that: "We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.'"

Cf., also, Cordova *v.* Grant, 248 U. S. 413, where the plaintiff's title to land depended on whether the international boundary along the Rio Grande had shifted with the river. The defendant asserted that the United States, although exercising *de facto* jurisdiction over the *locus*, had conceded the boundary to be unsettled, having by treaty agreed to adjust it by an international commission with exclusive jurisdiction to settle it. It was held that this circumstance did not oust the United States District Court of jurisdiction in the particular case, because the United States had rejected the action of the commission under the treaty, and had also waived objections based on comity to the litigation.

[3] Poole *v.* Fleeger, 11 Pet. 185; Robinson *v.* Minor, 10 How. 627; Mr.

and superjacent air space, must be recognized as a fundamental principle of international law, to which the United States avows attachment.[1] There exist, however, certain definite limitations which in practice are acknowledged to restrict the territorial sovereign in the exercise of rights of control, and which vary somewhat according to the nature of the thing over which those rights are asserted. It will be seen that with respect to certain of its territorial waters a State is not deemed to enjoy the same measure of control that it commonly asserts over its lands, and again, that the restrictions to which it is subjected in relation to different classes of water areas are not identical in kind or extent. Thus the duty of a State to yield to foreign vessels a so-called innocent passage along its marginal seas differs widely from that to accord them any privileges of navigation through a river forming an international boundary.

At the present time there is evidence of fresh demands upon the individual State to make concessions heretofore not regarded as obligatory. It is called upon to permit, under conditions not hurtful to itself, foreign powers to make limited use of the air space over the national domain,[2] and to afford them also certain privileges of transit by land.[3]

When the limitation of the right of control is so widely recognized and uniformly applied that every foreign power may reasonably demand observance of it for the benefit of itself or its nationals, it becomes unnecessary to record the fact in treaties. When, however, the limitation is one which is commonly acknowledged to be applicable without discrimination solely in favor of States possessed of a special geographical or economic relationship to the particular area concerned, the need of an appropriate convention is usually conceded. In such case the duty of the territorial sovereign to agree specifically with other States within the favored class, with respect at least to certain limitations, seems to be recognized. Nevertheless, it will be found that the restrictions of a treaty may be such as the territorial sovereign is far from acknowledging the slightest obligation to agree to impose upon itself, and which it yields on grounds of expediency, or in return for a substantial concession. Thus

Buchanan, Secy. of State, to Mr. Calderon de la Barca, July 27, 1847, MS. Notes to Spain, VI, 155, Moore, Dig., I, 746.

[1] *Cf.* The Supremacy of the Territorial Sovereign over the National Domain, In General, *infra*, § 190.

[2] *Cf.* Air Space over the National Domain, In General, *infra*, § 188.

[3] *Cf.* Transit by Land, In General, *infra*, § 194.

conventions which register what each of the parties thereto appears to regard as common and necessary limitations of the exercise of control over its domain by a contracting territorial sovereign are to be distinguished from those which reveal no such design.

That a State is obliged to limit its freedom of control over anything pertaining to its territory, such as land or water or air, is due to the interest of the international society in the restriction. That interest has only been acute when it had been clearly and widely perceived to be mutually advantageous for all States under like circumstances. The clearness of the perception has resulted from a common understanding of commercial needs and has been aided according to their growth. Those needs early demanded a right of innocent passage for ships of every flag through the waters in close proximity to the ocean coasts of States adjacent to the sea. Later, privileges of navigation through international rivers by foreign vessels of riparian and even non-riparian States were increasingly sought and obtained. In the advocacy of relevant principles American statesmen played no small part. At the present time, the potentialities of existing agencies of communication and of transportation strengthen the plea that no longer should any remote and interior State remain isolated from the sea when access thereto is to be had through foreign territory, by air or by land, as well as by water. It will be found, however, that statesmen still evince reluctance to impose fresh restrictions of universal application upon a territorial sovereign with respect to what it has hitherto been deemed to possess rights of exclusive control, which have been exercised with slight restraint. The limitations thus far imposed by convention in relation to the use of air space, or transit by land, constitute concessions which the contracting parties would doubtless be reluctant to acknowledge as declaratory of existing legal duties towards each other.

The needs of the international society can never be deemed to justify the attempt to restrict anew the freedom of its individual members in what pertains to the control of their respective territories until it is agreed on all sides not only that the limitation is beneficial for its entire membership, but also that a failure to apply it is subversive of justice among the nations. Differing sets of circumstances may combine to produce such conclusions. It suffices to observe that the necessary combination may be recurrent.

§ 153. The Same.

Treaties which impose upon a territorial sovereign limitations of control over its domain which are not required by international law, either for the sake of States generally, or for that of special groups of them, differ widely in scope and design. They may embrace leases of particular areas in perpetuity, vesting in the lessee substantial rights of sovereignty;[1] they may purport to yield for all time to the inhabitants of foreign territory, as did the convention between the United States and Great Britain of October 20, 1818,[2] purely economic rights such as fishing privileges within specified places; they may confer a right of passage across territory; they may burden the territorial sovereign with a duty not to fortify places along its frontier;[3] they may contemplate no arrangement that shall survive the time when the grantor ceases to maintain its sovereignty over the territory concerned. When the arrangement purports to attach permanently to territory or its appurtenances a restriction with respect to freedom of control for the benefit of a State other than the sovereign, the limitation is oftentimes described as a servitude. There is disagreement, however, as to what limitations possessed of such a character may be fairly so designated. There is controversy whether a servitude confers certain rights of sovereignty such as those of governmental administrative control upon the foreign State in whose favor it is yielded.[4] It may be greatly doubted,

[1] See, for example, convention between the United States and Panama, of Nov. 18, 1903, for the construction of a ship canal, Malloy's Treaties, II, 1349. *Cf.* Panama, *supra*, § 20.

[2] Malloy's Treaties, I, 631.

[3] Art. 42 of the Treaty of Peace of Versailles, of June 28, 1919, whereby Germany was forbidden to maintain or construct any fortifications either on the left bank of the Rhine or on the right bank to the west of a specified line. In the area defined, the maintenance and the assembly of armed forces, either permanently or temporarily, and military maneuvers of any kind, as well as the upkeep of all permanent works for mobilization, were in the same way forbidden. See Art. 43.

[4] In the course of the North Atlantic Coast Fisheries Arbitration it was alleged by the United States that the liberties of fishery granted to it by Art. I of the convention of Oct. 20, 1818, constituted an international servitude over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that, therefore, Great Britain was deprived, by reason of the grant, of its independent right to regulate the fishery. The Tribunal in its award disagreed with this contention for various reasons. It was declared that there was no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818. It was said that "a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens;* whereas by the treaty of 1818, one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another

therefore, whether, in view of the differing opinions of statesmen, the term serves to point to definite limitations of control having a distinctive and recognizable character in law. For that reason its use is believed to obscure rather than clarify the perception of what takes place when contracting States undertake to burden territory with restrictions in favor of a non-territorial sovereign.

In case of controversy concerning the nature and scope of a restriction the precise question is likely to be first, whether the limitation of control imposed by the treaty is permanent in character, applicable for all time to the area concerned, regardless of changes of sovereignty which it may undergo; and secondly, whether the arrangement serves to clothe a foreign grantee with privileges that are more than economic, embracing, for example, rights of political control. The solution of both questions depends upon the correct interpretation of the treaty involved, an achievement which in turn demands close observance of those fundamental principles of interpretation which are elsewhere discussed.[1] It may be doubted whether the attempt to attach to territory a burden to be fairly regarded by the inhabitants thereof as essentially detrimental to it, and thus in no sense responsive to any equitable demand of the international society, should be deemed to be capable of judicial approval or enforcement in an international forum, even though the validity of the compact is recognized. Again, it may be urged with force that the grantor State lacks (in an international, if not in a domestic or constitutional sense) the power validly to impress upon its territory such a burden for at least a period beyond that when it retains its sovereignty therein.

State." It was declared that the doctrine of international servitude, in the sense sought to be attributed to it, originated in the peculiar and obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns, they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the courts of that Empire, their right being of a civil rather than of a public nature, partaking more of the character of *dominium* than of *imperium*, and, therefore, not a complete sovereignty. In contra-distinction to this "quasi-sovereignty", the modern State, and particularly Great Britain, it was added, had never admitted partition of sovereignty, "owing to the constitution of a modern State requiring essential sovereignty and independence." It was said that "this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists." It could, therefore, it was declared, "in the interest of the Community of Nations, and of the parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract." See text of Award, G. G. Wilson, Hague Arbitration Cases, 145, 158–159.

[1] The Interpretation of Treaties, The Nature of the Problem, *infra*, § 530.

It must be clear that when a State by any process bargains away various uses of territory over which it otherwise retains its rights as sovereign, it thereby impairs as such its freedom of control, and that the impairment corresponding in exact proportion to what is yielded may even entail the loss of a certain measure of governmental control. Such a result would appear to be at variance with the theory on which State life has in fact developed, and which according to the practice of nations has proved to be expedient. Moreover, it would seem to add to the burden of the territorial sovereign of maintaining or acquiring an unchallenged place in that class of States which are regarded as independent.

(2)

§ 154. Marginal Seas.

Over its territorial waters along the marginal sea the control of the territorial sovereign is limited.[1] While it may regulate at will matters pertaining to fisheries, the enjoyment of the underlying land, coastal trade, police and pilotage, the use of particular channels, as well as maritime ceremonial,[2] it is not permitted to debar foreign merchant vessels from the enjoyment of what is known as the right of "innocent passage."[3] That right, although incidental to the privilege of navigating the high seas, may be said to owe its existence to the circumstance that, as Hall has pointed out, "the interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States."[4]

Vessels of war, although serving no commercial purpose, are not necessarily deprived of the right of passage under normal conditions, and still less, other public ships devoted to scientific purposes.[5]

[1] See, generally, bibliographical material referred to under Marginal Seas, *supra*, § 141.

[2] Fuller, C. J., in Louisiana *v.* Mississippi, 202 U. S. 1, 52; the Mark Gray case, Venezuelan Arbitrations, 1903, Ralston's Report, 33, where it was held that a State might grant a monopoly of towage privileges within its territorial waters.

[3] Declares Woolsey: "No vessel pursuing its way on the high seas can commit an offense by sailing within a marine league of the shore." 6 ed., 69. Said Mr. Bayard, Secy. of State, in the course of a communication to Mr. Manning, Secy. of the Treasury, May 28, 1886: "We do not, in asserting this claim [as to the territorial limit of the marginal seal, deny the free right of vessels of other nations to pass, on peaceful errands, through this zone, provided they do not by loitering produce uneasiness on the shore or raise a suspicion of smuggling." 160 MS. Dom. Let., 348, Moore, Dig., I, 718, 720, 721.

[4] Higgins' 7 ed., § 42, p. 163. See, also, Articles V and VIII of Rules adopted by the Institute of International Law, March, 1894, *Annuaire*, XIII, 329–330, J. B. Scott, Resolutions, 114.

[5] *Compare* Hall, Higgins' 7 ed., § 42, p. 163.

So long as the conduct of a vessel of any kind is not essentially injurious to the safety and welfare of the littoral State, there would appear to be no reason to exclude it from the use of the marginal sea. The Institute of International Law, in its Rules adopted in 1894, announced that all ships without distinction should have the right of innocent passage, saving to belligerents the right of regulating passage and, with a view to defense, of forbidding it to any ship, and saving also to neutrals the right of regulating the passage of vessels of war of every nationality.[1] It may be open to question whether this declaration does not place too great restriction upon the neutral. It must be apparent that such a State enjoys the right to prevent as well as regulate the passage through the marginal sea of a belligerent ship of whatsoever kind, in case of its failure to abstain from acts therein which would, if knowingly permitted by the neutral, constitute a violation of neutrality.[2] In a word, the right of so-called innocent passage vanishes whenever the conduct of a ship is harmful to the territorial sovereign. To the latter, whether a belligerent or a neutral, must be accorded the right to determine when acts of a passing ship lose their innocent character.

It will be observed that in the assertion of that form of control manifested by the doing of justice or, as it is commonly described, by the exercise of rights of jurisdiction, within territorial waters constituting the marginal sea, the territorial sovereign finds itself subjected to certain restraints with regard to foreign vessels and their occupants. It will be found that these restraints are due in part to the activities of such vessels while within such waters.[3]

(3)

Straits

(a)

§ 155. In General.

A strait which serves as a passage from one open sea to another ought not on principle to be closed.[4] This is believed to be true although the waterway is a part of the domain of the States adja-

[1] Art. V, *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114.
[2] See Art. XXV of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2362.
[3] Rights of Jurisdiction, The Marginal Sea, *infra*, § 226.
[4] Art. X, Section 3, of Rules on the Definition and Régime of the Territorial Sea adopted by the Institute of International Law in 1894, *Annuaire*, XIII, 331, J. B. Scott, Resolutions, 115.

cent to it. It is the relation which the channel of communication bears to navigation generally as a means of access to the seas thus connected which, rather than any other circumstance, is decisive of the equities of foreign maritime States. That a territorial sovereign ought to be permitted to protect itself as against hostile acts in times of peace or war, and regardless of its status as a belligerent or neutral, should be clear. The mode of protection should, however, be one designed to oppose the least possible obstacle in the way of navigation. The neutralization of a strait offers an appropriate means of achieving this two-fold object.

A channel of water, whether or not described as a strait, lying wholly within the territory of a single State, may afford a convenient means of access to, or connection between, different parts of the same sea where it is contiguous to the coasts of the same State, and without also becoming a necessary channel of communication for international commerce. Long Island Sound is an instance. It is useful chiefly for coastwise traffic. There would seem to be no obligation on the part of the United States to permit foreign ships generally to pass through it save on such terms as American authority may prescribe.[1] That both termini of a territorial strait, as well as the entire waterway, lie within the domain of a single State would not, however, appear to create a right to bar the navigation of foreign ships, if two different seas are thus connected and the use of the waterway a matter of vital concern to commerce generally.[2] The Kiel Canal, were it a natural waterway, would be illustrative.[3]

(b)

§ 156. The Danish Sound Dues.

Since 1857 the navigation of the sound and belts connecting the Baltic with the North Sea has been free from the duties previously levied by Denmark under a claim of right based upon "immemorial prescription, sanctioned by a long succession of treaties with foreign powers."[4] This freedom was established, in so far as concerned the maritime powers of Europe, by the Treaty

[1] Extent of the National Domain, Straits, *supra*, § 150.

[2] See Naval War College, Int. Law Topics, 1913, 46.

[3] See clauses relating to the Kiel Canal in Arts. 380–386, of treaty of peace with Germany, June 28, 1919.

[4] Mr. Buchanan, Secy. of State, to Mr. Flenniken, Minister to Denmark, No. 17, Oct. 14, 1848, House Ex. Doc. No. 108, 33 Cong., 38, 39, Moore, Dig., I, 659, 661. Dana's Wheaton, 262–264; Woolsey, 6 ed., 77–79; Bonfils-Fauchille, 7 ed., § 509; T. E. Holland, Studies in International Law, 277–279; Rivier, I, 158–159.

of Copenhagen of March 14, 1857, providing for the capitalization of the Sound dues;[1] and with respect to the United States, by its treaty with Denmark of April 11, 1857, providing for the payment by the former of $393,011, and for the proper lighting and buoying of the passages and other necessary improvements thereof by Denmark without charge.[2]

(c)

§ 157. The Bosphorus and the Dardanelles.

When Turkey in the eighteenth century ceased to retain control over all of the territory surrounding the Black Sea, and the waters thereof were no longer regarded as territorial, the Straits of the Bosphorus and the Dardanelles, although remaining within the Turkish domain, formed a passage between two open seas. Turkey necessarily yielded the right of navigation through those waterways to foreign merchant vessels. According, however, to a series of treaties, of which the first was concluded with Great Britain, January 5, 1809, the European Powers agreed that Turkish authority might bar the passage of foreign vessels of war.[3] By the terms of the Treaty of London of July 13, 1841, as well as of the Treaty of Paris of March 30, 1856, and that of London of March 13, 1871, the Sultan reserved the right to permit the passage of light vessels of war employed in the service of foreign legations; and by the terms of the treaty of 1871, it was declared that he might open the Straits in times of peace to the vessels of war of friendly and allied powers, should he deem it necessary for the execution of the treaty of March 30, 1856.[4]

[1] Brit. and For. State Pap., XLVII, 32.

[2] Malloy's Treaties, I, 380; statement in Moore, Dig., I, 659–664, and documents there cited; Dana's Wheaton, 264–267; correspondence between the United States and Denmark, 1841–1854, contained in British and Foreign State Papers, XLV, 807–863; Eugene Schuyler, American Diplomacy, 306–316.

The right of navigation of Fuca's Straits contained in the treaty between the United States and Great Britain of June 15, 1846, was not, in the opinion of Mr. Wharton, Acting Secy. of State, May 22, 1891, in a communication to the Secretary of the Treasury, regarded as violated by the prohibition to engage in the coasting trade. 182 MS. Dom. Let. 79; Moore, Dig., I, 664.

[3] *Nouv. Rec.*, I, 160; Coleman Phillipson and Noel Buxton, The Question of the Bosphorus and Dardanelles, London, 1917.

[4] See protocol of London, July 10, 1841, signed by plenipotentiaries of Great Britain, Austria, Russia, Prussia and Turkey, *Nouv. Rec. Gén.*, II, 126; Art. I, Treaty of London, July 13, 1841, concluded by Great Britain, Austria, Prussia and Russia, with Turkey, *Nouv. Rec. Gén.*, II, 128; Art. X, Treaty of Paris, March 30, 1856, and Art. I of convention annexed thereto, *Nouv. Rec. Gén.*, XV, 770 and 785; Art. II, Treaty of London, March 13, 1871, *Nouv. Rec. Gén.*, XVIII, 303, 305; T. E. Holland, The European Concert in the Eastern Question, 224–226; Eugene Schuyler, American Diplomacy, 317–328; Moore, Dig., I, 664–666; Maurice Lozé, *La question des détroits*, Paris, 1908.

The position of the United States, in the years preceding The World War, appears to have been one of reluctant acquiescence.[1] Secretaries Cass and Fish were unwilling to admit the right of Turkey, in conjunction with a group of European Powers, by means of conventions to which the United States was not a party, to bar the passage of American vessels of war through the Straits.[2] Moreover, certain requests made by American naval commanders and addressed to Turkish authorities, for permission to pass through the Dardanelles, were said to have been unauthorized.[3] On two occasions, however, in 1895, permission was requested by the American Minister at Constantinople, without the apparent disapproval of the Department of State. In both instances consent was refused.[4]

President Wilson, in his address to the Congress on conditions of peace, January 8, 1918, declared that "the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees." [5]

§ 158. The Same.

According to the Turkish treaty of peace signed at Sèvres, August 10, 1920, the navigation of the Straits, including the Dardanelles, the Sea of Marmora, and the Bosphorus, were to be opened in time of peace and war, to every vessel of commerce or of war, and to military and commercial aircraft without distinction. These waters were not to be blockaded; nor was any belligerent right or act of hostility to be committed therein, "unless in pursu-

[1] Mr. Fish, in the course of a communication to Mr. Boker, Minister to Turkey, Jan. 3, 1873, declared: "The right [of Turkey], however, has for a long time been claimed and has been sanctioned by treaties between Turkey and certain European States. A proper occasion may arise to dispute the applicability of the claim to United States men-of-war. Meanwhile it is deemed expedient to acquiesce in the exclusion." MS. Inst. Turkey, II, 452, Moore, Dig., I, 667.

[2] Mr. Cass, Secy. of State, to Mr. Pickens, Minister to Russia, Jan. 14, 1859, MS. Inst. Russia, XIV, 159, Moore, Dig., I, 665; Mr. Fish, Secy. of

Minister to Turkey, Jan. 25, 1875, MS. Inst. Turkey, II, 456, Moore, Dig., I, 668. *Compare* Mr. McVeagh, Minister to Turkey, to Mr. Fish, Secy. of State, Jan. 24, 1871, and March 27, 1871, For. Rel. 1871, 892 and 897, Moore, Dig., I, 667, note.

[3] Mr. Fish, Secy. of State, to Mr. Boker, Minister to Turkey, Jan. 3, 1873, MS. Inst. Turkey, II, 452, Moore, Dig., I, 667; Same to Same, Jan. 25, 1873, MS. Inst. Turkey, II, 456, Moore, Dig., I, 668.

[4] Mr. Terrell, Minister to Turkey, to Mr. Olney, Secy. of State, Nov. 21, and Dec. 6, 1895, concerning the U. S. S. *Marblehead*, For. Rel. 1895, II, 1344 and 1383, Moore, Dig., I, 668; Mavroyeni Bey, Turkish Minister, to Mr. Olney, Secy. of State, Jan. 16, 1896, concerning the U. S. S. *Bancroft*, For. Rel. 1895, II, 1461, Moore, Dig., I, 668, note.

[5] Official Bulletin, Jan. 8, 1918.

ance of a decision of the Council of the League of Nations."[1] A so-called "Commission of the Straits" was to exercise control in the name of the Turkish and Greek Governments, and with authority over all waters between the Mediterranean mouth of the Dardanelles and the Black Sea mouth of the Bosphorus, embracing waters within three miles of the mouths.[2] The Commission was accorded complete independence of local authority in the exercise of its powers, and concerning its own flag, budget and organization.[3] The Commission was to inform the representatives of the Allied Powers in case of interference with the right of passage through the Straits, as a means of invoking their forcible aid.[4] In matters of navigation all ships were to be treated on terms of absolute equality;[5] and the levying of any dues or charges was to be without discrimination.[6] The transit of vessels of war was to be in conformity with the regulations.[7] The conditions established for the transit of belligerent vessels of war were specified in terms resembling those of the Suez Canal Convention of October 29, 1888, subject, however, to the reservation that they should not limit belligerent rights exercised in pursuance of a decision of the Council of the League of Nations.[8]

(4)

Navigation of Rivers

(a)

§ 159. National Streams.

When the entire course of a river is within the territory of a single State, it is generally agreed that a right of exclusive control

[1] Arts. 37–61. The treaty remains as yet unratified.

[2] Arts. 38–39. The Commission was to be composed of representatives of the United States (if it should be willing), Great Britain, France, Italy, Japan, Russia (when belonging to the League of Nations), Greece, Roumania, Bulgaria and Turkey (when the last two should belong to the League of Nations). Art. 40. Each Power was to appoint one representative; but representatives of the United States, Great Britain, France, Italy, Japan and Russia were to have two votes each, while representatives of the other three Powers were to have one vote each. Large rights of administrative control were conferred upon the Commission. Art. 43.

[3] Art. 42.

[4] Art. 44. The Commission was clothed with power to acquire property or permanent works, raise loans, and levy dues. Art. 45. Functions formerly exercised by certain specified sanitary organizations were to be discharged under the control of the Commission which was to coöperate with the League of Nations in measures for the combating of diseases. Art. 46. Provision was made with respect to the exercise of jurisdiction. Arts. 49–50.

[5] Art. 52.

[6] Art. 54.

[7] Art. 56.

[8] Arts. 57–60.

is possessed by the territorial sovereign, which may, therefore, lawfully close the navigation of the stream to foreign ships. Any privilege of transit enjoyed by them must be regarded as due to the consent of that sovereign.[1]

(b)

International Streams of North America

(i)

§ 160. Preliminary.

When a navigable river flows through the territory of two or more States, or forms an international boundary, the broad question arises as to the nature and extent of the right of one of them to exercise privileges of navigation within waters outside of the national domain, whether downstream or upstream, or on the opposite side of a line of demarcation. The inquiry also arises respecting the claims of non-riparian States.[2]

[1] "It is not doubted that rivers such as the Hudson and the Mississippi, which are navigable only within the territory of one country, are subject to that country's exclusive control." J. B. Moore, Principles of American Diplomacy, 1918, 130. Mr. Foster, Secy. of State, to Sir Julian Pauncefote, British Minister, at Washington, Dec. 31, 1892, For. Rel. 1892, 335, 337; Moore, Dig., I, 626–627; Oppenheim, 2 ed., I, § 176.

Compare instructions of Mr. Clay, Secy. of State, to Mr. Gallatin, Minister to Great Britain, June 19, 1826, American State Pap., For. Rel., VI, 762, 763.

[2] Concerning the navigation of international rivers generally, see Alphonse Bergès, *Du Régime de Navigation des Fleuves Internationaux*, Toulouse, 1902; J. C. Carlomagno, *El Derecho Fluvial Internacional*, with bibliography, Buenos Aires, 1913; Étienne Carathéodory, *Du Droit International Concernant les Grands Cours d'Eau*, Leipzig, 1861; Ed. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, Paris, 1879; *Histoire du Droit Fluvial Conventionnel*, Paris, 1889; G. Kaeckenbeeck, International Rivers, Grotius Society Publications, No. 1, London, 1918 (subjected to a notable review by Joseph P. Chamberlain, in *Yale L. J.*, XXVIII, 519); Ismael López, *Régimen Internacional de los Rios Navegables*, Bogotá, 1905; P. M. Ogilvie, International Waterways, New York, 1920; Pierre Orban, *Étude de Droit Fluvial International*, with bibliography, Paris, 1896; J. Vallotton, *"Du Régime Juridique des Cours d'Eau Internationaux de l'Europe"*, *Rev. Droit Int.*, 2 ser., XV, 271.

See, also, Bonfils-Fauchille, 7 ed., 1914, §§ 520–531, with bibliography; Calvo, 5 ed., I, 433–465; *Clunet, Tables Générales*, I, 462–465, 882–883; Hall, Higgins' 7 ed., §§ 38, 39; Martens, II, 345–355; J. B. Moore, Principles of American Diplomacy, New York, 1918, 130–134; Dig. of Int. Law, I, §§ 128–132; E. Nys, *"Les fleuves internationaux traversant plusieurs territoires"*, *Rev. Droit Int.*, 2 ser., V, 517; *Le Droit International*, I, 423–437; Oppenheim, 2 ed., I, §§ 176–181, with bibliography; Rivier, I, 221–229; Eugene Schuyler, American Diplomacy, New York, 1886, 265–305, 319–366; Dana's Wheaton, 274–288; Woolsey, 6 ed., 79–83. Also Draft of International Regulations for the Navigation of Rivers, adopted by the Institute of International Law at Heidelberg in 1887, *Annuaire*, IX, 182, J. B. Scott, Resolutions, 78; Resolutions adopted by the Institute at Madrid in 1911, on the subject of International Regulation of the Use of International Streams, *Annuaire*, XXIV, 365, J. B. Scott, Resolutions, 168.

In testing the pretensions of claimant States by the practice of the past hundred years, it will be found that not infrequently there has been a willingness to yield principle for the sake of actual privileges greatly needed. Those accorded have commonly been acknowledged by treaty. Inasmuch as conventional arrangements have been shaped according to geographical and commercial considerations, and in response to the particular requirements of the contracting parties, there has been lack of uniformity of action save with respect to navigation through rivers offering the same fundamental problems peculiar to the same continent. Nevertheless, from the conventions illustrative of the practice observed, it is believed to be possible to draw conclusions indicating the extent to which riverain States appear to respect an obligation to consent to the exercise of privileges of navigation within their respective waters by vessels under foreign flags.

(ii)

§ 161. The Mississippi.

According to Article VIII of the treaty of peace between the United States and Great Britain, of September 3, 1783, it was agreed that the navigation of the Mississippi, from its source to the ocean, should forever "remain free and open to the subjects of Great Britain and to the citizens of the United States."[1] By virtue of its treaty of the same year with Great Britain, Spain acquired east and west Florida, becoming thereby the riparian sovereign on both sides of the Mississippi at its mouth.[2] The United States thereupon sought Spanish recognition of a right of navigation through the lower waters to the sea. That claim, vigorously advocated by Mr. Jefferson, then Secretary of State, was said to rest upon the law of nature and of nations.[3] After

[1] Malloy's Treaties, I, 589.

[2] Letter from the Minister of Spain to Mr. Pickering, Secy. of State, May 6, 1797, American State Pap., For. Rel., II, 14–15.

[3] Mr. Jefferson, Secretary of State, in support of the claim of his Government, relied first, upon Article V of the treaty between Great Britain and France of Feb. 10, 1763, providing for free navigation of the Mississippi by the subjects of those countries; secondly, upon the treaty of peace between the United States and Great Britain of 1782–1783; and finally upon the "law of nature and nations." He asserted that the sentiment was written in deep characters on the heart of man that "the ocean is free to all men, and their rivers to all their inhabitants." Accordingly he declared that: "When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind." He said that the writers on the subject were agreed that an innocent passage along a river was the natural right of those inhabiting its borders above; that

protracted discussions, a treaty was concluded October 27, 1795. With respect to the Mississippi is was provided in Article IV that —

> His Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth from its source to the ocean, shall be free only to his subjects and citizens of the United States, unless he should extend this privilege to the subjects of other powers by special convention.[1]

According to Article III of the Jay Treaty, concluded with Great Britain November 19, 1794, the United States had agreed that the Mississippi should, "according to the treaty of peace, be entirely open to both parties." [2]

In 1796, the United States and Great Britain annexed to the Jay Treaty an explanatory Article relative to the navigation of the rivers and waters of the contracting parties, and to the effect that no stipulations in any convention subsequently concluded by either of the contracting parties with any other State could be understood to derogate in any manner from the rights of commerce and navigation of their respective citizens and subjects and for which provision had been made in the Jay Treaty.[3] Spain made complaint, contending that this Article was contrary to the treaty with the United States of 1795, and which, it was declared, was the basis of the American right of navigation.[4]

It may be observed that the treaties concluded by the United States with both Great Britain and Spain purported to secure

although this right was regarded as an inherited one, inasmuch as the modification of its exercise depended to a large degree on the convenience of the nation through whose territory foreign vessels passed, it was, nevertheless, "still a right as real as any other right, however well defined; and were it to be refused, or to be so shackled by regulations, not necessary for the peace or safety of its inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation is the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water." He said also: "We might add, as a fifth *sine qua non*, that no phrase should be admitted in the treaty which could express or imply that we take the navigation of the Mississippi as a *grant* from Spain. But, however disagreeable it would be to subscribe to such a sentiment, yet, were the conclusion of a treaty to hang on that single objection, it would be expedient to waive it, and to meet, at a future day, the consequences of any resumption they may pretend to make, rather than at present, those of a separation without coming to any agreement." Instructions to Messrs. Carmichael and Short, commissioners to negotiate a treaty with Spain, Mar. 18, 1792. American State Pap., For. Rel., I, 252–257.

[1] Malloy's Treaties, II, 1642.

[2] Malloy's Treaties, I, 592.

[3] Malloy's Treaties, I, 607.

[4] Correspondence in 1797, between Mr. Pickering, Secy. of State, and the Spanish Minister, American State Pap., For. Rel., II, 14–15, 16–17.

rights of navigation for the benefit of the contracting parties exclusively. No statement of principle as to the freedom of navigation of international rivers was made. Moreover, the language of the convention of 1795 gave some color to the Spanish claim that the American right to navigate the Mississippi was in the nature of a grant from His Catholic Majesty.

Through the acquisition of Louisiana and the Floridas, by virtue of treaties respectively with France, of April 30, 1803, and with Spain, of February 22, 1819, the United States found the Mississippi wholly within its own domain. The river ceased to be an international stream.[1]

(iii)

§ 162. The St. Lawrence.

Between 1823 and 1827, the United States made vigorous effort to secure from Great Britain recognition of a right to navigate the lower waters of the St. Lawrence. In view of the principles ably enunciated yet vainly advocated by Secretaries Adams and Clay, as well as by Messrs. Rush and Gallatin, the basis of the subsequent arrangement was significant.[2] By means of sacrifices doubtless regarded as offering sufficient compensation to British interests, the United States, through Article IV of the reciprocity treaty of June 5, 1854, secured temporarily the privilege of free navigation.[3]

[1] It had been supposed by the negotiators of the earliest treaty between the United States and Great Britain, that the source of the Mississippi was in Canada, and it was, therefore, agreed that the boundary line should run from the most northwestern point of the Lake in the Woods on a due west course to the Mississippi. As a matter of fact, such a line could not touch or intersect that river, inasmuch as its waters were wholly south thereof. Moore, Dig., I, 625; also Moore, Arbitrations, I, 705–707.

[2] See documents communicated to the House of Representatives by President J. Q. Adams, Jan. 7, 1828, American State Pap., For. Rel., VI, 757–777. It is believed that the cause of an upstream State was never more forcibly pleaded than by the American secretaries and plenipotentiaries of this period. Attention is particularly called to a memorandum prepared by Mr. Rush and submitted to the British plenipotentiaries in 1824. *Id.*, 769–772. In the course of it he said: "The right of the upper inhabitants to the full use of the stream rests upon the same imperious wants as that of the lower; upon the same intrinsic necessity of participating in the benefits of this flowing element. Rivers were given for the use of all persons living in the country of which they make a part, and a primary use of navigable ones is that of external commerce. The public good of nations is the object of the law of nations, as that of individuals is of municipal law. The interest of a part gives way to that of the whole; the particular to the general. The former is subordinate; the latter paramount. This is the principle pervading every code, national or municipal, whose basis is laid in moral right, and whose aim is the universal good."

[3] Malloy's Treaties, I, 671. The provisions of Article IV for the navigation of the St. Lawrence and Canadian canals used as a means of communica-

According to Article XXVI of the Treaty of Washington, of May 8, 1871, the navigation of the St. Lawrence ascending and descending to and from the sea, from the point where the river ceased to be the international boundary —

> Shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation.[1]

In Article I of the convention concluded January 11, 1909, concerning the boundary waters between the United States and Canada, it was declared that the navigation of all navigable boundary waters should

> forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.[2]

It was further agreed that so long as the treaty should remain in force, the same right of navigation should extend to the waters of Lake Michigan and to all canals connecting boundary waters, then existing or which might thereafter be constructed on either side of the line.[3]

tion between the Great Lakes and the Atlantic, by citizens and inhabitants of the United States on the same basis as British subjects, contained also the declaration that the British Government retained the right to suspend the privilege on giving due notice thereof, and that in case of such suspension the United States might suspend also the operation of Article III (providing for the free admission of certain specified articles into the British Colonies and into the United States), for such period as the rights of navigation were suspended. Article IV also gave to British subjects the right to navigate Lake Michigan for a term of years. The United States engaged to urge the State Governments to give British subjects the use of the State canals on terms of equality with the inhabitants of the United States. It was further agreed that duties should not be levied by Great Britain on Maine lumber floated down the river St. John and its tributaries when shipped to the United States from New Brunswick. Concerning this Article see comment of Hall, Higgins' 7 ed., § 39.

[1] Malloy's Treaties, I, 711. [2] Charles' Treaties, 40.

[3] It was also provided that either of the contracting parties might adopt rules and regulations governing the use of such canals within its own territory and charge tolls for the use thereof, but that all such rules and regulations and all tolls charged should apply alike to the nationals of the contracting parties, and to the ships, vessels and boats of both of those parties, and that they should be placed on terms of equality in the use thereof. *Id.*

(iv)

§ 163. The Yukon, the Porcupine and the Stikine. The St. John. The Columbia.

Article XXVI of the treaty with Great Britain of May 8, 1871, provided for the free navigation forever of the rivers Yukon, Porcupine and Stikine, ascending and descending to the sea, to the citizens and subjects of the two countries, subject to any regulations of either within its own territory not inconsistent with free navigation. Thus, the United States, the lower riparian proprietor of those Alaskan rivers, secured a right of navigation through the upper waters wholly within British territory.[1]

Article III of the treaty between the United States and Great Britain of August 9, 1842, provided that where the river St. John formed the boundary line between the territories of the contracting parties, navigation should be free and open to both. It was provided that the produce of the forest or of agriculture ("not being manufactured") grown in such parts of the State of Maine as might be watered by the river or its tributaries, should have free access into and through the St. John and its tributaries having their source within the State of Maine, to and from the seaport at the mouth of the river, and to and around the falls of the river, by boats, rafts or other conveyance. Such produce while within the Province of New Brunswick was to be treated as if it were the produce of that Province. In like manner the inhabitants of the territory of the upper St. John, where the river was a British stream, were to have access to and through the river for their produce where the river ran wholly through the State of Maine. It was declared that the treaty should not give to either party a right to interfere with any regulations not inconsistent with the terms of the agreement, and which the Governments of Maine and New

[1] Malloy's Treaties, I, 711. "This stipulation is understood to secure 'the right of access and passage', but not 'the right to share in the local traffic' between American and British ports, as the case may be." Moore, Dig., I, 635, *citing* Mr. Adee, Second Assist. Secy. of State, to Mr. Woodbury, Jan. 6, 1898, 224 MS. Dom. Let. 229. Concerning the whole article see, also, Eugene Schuyler, American Diplomacy, 290–291.

Article XXVII contained an engagement by the British Government to urge upon that of the Dominion to secure for the inhabitants of the United States on terms of equality with those of the Dominion the use of the Welland, St. Lawrence and other canals; the United States, on the other hand, engaging that British subjects might on similar terms enjoy the use of the St. Clair Flats; and agreeing also to urge the State Governments to secure for such subjects, on like terms, the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the international boundary. Malloy's Treaties, I, 711.

Brunswick might make respecting the navigation of the river where both banks should belong to the same party.[1]

According to Article II of the treaty between the United States and Great Britain of June 15, 1846, the north branch of the Columbia River within American territory as far as the junction with the main stream, and thence down that stream to the sea, was opened to the Hudson's Bay Company and to all British subjects "trading with the same", subject, however, to such regulations not inconsistent with the treaty as the United States might prescribe.[2] Attention has been called to the fact that the treaty contained no stipulation concerning the navigation of the upper waters of the stream within British territory.[3]

(v)

§ 164. The Colorado and the Rio Grande.

By the treaty with Mexico of Guadalupe-Hidalgo, of February 2, 1848, the United States, as the upper riparian proprietor, secured a right of navigation through the lower waters of the Colorado River below its confluence with the Gila, to and through the Gulf of California. No provision was made, however, for the navigation by the inhabitants of Mexico of the upper waters of the Colorado within the territory of the United States.[4] It was declared that the river Gila, and the part of the Rio Grande (described as the Rio Bravo del Norte) lying below the southern boundary of New Mexico, should be "free and common to the vessels and citizens of both countries", and that neither should, "without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not

[1] Malloy's Treaties, I, 653. Concerning the right of New Brunswick under the treaty to impose an export duty on all timber shipped from the Province, including that floated down from Maine, see Moore, Dig., I, 636–637, and documents there cited.

Art. XXXI of the treaty of May 8, 1871, contained an engagement by Great Britain to urge upon the Parliament of the Dominion and the Legislature of New Brunswick that no export or other duty should be imposed on lumber of any kind in that part of Maine watered by the St. John and its tributaries, and floated down that river to the sea, when the same was shipped to the United States from the Province of New Brunswick. Malloy's Treaties, I, 713.

[2] Malloy's Treaties, I, 657.

[3] See statement by J. B. Moore in Moore, Dig., I, 639. Concerning the claims of the Hudson's Bay Co., *cf.* Moore, Arbitrations, I, 253, 262. See communication of Mr. Bayard, Secy. of State, to Mr. Lundy, July 25, 1885, 156 MS. Dom. Let. 358, Moore, Dig., I, 639, in which a distinction is made between the rights of the upper and lower riparian inhabitants.

[4] Art. VI, Malloy's Treaties, I, 1111.

even for the purpose of favoring new methods of navigation." [1] By the Gadsden Treaty of December 30, 1853, the United States became the sovereign over the territory traversed by the Gila, and over that on both sides of the Rio Grande as far south as latitude 31° 47′ 30″, below which point the river remained the international boundary. That treaty provided that the previous arrangement as to the Rio Grande should remain in force only below latitude 31° 47′ 30″. The previous provisions as to the Gila were abrogated.[2]

(vi)

§ 165. **Conclusions.**

From the practice of the United States as indicated by the foregoing treaties with respect to rivers in part traversing or bounding its own territory, the following conclusions are to be drawn:

First, no right of navigation is known to have been exercised in foreign territory or permitted in American territory except by virtue of a treaty.

Second, no treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian States.[3]

Thirdly, notwithstanding the principles advocated by its statesmen, the United States, as the upstream sovereign, on at least one occasion accepted a treaty the terms of which afford some basis for the contention that the right of navigation secured thereby was conferred as a grant by the sovereign downstream; and on another occasion substantial concessions were yielded for the privilege of access to the sea.

Fourthly, in two cases where the upper stream was wholly within the territory of a single State, no permission was accorded

[1] Art. VII, where the following provision was added: "Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

"The stipulations contained in the present Article shall not impair the territorial rights of either Republic within its established limits."

[2] Art. IV, *id.*, 1123. It will be noted that the point below which provision was made for navigation was thirty seconds north of the point where the river constituted the international boundary. See, also, Art. III of boundary convention of Nov. 12, 1884, *id.*, 1160; Art. V of boundary convention of March 1, 1889, *id.*, 1168.

[3] *Compare* Art. XXVI, treaty between the United States and Bolivia of May 13, 1858, with respect to the rivers Amazon and La Plata, Malloy's Treaties, I, 122.

the inhabitants of the territory downstream to navigate the upper waters.

Fifthly, in a treaty of the twentieth century concerning the Canadian boundary waters, the broad rights of navigation reciprocally agreed upon for the benefit of the riparian States were subjected to the operation of local regulations of either country not at variance with the compact.

(c)

International Streams of South America

(i)

§ 166. In General.

South America is traversed by rivers which, together with their confluents, afford navigable channels of communication with the sea to States remote therefrom, and so afford an indispensable means of access to the outside world.[1] To oversea as well as to interior riparian States, the importance of freedom of navigation has been apparent. The United States has frequently urged the opening of such streams to foreign maritime commerce, and has entered into treaties so providing.[2] In one of them freedom of navigation is declared to be a principle of international law.[3] Certain others imply that the privilege is a grant by a riparian sovereign.[4]

[1] Pierre Orban, *Étude de Droit Fluvial International*, 163–164.

[2] Mr. Marcy, Secy. of State, in a communication to Mr. Trousdale, Minister to Brazil, Aug. 8, 1853, declared: "You are instructed to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations — it is a natural one — as much so as that to navigate the ocean — the common highway of nations. By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power to exclude such rivers from the common use of nations." MS. Inst. to Brazil, XV, 215, Moore, Dig., I, 642, 643.

[3] Thus in Art. XXVI of the treaty with Bolivia of May 13, 1858, it is declared that "In accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata, with their tributaries, as highways or channels opened by nature for the commerce of all nations." Malloy's Treaties, I, 122.

[4] Art. I of the treaty with the Argentine Confederation of July 10, 1853, declared that "The Argentine Confederation, in the exercise of her sovereign rights, concedes the free navigation of the rivers Paraná and Uruguay, wherever they may belong to her, to the merchant vessels of all nations, subject only to the conditions which this treaty establishes, and to the regulations sanctioned or which may hereafter be sanctioned, by the national authority of the Confederation." Malloy's Treaties, I, 18. See, also, Art. II of treaty with Paraguay of Feb. 4, 1859, *id.*, II, 1365. Ismael López, *Régimen Internacional de los Ríos Navegables*, 53–54.

(ii)

§ 167. The Amazon. The Orinoco. The Rio de la Plata.

Brazil, across the domain of which the streams of the Amazon and its affluents flow to the sea, announced by a decree of December 7, 1866, that that river would be "opened to vessels of all nations" from September 7, 1867, as far as the frontiers of that State.[1] This action contrasted sharply with the narrower position taken by the Brazilian Government in previous years.[2]

It should be observed, however, that the Brazilian Government appears to take the stand that rights of foreign (and even riparian) States to privileges of navigation in streams traversing its territory rest upon concessions from itself as set forth in treaties or declarations.[3]

By a law of May 14, 1869, and a decree of July 1 of the same year, Venezuela opened the Orinoco and its branches to foreign merchant vessels.[4] Venezuela appears, however, in discussions

[1] British and For. State Pap., LVIII, 551, 552–567. See, also, decree of Jan. 25, 1873, *id.*, LXV, 607; Moore, Dig., I, 645.

Cf., also, J. C. Carlomagno, *El Derecho Fluvial Internacional*, 129–144; Ismael López, *Régimen Internacional de los Rios Navegables*, 57–62; Pierre Orban, *Étude de Droit Fluvial International*, 170–173.

With respect to the permission granted by Brazil at various times to American vessels of war to ascend the upper Amazon, see For. Rel. 1899, 115–124, Moore, Dig., I, 648–649.

Cf. Art. IV of treaty of boundaries and navigation between Brazil and Colombia of April 24, 1907, For. Rel. 1907, I, 110; *modus vivendi* between same States of same date relative to navigation and commerce on the Içá or Putumayo, *id.*, 110; statement of Baron do Rio-Branco, Brazilian Minister of Foreign Relations, to the President of Brazil, Sept. 30, 1907, respecting the *modus vivendi* with Colombia, *id.*, 113.

Concerning the effect of the Constitution of Brazil on the right of that State to impose transit taxes, see opinion of Mr. L. Renault, For. Rel. 1903, 38–39.

[2] Concerning the efforts of the United States to secure freedom of navigation in the Amazon between 1850 and 1860, and the stand taken by Brazil, see Moore, Dig., I, 640–645, and documents there cited, especially communication of Mr. Marcy, Secretary of State, to Mr. Trousdale, American Minister to Brazil, Aug. 8, 1853, MS. Inst. Brazil, XV, 215; also Schuyler, American Diplomacy, 329–344.

[3] This was shown by the attitude of Brazil in its controversy with Bolivia respecting the Acre question. See Baron do Rio-Branco, Minister for Foreign Affairs, to Mr. Seeger, American Consul-General, Feb. 20, 1903, For. Rel. 1903, 42, 43, Moore, Dig., I, 646. *Cf.* Art. V of treaty between Brazil and Peru, Sept. 8, 1909, concerning the navigation of the Amazon basin, Brit. and For. State Pap., CII, 199, 201; also treaty of commerce and fluvial navigation between Bolivia and Brazil, of Aug. 12, 1910, *Nouv. Rec. Gén.*, 3 ser., VII, 632.

[4] Moore, Arbitrations, II, 1696–1698. Concerning the concession in 1873, of an exclusive right of navigation to Gen. Perez, *cf. id.*, 1701. See, also, decree of July 1, 1893, closing all of the channels of the Orinoco to foreign commerce except the Boca Grande, reserving the Macareo and Pedernales channels for the coasting trade, and absolutely prohibiting the navigation of its other channels, For. Rel. 1893, 730; also decree of June 6, 1894, For. Rel. 1894, 794; decision of the High Federal Court sustaining validity of decree of July 1, 1893, *id.*, 798. *Cf.*, also, in this connection, Moore, Dig., I, 649–650.

and negotiations with Colombia, the riverain proprietor of the upper waters, to have contested its claim to a right, founded on the law of nations, of access to the sea. The former has asserted that any privilege of navigation through the waters traversing Venezuelan territory is in the nature of a grant from the sovereign thereof.[1]

Pursuant to numerous treaties, the Rio de la Plata and its affluents, the Paraná and the Uruguay, have been opened to the navigation of non-riparian as well as riparian States.[2] To certain of these agreements the United States is, as has been observed, a party. Notwithstanding the jurisdictional claims of the Argentine Republic, and the prevailing theory on which rights of navigation are yielded, there has resulted a régime which, according to Pierre Orban, "has been little by little unified on a very broad basis."[3]

(d)

International Streams of Europe

(i)

§ 168. Relation of the United States to Navigation Generally.

The navigation of European rivers, while of much concern to riparian States and others of the same continent, was, during the nineteenth century, of less moment to oversea Powers.

The United States doubtless felt the influence of the tendency towards freedom of navigation expressed by and resulting from the Peace of Paris of 1814, and the Treaty of Vienna of 1815. Its chief concern was, however, in the effect of such conventions upon practices which did or should prevail in relation to American streams.

[1] J. C. Carlomagno, *El Derecho Fluvial Internacional*, 118, 126–128; Ismael López, *Régimen Internacional de los Rios Navegables*, 96–100. See, also, report of Colombian Minister of Foreign Affairs, For. Rel. 1894, 193, 200, Moore, Dig., I, 151. See reasoning of the umpire in the Faber case, sustaining certain Venezuelan decrees suspending traffic on the river Zulia during 1900, 1901, and 1902, Ralston's Report (Venezuelan Arbitrations, 1903), 600, 620; also bibliographical note of the reporters, *id.*, 603.

[2] Bonfils-Fauchille, 7 ed., § 529, and conventions there cited; also J. C. Carlomagno, *El Derecho Fluvial Internacional*, Chap. VI; Ismael López, *Régimen Internacional de los Rios Navegables*, 53–56.

[3] *Étude de Droit Fluvial International*, 162, 170. See "The Jurisdiction of the Rio de la Plata", *Am. J.*, IV, 430; also Supp., *id.*, 138, with text of protocol between Uruguay and Argentina of Jan. 6, 1910.

In the elaborate arrangement for the navigation of international rivers established by the German and Austrian peace treaties of 1919, the United States, whether or not a party thereto, has a substantial commercial interest with respect to provisions designed to facilitate the transit of goods, as well as to those pertaining to the treatment of vessels.

(ii)

The Treatment of Certain Rivers in the Nineteenth Century

§ 169. The Rhine.

The treaty of peace of Paris of May 30, 1814, announced in Article V that the navigable portions of the Rhine, to and from the sea, should be free, and in such a way that their use should be forbidden to no one. To the future Congress (of Vienna) was left the burden of fixing the principles by which should be regulated the duties to be raised by the riparian States, in a manner equal and most favorable for the commerce of all nations. That Congress, in order to facilitate communications between peoples, and to render them constantly less strangers to each other, was also to examine and decide in what manner the foregoing provisions could be extended to all other rivers which in their navigable courses separated different States.[1]

The rules of the Congress of Vienna were so expressed as to give room for a narrow construction of the principles laid down in the

[1] Brit. and For. State Pap., XIX, 86.

"By the Treaty of Vienna of June 9, 1815, the powers whose States were 'separated or traversed by the same navigable river' engaged 'to regulate, by common consent, all that regards its navigation', and for this purpose to name commissioners who should adopt as the bases of their proceedings certain principles, the chief of which was that the navigation of such rivers, 'along their whole course, . . . from the point where each of them becomes navigable to its mouth shall be entirely free, and shall not, in respect to commerce, be prohibited to any one', subject to regulations of police. In order to assure the application of this principle, Articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that 'the same freedom of navigation' should 'be extended to the Necker, the Mayne, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths.' And in order to 'establish a perfect control' over the regulation of the navigation, and to 'constitute an authority which may serve as a means of communication between the States of the Rhine upon all subjects relating to navigation', it was stipulated that a central commission should be appointed, consisting of delegates named by the various bordering States, which commission should regularly assemble at Mayence on the 1st of November in each year." Moore, Dig., I, 628. Arts. CVIII–CXVI of the so-called Act of the Congress of Vienna of June 9, 1815, contain the provisions for the navigation of international rivers. For the text thereof see Brit. and For. State Pap., II, 7, 52–53. Annex XVI contains the Rules of Navigation. *Id.*, 162. Attached to the rules were a series of Articles concerning the navigation of the Rhine. *Id.*, 163–178.

Treaty of Paris of May 30, 1814.[1] In consequence, those rules were oftentimes so interpreted and applied in later conventions between the riparian States as to indicate that rights of navigation in the Rhine were the sole possession of States whose territories were traversed or separated by its streams, and that the riparian proprietors could themselves lawfully fix the terms of navigation therein.[2] This was illustrated by regulations adopted by the riparian States in the convention of Mayence, March 31, 1831,[3] and by those (which replaced them) of the convention of Mannheim, October 17, 1868.[4]

§ 170. The Danube.

The principles of the Act of the Congress of Vienna designed to regulate the navigation of international rivers were applied to the Danube and its mouths by Article XV of the Treaty of Paris of March 30, 1856. It was declared that the navigation of that river should not be subjected to any impediment or charge not expressly provided for by the accompanying stipulations, and that consequently, there should not be levied any toll founded solely upon the fact of the navigation of the river, or any duty upon goods which might be on board of a vessel. With the exception of

[1] E. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, 32–41, 73–93, in which attention is called to the work of Baron Humboldt in securing acceptance of the ambiguous provision that the navigation of the Rhine should not be prohibited to any one "with respect to commerce" (*sous le rapport du commerce*). See, also, Pierre Orban, *Étude de Droit Fluvial International*, 97–129.

[2] Engelhardt (in *Du Régime Conventionnel des Fleuves Internationaux*, p. 81) adverts to the opinion expressed by the Prussian Government in a despatch addressed in 1857 to its delegates on the European Danube Commission in the following terms: "According to the negotiations of the Congress at Vienna respecting Art. 109, it is not to be doubted that it was not within the design of that act to accord to non-riparians a right of navigation on the rivers dealt with conventionally." *Citing* despatch of Baron de Manteuffel of Aug. 26, 1857. That author adds that practice served to confirm this interpretation with respect to the rivers traversing Prussian territory — that is, the Elbe, the Weser, the Ems, and the Rhine, as well as to Austro-Russian streams, such as the Vistula, the Dnieper and the Pruth. He calls attention also to the formality and rigor of Rhenish legislation of 1831. He *cites* Art. IV of the convention of June 23, 1821, respecting the navigation of the Elbe (Brit. and For. State Pap., VIII, 954); Arts. III and XLII of the convention concluded at Mayence Mar. 31, 1831, relative to the navigation of the Rhine (*id.*, XVIII, 1078 and 1092); Art. VI of the Act concerning the Ems of 1843; Art. I of the Act concerning the Weser of 1823; as well as the convention between Austria and Russia of Aug. 5–17, 1818. (Brit. and For. State Pap., V, 938.) See, also, G. Kaeckenbeeck, International Rivers, 62–66.

[3] Brit. and For. State Pap., XLVIII, 1076.

[4] Brit. and For. State Pap., LIX, 470. See, also, in this connection, British memorandum opposing demands of the United States in 1824, respecting the navigation of the St. Lawrence, Am. State Pap., For. Rel., VI, 772, 774.

regulations of police and quarantine, no obstacle whatever was to be opposed to free navigation.[1]

With a view to carrying out the foregoing arrangement it was provided in Article XVI that a commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey were each to be represented by one delegate, should be charged to designate and to cause to be executed certain necessary works to clear the mouths of the Danube as well as neighboring parts of the sea from obstructing impediments, for the benefit of navigation.[2]

By Article XVII provision was made for the establishment of a permanent commission (described in Article XVIII as the "River Commission") to be composed of delegates of Austria, Bavaria, the Sublime Porte and Wurtemberg (one for each of those powers), to whom should be added commissioners from the three Danubian Principalities whose nomination should have been approved by the Porte. This commission was to prepare regulations of navigation and river police, to remove impediments of whatever nature which might serve to prevent the application to the Danube of the arrangements of the treaty of Vienna, to order and cause to be executed the necessary works throughout the whole course of the river, and, after the dissolution of the European Commission, to see to the maintaining of the mouths of the Danube and the neighboring parts of the sea in a navigable state.[3]

The Treaty of Berlin of July 13, 1878, made numerous further provisions. In order to increase the guaranties assuring freedom of navigation on the Danube and "recognized as of European interest", Article LII declared that all existing fortresses and fortifications on the course of the river from the Iron Gates to its

[1] Brit. and For. State Pap., XLVI, 8, 12, Moore, Dig., I, 630.

According to Art. XV it was declared that the arrangement applied to the Danube thenceforth formed a part of the public law of Europe and that the contracting parties took it under their guaranty.

[2] The commission referred to in the text was known as the European Danube Commission as distinct from the so-called River Commission for which provision was made in Art. XVII. See statement in Moore, Dig., I. 630–631.

"By the Treaty of London of Mar. 13, 1871, the existence of the European Commission was extended to April 24, 1883. It was further provided that 'the conditions of the reassembling of the riverain commission', established by Art. XVII of the Treaty of Paris, should 'be fixed by previous understanding between the riverain powers, without prejudice to the clause relative to the three Danubian principalities', and that, so far as any modification of the Article should be involved, it should 'form the subject of a special convention between the consignatory powers.'" Moore, Dig., I, 630. For the text of the treaty, see Brit. and For. State Pap., LXI, 7.

[3] Brit. and For. State Pap., XLVI, 14. According to Art. XIX it was agreed that the contracting parties should have the right to station at all times two light vessels at the mouths of the Danube. *Id.*, 14.

mouths should be razed, and no new ones erected; and that below that point, no vessel of war, with the exception of ships of light tonnage in the service of the river police and customs, should navigate the stream.[1] Other articles maintained the European Commission and extended its functions.[2]

"The historical development of the Danube question resulted," as an authoritative American commentator has pointed out, "in a division of the river among a large number of régimes," and which "secured the actual freedom of navigation only on the lower river."[3] That division was doubtless partly due to the differing

[1] Brit. and For. State Pap., LXIX, 749, 765, Moore, Dig., I, 630. It was also provided that the so-called "stationnaires" of the powers at the mouths of the Danube might ascend the river as far as Galatz. *Cf.* Pierre Orban, *Étude de Droit Fluvial International*, 226–235.

[2] According to Art. LIII the European Commission of the Danube, on which Roumania was to be represented, was maintained in its functions and was to exercise them thereafter as far as Galatz in complete independence of the territorial authorities. Moreover, all treaties, arrangements, acts, and decisions relating to its rights, privileges, prerogatives, and obligations were confirmed. By Art. LIV it was provided that one year before the expiration of the term assigned for the duration of the European Commission (April 24, 1883) the Powers should come to an understanding as to the prolongation of its powers, or the modifications which they might deem necessary to introduce. Art. LV declared that the regulations respecting navigation, river police and supervision from the Iron Gates to Galatz, should be drawn up by the European Commission, assisted by delegates of the riverain States, and placed in harmony with those which had been or might be issued for the portion of the river below Galatz.

"In order to come to an understanding in regard to these last stipulations, a new treaty was concluded March 10, 1883, between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey. By this treaty the jurisdiction of the European Commission was extended from Galatz to Ibraïla, and its powers were prolonged till April 24, 1904, and thereafter for successive terms of three years till a certain notice was given.

"But, besides prolonging the existence of the European Commission, the treaty also created a new commission, called the 'Mixed Commission of the Danube', to consist of delegates of Austria-Hungary, Bulgaria, Roumania, and Servia, and a member of the European Commission, for the purpose of superintending the execution of the regulations made for the navigation of the river. This commission is to endure as long as the European Commission, to hold two sessions a year and to make its decisions 'by a majority of votes.'" Moore, Dig., I, 631. For the text of the treaty of March 10, 1883, see Brit. and For. State Pap., LXXIV, 20.

See Regulations for Navigation and Police applicable to the Danube between Galatz and the mouths, Nov. 10, 1911, Hertslet's Commercial Treaties, XXVI, 862.

See Gustave Demorgny, *La Question du Danube*, Paris, 1911, 295–313; Bonfils-Fauchille, 7 ed., § 528, with bibliography; A. G. Pitisteano, *La Question du Danube*, Paris, 1914.

Cf. G. Kaeckenbeeck, International Rivers, 83–137, and documents there given.

[3] Joseph P. Chamberlain, The Danube, Dept. of State, confidential document, 1918, 102. That writer in his valuable monograph notes the treatment which was applied to eight different sections of the river: (1) "from the point where the river becomes navigable in German territory to Passau on the Austrian border"; (2) "from Passau to the point where the river becomes a boundary between Serbia and Austria"; (3) "between the point where it is

relationships which various sections of the river bore to the riparian States whose territories were bounded or intersected by it, and to the differing degrees of interest felt by maritime States, whether riparian or non-riparian, in the navigation of particular sections.[1] No single method of administration was acknowledged to be applicable even to such parts of the river as were open to ships of every flag.

§ 171. The Scheldt. The Po.

According to the Treaty of Vienna of June 9, 1815, such freedom of navigation as had been fixed for the Rhine was extended also to the Scheldt and the Meuse, as has been observed, from the point where each of those rivers was navigable to its mouth.[2] Article IX of the annex to the treaty of London of April 19, 1839, between Great Britain, Austria, France, Prussia and Russia on the one part, and the Netherlands on the other, declared that the provisions of the General Act of the Congress of Vienna, relative to the free navigation of navigable streams, should be applied to those rivers which separated Belgian and Dutch territories or which traversed them both. Elaborate provision was made for the navigation of the Scheldt, and permission accorded the Government of the Netherlands to levy a specified tonnage duty on vessels "coming from the high sea" which should ascend the western Scheldt in order to proceed to Belgium, and also such a duty (of less amount) on vessels which, coming from Belgium, should descend that stream in order to proceed to the high sea.[3] On May 12, 1863, Belgium and the Netherlands concluded a treaty for the redemp-

the boundary between Serbia and Austria to Moldowa at the head of the Cataracts"; (4) "the Iron Gates Cataracts section"; (5) "from the Iron Gates to Braila"; (6) "Braila to Soulina, including the St. Georges arm"; (7) "that part of the Kilia arm which forms the boundary between Russia and Roumania"; and (8) "the Kilia arm and Kilia delta, wholly under Russian territory."

[1] Thus the general concern as to privileges between Braila and the sea, and which also differed from that as to privileges between Braila and the Iron Gates, was of wider scope and was felt by more States than that pertaining to navigation on the upper river.

[2] Art. CXVII of the Act of the Congress of Vienna, Brit. and For. State Pap., II, 7, 54; Articles appended to Annex XVI, *id.*, 178.

. The navigation of the Scheldt had been closed by Art. XIV of the Treaty of Münster of Jan. 30, 1648. See, in this connection, E. Engelhardt, *Histoire du Droit Fluvial Conventionnel*, 40 *et seq.*; Phillimore, Int. Law, I, § CLXIII.

[3] Brit. and For. State Pap., XXVII, 992, 994–996. It may be observed that on the same day, Belgium and the Netherlands concluded a treaty containing the several Articles embodied in the Annex mentioned in the text. According to Art. XIV of the Annex: "The port of Antwerp, in conformity with the stipulations of Art. XV of the treaty of Paris, of the 30th of May, 1814, shall continue to be solely a port of commerce."

tion of the Scheldt dues by the capitalization of the same for a specified sum, and in which the King of the Netherlands renounced forever the right of collecting tolls on the navigation of the Scheldt pursuant to Article IX of the treaty of 1839.[1] This agreement was annexed to the general treaty of July 16, 1863, concluded in behalf of seventeen interested States on the one hand, and Belgium on the other, and providing for an equitable division of the burden assumed by the convention of May 12.[2]

Upon the outbreak of The World War in 1914, the Dutch Government undertook the establishment of "war buoying" on the Scheldt, and with the design of maintaining navigation therein.[3] In its neutrality declaration communicated August 6, 1914, vessels of war or vessels assimilated thereto and belonging to a belligerent, were forbidden passage across the territory within Dutch territorial waters, and which obviously embraced the lower Scheldt and its mouths.[4] It must be apparent that, as Sir Walter Phillimore observed in 1917, any arrangement which prevents military or naval expeditions from passing between Antwerp and the sea is a serious detriment to the welfare of Belgium, and a reason for an adjustment giving to that State "equal rights with Holland over the west Scheldt both in war and peace:" [5]

[1] Brit. and For. State Pap., LIII, 15; Malloy's Treaties, I, 77.

[2] Brit. and For. State Pap., LIII, 8. See, also, Pierre Orban, *Étude de Droit Fluvial International*, 138–143; Auguste Parent, *Du Commerce de Belgique à propos de l'Affranchissement de l'Escaut*, Brussels, 1863; G. Kaeckenbeeck, International Rivers, 31–32, 71–83.

The United States, by a treaty concluded with Belgium July 20, 1863, secured the advantages of the extinguishment of the Scheldt dues through an undertaking to assume an equitable portion of the capitalization thereof as provided by a convention between the same States of May 20, 1863. Malloy's Treaties, I, 75 and 73, respectively. Annexed to the treaty of July 20, 1863, was a declaration by the Netherlands Minister at Brussels of July 15, 1863, in virtue of special powers delivered to him, that the extinguishment of the Scheldt dues, consented to by his sovereign on May 12, applied to all flags, that those dues could never be reëstablished in any form whatsoever, and that their extinguishment should not affect in any way the other provisions of the treaty of April 19, 1839. *Id.*, 79. See, also, Dana's Wheaton, Dana's Note No. 116.

[3] Belgian Gray Book, Misc. No. 12 [1914], Cd. 7627, documents 29, 54, 55, and 56. According to document No. 49, the British Government announced Aug. 5, 1914, that "the British fleet will insure the free passage of the Scheldt for the provisioning of Antwerp."

"During the siege of Antwerp in October, 1914, no attempt was made by the Allies to use the estuary of the Scheldt for warlike purposes, but the position of these waters in international law has never yet been precisely acknowledged or defined." Oakes and Mowat, The Great European Treaties of the Nineteenth Century, Oxford, 1918, p. 135.

[4] Misc. No. 12 [1914], Cd. 7627, document No. 53, *Am. J.*, IX, Supp., 80.

[5] Sir Walter G. F. Phillimore, bart., Three Centuries of Treaties of Peace, London, 1917, 147 and 52. That distinguished jurist has since been made a baron.

The relation of Antwerp both to Belgium and to oversea maritime States would appear to create a general interest in removing the barrier due to the circumstance that the estuaries of the Scheldt pass through territory foreign to Belgium, and possibly by assisting that State to become, on equitable terms, the territorial sovereign over a necessary channel between Antwerp and the sea.

The general principles adopted by the Congress of Vienna for the navigation of rivers were, by Article XCVI of the General Act of 1815, made applicable to the Po.[1] By the treaty of July 3, 1849, between Austria and the Duchies of Parma and Modena, the navigation of that river, including all of its affluents, whether or not international streams, was rendered free to all flags.[2] The Treaty of Zurich, concluded November 10, 1859, in behalf of France, Austria and Sardinia, maintained the liberty of navigation within the Po and its affluents "conformably to the treaties." [3]

§ 172. The Vistula.

The principle of free navigation of international rivers was early applied to certain Polish streams. Article VIII of the treaty of Tilsit, concluded between France and Russia July 7, 1807, declared the navigation of the Vistula to be free.[4] On May 3, 1815, treaties concluded between Russia and Austria,[5] and Russia and Prussia,[6] provided that the navigation of all rivers and canals throughout the entire extent of the ancient Kingdom of Poland, wherever they were actually navigable or might become so, should be free, in the sense that they should not be closed to any of the inhabitants of the Polish Provinces under the Governments of Russia or Austria, and Russia or Prussia, respectively.[7] The principles of these and certain other provisions of both treaties were reaffirmed by Article

[1] Brit. and For. State Pap., II, 47.

[2] *Id.*, XXXVIII, 130. The Pope acceded to this treaty by an Act of Feb. 12, 1850. *Id.*, 136. See Pierre Orban, *Étude de Droit Fluvial International*, 143–145, where that author remarks: "Let us observe that the negotiators of 1815 did not dare to assimilate to rivers their affluents which were purely national. Those of 1849 were, therefore, shown to be the more courageous and also the more logical."

[3] Brit. and For. State Pap., L, 1019. According to a treaty between Portugal and Spain of Aug. 31, 1835, the river Douro was rendered free for the navigation of the subjects of the contracting parties. *Nouv. Rec.*, XIV, 97; Brit. and For. State Pap., XXIII, 1046. See, also, Sec. 11 of Regulations concluded between Spain and Portugal, Jan. 16, 1877, Brit. and For. State Pap., LXVIII, 145, 152.

See, also, J. Vallotton, "*Du Régime Juridique des Cours d'Eau Internationaux de l'Europe Centrale*", *Rev. Droit Int.*, 2 ser., XV, 271, 303–306.

[4] *Rec.*, VIII, 639.

[5] Brit. and For. State Pap., II, 56, 60.

[6] *Id.*, II, 63, 68.

[7] Pierre Orban, *Étude du Droit Fluvial International*, 133–138.

XIV of the General Act of the Congress of Vienna.[1] Austria and Russia by a treaty concluded at St. Petersburg August 5/17, 1818,[2] and Prussia and Russia by a treaty there concluded December 19, 1818,[3] gave precise applications to their earlier compacts. The Austro-Russian convention declared in Article XI that the navigation of the Vistula should be free from every duty or tax with respect to the borders which belonged to the contracting parties. The Russo-Prussian convention provided in Article II that the navigation of the Vistula should be free from every charge except one collected in Prussia under the denomination of "*Schiffsgefassgelder*." This convention was replaced by a treaty concluded by Prussia and Russia February 27 (March 11), 1825, which provided in Article V that the navigation of the Vistula and the Niemen, as well as their affluents, should be free from tolls.[4]

(iii)

Certain Conventional Arrangements of 1919

§ 173. Freedom of Inland Navigation.

According to the treaty of peace with Germany of June 28, 1919, the nationals of any of the Allied and Associated Powers, as well as their vessels and property, were accorded the right to enjoy in all German ports and on the inland navigation routes of Germany the same treatment in all respects as German nationals, vessels and property. It was declared in particular that the vessels of any one of those Powers should be entitled to transport goods of any description, and passengers also, to or from any ports or places in German territory to which German vessels might have access, under conditions which should not be more onerous than those applied in the case of national vessels.[5]

[1] Brit. and For. State Pap., II, 14. [2] *Nouv. Rec.*, IV, 540.
[3] Brit. and For. State Pap., V, 945.
[4] *Id.*, XII, 927, 928.
"What is necessary to remember is that the rivers and other channels of the ancient Kingdom of Poland would have been in reality subjected to a sufficiently broad régime had not the States which established it kept the benefits solely to themselves." Pierre Orban, *Étude de Droit Fluvial International*, 138.
[5] Art. 327. It was added that the vessels of the Allied and Associated Powers "shall be treated on a footing of equality with national vessels as regards port and harbour facilities and charges of every description, including facilities for stationing, loading and unloading, and duties and charges of tonnage, harbour, pilotage, lighthouse, quarantine, and all analogous duties and charges of whatsoever nature, levied in the name of or for the profit of the Government, public functionaries, private individuals, corporations, or establishments of any kind."
It was also provided that the granting by Germany of a preferential régime to any of the Allied or Associated Powers or to any other foreign Power, should

§ 174. Free Zones in Ports.

By the same treaty, free zones existing in German ports on August 1, 1914, were to be maintained; and these zones together with any others which might be established in German territory pursuant to the treaty, were to be subjected to the régime for which provision was made in subsequent Articles.[1] It was declared that goods entering or leaving a free zone should not be subjected to any import or export duty, other than those provided for in a specified Article (Art. 330), where the right to levy duties on goods leaving the free zone for consumption in the country on the territory of which the port of such zone was situated, was acknowledged; and conversely, there was no prohibition of export duties to be levied on goods coming from such country and brought into the free zone. On the other hand, Germany was forbidden to levy, under any denomination, "any import, export or transit duty on goods carried by land or water across her territory to or from the free zone from or to any other State." [2]

Clauses Relating to the Elbe, the Oder, the Niemen (Russstrom-Memel-Niemen) and the Danube

§ 175. General Clauses.

The treaty declared specified rivers to be "international." The following were so described: the Elbe (*Labe*) from its confluence with the Vltava (*Moldau*), and the Vltava (*Moldau*) from Prague; the Oder (*Odra*) from its confluence with the Oppa; the Niemen (Russstrom-Memel-Niemen) from Grodno; the Danube from Ulm, as well as "all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without trans-shipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river." [3]

be extended immediately and unconditionally to all of the Allied and Associated Powers.

It was declared that there should be no impediment to the movement of persons or vessels other than those arising from prescriptions concerning customs, police, sanitation, emigration and immigration, and those relating to the import and export of prohibited goods. Such regulations were, moreover, to be reasonable and uniform, and not to impede traffic unnecessarily.

This Article was reproduced in Art. 290 of the treaty of peace with Austria of Sept. 10, 1919.

[1] Art. 328. See, also, the details worked out in Arts. 329–330.

[2] Art. 330.

[3] Art. 331. It was added that the same provisions should be applied to the

On these waterways, declared to be international, it was provided that the nationals, property and flags of all Powers should be treated on a footing of perfect equality, "no distinction being made to the detriment of the nationals, property or flag of any Power between them and the nationals, property or flag of the riparian State itself or of the most favoured nation." [1]

Provision was made for a temporary régime for these waterways,[2] to be superseded by one to be laid down in a so-called General Convention to be drawn up by the Allied and Associated Powers and approved by the League of Nations, with reference to the waterways recognized in such convention as having an international character.[3]

§ 176. Special Clauses Relating to the Elbe, the Oder and the Niemen (Russstrom-Memel-Niemen).

The Elbe was to be placed under the administration of an international Commission,[4] and likewise the Oder.[5] In each case such commission was to comprise representatives of specified non-riparian as well as riparian States. The Niemen (Russstrom-Memel-Niemen) was to be placed under such a commission upon the request made to the League of Nations by any riparian State; and in such event, the commission was to comprise one representative of each riparian State, and three representatives of other States specified by the League of Nations.[6]

Rhine-Danube navigable waterway, should it be constructed under conditions laid down in Art. 353. See, also, Art. 291 of the treaty of peace with Austria, with respect to general causes relating to the Danube.

[1] Art. 332, where it was added that German vessels should not be entitled to carry passengers or goods by regular services between the ports of any Allied or Associated Power, without its special authority. See, also, Arts. 292 and 293 of the treaty of peace with Austria.

[2] Arts. 333–337. See, also, Arts. 294–298 of the treaty of peace with Austria.

[3] Art. 338, where it was declared that the General Convention should apply in particular to the whole or part of the above-mentioned river systems of the Elbe, the Oder, the Niemen and the Danube, and such other parts of those river systems as might be covered by a general definition. Art. 339 made provision for the cession by Germany to the Allied and Associated Powers of river craft.

[4] Art. 340. [5] Art. 341.

[6] Art. 342. With reference to the times of meeting and the functions of these commissions see Arts. 343–345. According to Art. 343, each of these commissions was to proceed immediately to prepare a project for the revision of the existing international agreements and regulations, in conformity with the General Convention referred to in Art. 338, should it have been already concluded. In the absence of such convention, the project for revision was to conform with the principles of Arts. 332 to 337 of the treaty.

§ 177. Special Clauses Relating to the Danube.

It was declared that the European Commission of the Danube was to re-assume the powers which it had possessed before the war. Nevertheless, "as a provisional measure", it was agreed that only representatives of Great Britain, France, Italy and Roumania should constitute the Commission.[1] From the point where the competence of the European Commission ceased, the Danube system, as referred to in the general clauses (Art. 331), was from Ulm, a point in the upper river in Wurtemberg, to be placed under the administration of an International Commission composed of two representatives of German riparian States, one representative of each other riparian State, and one representative of each non-riparian State represented in the future on the European Commission of the Danube.[2]

Germany agreed to accept the régime to be established for the Danube by a Conference of the Powers to be nominated by the Allied and Associated Powers, and which should meet within one year after the coming into force of the treaty, and at which German representatives might be present.[3] The mandate given by the Treaty of Berlin of July 13, 1878, to Austria-Hungary, and transferred by her to Hungary, to carry out works at the Iron Gates, was abrogated.[4] Germany accepted the important obligation to make to the European Commission of the Danube "all restitutions, reparations and indemnities for damages inflicted on the Commission during the war."[5] Germany undertook to apply to such deep-draught Rhine-Danube navigable waterway as might be constructed the régime prescribed in Articles 332–338.[6]

[1] Art. 346.

[2] Art. 347. This International Commission was to undertake provisionally the administration of the river in conformity with the provisions of Arts. 332 to 337, until such time as a definite statute regarding the Danube was concluded by the Powers nominated by the Allied and Associated Powers. Art. 348. See, also, Arts. 301–308, of the Austrian treaty of peace of Sept. 10, 1919.

[3] Art. 349 of the German treaty of peace of June 28, 1919.

[4] Art. 350. According to Art. 351, should the Czecho-Slovak State, the Serb-Croat-Slovene State or Roumania, with the authorization of, or under mandate from, the International Commission, undertake maintenance, improvement, weir or other works on a part of the river system forming a frontier, those States were to enjoy on the opposite bank, and also on the part of the bed outside of their territory, all necessary facilities for the survey, execution and maintenance of such works.

[5] Art. 352.

[6] Art. 353. It may be noted that the Special Clauses relating to the Danube were reproduced as Arts. 301–308, in the treaty of peace with Austria. But see Art. 309 of the latter treaty, with reference to the use by a riparian State of the hydraulic system located within the territory of another.

§ 178. Clauses Relating to the Rhine and the Moselle.

It was declared that from the time of the coming into force of the treaty, the convention of Mannheim of October 17, 1868, together with the final protocol thereof, should continue to govern navigation on the Rhine, subject, however, to conditions which were laid down.[1] Any provisions of that convention proving to be in conflict with those of the General Convention (referred to in Article 338) were to yield to the latter. The so-called Central Commission provided for in the convention of Mannheim and by the treaty of peace, was to draw up a project of revision of the convention of 1868, the project to be in harmony with the provisions of the General Convention, should it have been concluded by that time, and to be submitted to the Powers represented on the Central Commission. Germany agreed to adhere to the project so drawn up.[2] The Central Commission provided for in the convention of Mannheim was to consist of nineteen members, representative of specified non-riparian as well as riparian States.[3]

It was agreed that vessels of all nations, and their cargoes, should have the same rights and privileges as those which were granted to vessels belonging to the Rhine navigation, and to their cargoes. Moreover, none of the provisions contained in specified Articles (15–20, and 26) of the convention of Mannheim, in Article 4 of the final protocol thereof, or in later conventions, were to impede the free navigation of vessels and crews of all nations on the Rhine and on waterways to which such conventions applied, subject to compliance with pilotage regulations and police measures drawn up by the Central Commission.[4]

Subject to requirements of the convention of Mannheim, or of

[1] Art. 354.

[2] The convention of Mannheim was to be immediately modified according to the provisions of the relevant Articles of the treaty of peace. According to Art. 354, the Allied and Associated Powers reserved to themselves the right to arrive at an understanding in this connection with Holland, Germany agreeing to accede, if required, thereto.

[3] The representatives were to be apportioned as follows: two of the Netherlands; two of Switzerland; four of German riparian States; four of France (which in addition was to appoint the President of the Commission); two of Great Britain; two of Italy; two of Belgium. Whatever the number of members present, each delegation was to have the right to record a number of votes equal to the number of representatives allotted to it.

[4] Art. 356. It was declared that the provisions of Art. 22 of the convention of Mannheim, and of Art. 5 of the final protocol thereof should be applied only to vessels registered on the Rhine. The Central Commission was to decide on the steps to be taken to insure that other vessels satisfied the conditions of the general regulations applying to navigation on the Rhine. *Id.*

Art. 357 provided for the cession by Germany to France of river craft, etc., as well as of docks, warehouses, installations, anchorage accommodations, etc., of public or private ownership, in the port of Rotterdam.

the convention which might be substituted for it, and to the stipulations of the treaty, France was to enjoy on the whole course of the Rhine included between the two extreme points of the French frontiers: (*a*) the right to take water from the Rhine to feed navigation and irrigation canals (constructed or to be constructed), or for any other purpose, and to execute on the German bank all works necessary for the exercise of such right; (*b*) the exclusive right to the power derived from works of regulation on the river, subject to payment to Germany of the value of half the power actually produced.[1] Similarly, Belgium was accorded the right of taking water from the Rhine to feed the Rhine-Meuse navigable waterway for which the treaty made subsequent provision. The exercise of these rights of diversion of water was not, however, to interfere with navigability, or to reduce facilities for navigation, either in the bed of the Rhine or in the derivations which might be substituted therefor. Nor was it to involve any increase in the tolls formerly levied under the convention in force. All proposed schemes were to be laid before the Central Commission in order that it might assure itself that such conditions were complied with. Germany, moreover, in order to insure the proper and faithful execution of the foregoing provisions (*a*) and (*b*), bound herself not to undertake or to allow the construction of any lateral canal or any derivation on the right bank of the river opposite the French frontiers. Germany recognized the possession by France of the right of support on, and the right of way over all lands situated on the right bank which might be required in order to survey, to build, and to operate weirs, which France, with the consent of the Central Commission, might subsequently decide to establish.[2] Switzerland, upon its demand, and with the approval of the Central Commission, was to enjoy the same rights for that part of the river forming her frontier with other riparian States.[3] It was declared that subject to the preceding provisions,

[1] Art. 358. The payment by France to Germany was to take into account the cost of the works necessary for producing the power, and was to be made either in money or in power, and in default of agreement, to be determined by arbitration. For this purpose France alone was to have the right to carry out in the part of the river mentioned, all works of regulation (weirs or other works), which she might consider necessary for the production of power.

[2] In accordance with such consent, France was to be entitled to decide upon and fix the limits of the necessary sites, and was to be permitted to occupy such lands after a period of two months after simple notification, subject to the payment by her to Germany of indemnities of which the total amount was to be fixed by the Central Commission. Germany was to make it her business to indemnify the proprietors whose property was burdened with such servitudes or permanently occupied by the works. Art. 358.

[3] Art. 358. Germany also agreed to hand over to the French Government,

no works were to be carried out in the bed or on either bank of the Rhine where it formed the boundary of France and Germany without the previous approval of the Central Commission or of its agents.[1]

It was agreed that should Belgium within twenty-five years from the coming into force of the treaty decide to create a deep-draft Rhine-Meuse navigable waterway, in the region of Ruhrort, Germany should be bound to construct, in accordance with plans communicated by Belgium, after agreement with the Central Commission, the portion of the waterway situated within German territory. The Belgian Government was, for such purpose, to have the right to carry out on the ground all necessary surveys. This navigable waterway was to be placed under the same administrative régime as the Rhine itself, and the division of the cost of initial construction, including indemnities, among the States crossed by the waterway, was to be made by the Central Commission.[2]

Germany agreed to offer no objection to any proposals of the Central Rhine Commission for the extension of its jurisdiction: (*a*) to the Moselle, below the Franco-Luxemburg frontier down to the Rhine, subject to the consent of Luxemburg; (*b*) to the Rhine above Basle up to the Lake of Constance, subject to the consent of Switzerland; (*c*) to the lateral canals and channels which might be established either to duplicate or to improve naturally navigable sections of the Rhine or the Moselle, or to connect two naturally navigable sections of those rivers, and also any other parts of the Rhine river system which might be covered by the General Convention for which provision was earlier made (in Article 338).[3]

during the month following the coming into force of the treaty, all projects, designs, drafts of concessions and of specifications concerning the regulation of the Rhine for any purpose whatever which might have been drawn up or received by the Government of Alsace-Lorraine or of the Grand Duchy of Baden.

[1] Art. 359. According to Art. 360, France reserved the option of substituting herself as regards the rights and obligations resulting from agreements arrived at between the Government of Alsace-Lorraine and the Grand Duchy of Baden concerning the works to be carried out on the Rhine; and she was also permitted to denounce such agreements within a term of five years from the coming into force of the treaty.

[2] Art. 361. It was declared that should Germany fail to carry out all or any of such works, the Central Commission should be entitled to carry them out instead; and for such purpose might decide upon and fix the limits of the necessary sites and occupy the ground after a period of two months after simple notification, subject to the payment of indemnities to be fixed by it and paid to Germany. *Id.*

[3] Art. 362.

Clauses Giving to the Czecho-Slovak State the Use of Northern Ports. Arts. 363 and 364 comprised clauses providing for the lease by Germany to the Czecho-

§ 179. Poland and the Vistula.

As the territory of the new Polish State embraced the country traversed by the Vistula, save that at the mouth of the river where it passed through that assigned to the Free City of Danzig, the Principal Allied and Associated Powers undertook (in the treaty of peace with Germany) to negotiate a treaty between the Polish Government and the City, with a view to insure to Poland the control and administration of the river, and enjoyment of the freest use thereof.[1] Certain of these uses were specified, and manifested a design to remove every possible restriction which might otherwise prove an obstacle to uninterrupted navigation to and from the Baltic.

§ 180. General Results.

The foregoing arrangements of 1919, pertaining to navigation, presented certain significant aspects, of which the following may be noted:

(*a*) The privileges of inland navigation established in favor of the Allied and Associated Powers;

(*b*) The reëstablishment of free zones in ports of Germany;

(*c*) The internationalization of important river systems and their appurtenances, for the benefit of non-riparian as well as riparian States;

(*d*) The placing of such waterways under the administration of commissions representative of both non-riparian and riparian

Slovak State for a period of ninety-nine years, of areas within the ports of Hamburg and Stettin, such areas to be placed under the régime of free zones, and to be used for the direct transit of goods coming from or going to that State. The delimitation of these areas, their equipment, exploitation, and in general all conditions for their utilization, including the amount of rental, was to be decided by a specified commission. Such conditions were regarded as susceptible of revision every ten years in the same manner. Germany agreed in advance to adhere to the decisions so taken.

[1] Art. 104. The following were among the objects of the proposed treaty:

"(1) To effect the inclusion of the Free City of Danzig within the Polish customs frontiers, and to establish a free area in the port;

"(2) To ensure to Poland without any restriction the free use and service of all waterways, docks, basins, wharves and other works within the territory of the Free City necessary for Polish imports and exports;

"(3) To ensure to Poland the control and administration of the Vistula and of the whole railway system within the Free City, except such street and other railways as serve primarily the needs of the Free City, and of postal, telegraphic and telephonic communication between Poland and the port of Danzig;

"(4) To ensure to Poland the right to develop and improve the waterways, docks, basins, wharves, railways and other works and means of communication mentioned in this Article, as well as to lease or purchase through appropriate processes such land and other property as may be necessary for these purposes."

States; and the special application of this principle with respect to the Rhine and the Danube;[1]

(*e*) The arrangement for a new régime under the General Convention to be drawn up by the Allied and Associated Powers and approved by the League of Nations, as well as the régime to be laid down for the Danube by the contemplated Conference of the Powers;

(*f*) The scope of the hydrotechnical privileges with respect to the Rhine, yielded to France and Switzerland;

(*g*) The obligation imposed upon Germany to make restitution and reparation to the European Commission of the Danube for damages inflicted upon it during the war.

(e)

International Streams of Africa

§ 181. The Congo. The Niger.

The General Act of the Berlin Conference of February 26, 1885, made significant application of the fundamental principles of the Congress of Vienna to the rivers Congo and Niger.[2] With respect to both, it was provided that navigation of the stream and the affluents thereof, as well as of roads, railways, or lateral canals that might be constructed with the special view of obviating unnavigability or of correcting imperfections of a river route, should be and remain "free for the merchant ships of all nations equally, whether carrying cargo or ballast, for the transportation of both merchandise and passengers."[3] The subjects and flags of all nations were treated on a footing of perfect equality "not only for the direct navigation from the open sea to the inland ports", and vice versa, "but also for the great and small coasting trade, and for the boat traffic along the course of the river." It was declared that throughout the courses and in the mouths of both the Congo and the Niger, no distinction should be made between the subjects

[1] It may be noted that the United States was not to be represented on any of these commissions.

[2] For the text of the General Act, see Brit. and For. State Pap., LXXVI, 4; also Senate Ex. Doc. No. 196, 49 Cong., 1 Sess., 297.

[3] Chapter IV, embracing Arts. XIII to XXV, embodied an Act for the navigation of the Congo, while Chapter V, embracing Arts. XXVI to XXXV, made provision for the navigation of the Niger. Attention should also be called to the preamble of the General Act and to Art. II thereof.

See the illuminating report of Baron de Courcel in behalf of the commission which drafted the instruments for the regulation of the navigation of the Congo and the Niger, Senate Ex. Doc. No. 196, 49 Cong., 1st Sess., 93; also protocol of the session of Nov. 15, 1884, of the Berlin Conference, *id.*, 23.

of riparian States and those of non-riparian States, and that no exclusive privilege of navigation should be granted to any companies, corporations or private persons whatsoever. These provisions were, it was said, "recognized by the signatory powers as being henceforth a part of international law." With respect to both rivers it was declared that there should be levied no maritime or river toll based on the mere fact of navigation, nor any tax on goods aboard of ships, and that there should only be collected taxes or duties having the character of an equivalent for services rendered in navigation.[1] Provision was also made for the neutralization of both streams in the event of war.[2] With respect to the Congo an international commission was created and clothed with broad powers for the purpose of executing the provisions agreed upon.[3]

These liberal arrangements, and particularly those dealing with the Congo, were possible partly because the waters in question traversed territory of which the occupants were chiefly a native population unfamiliar with European civilization, and of which the sovereignty was not always lodged in an independent State recognized as such. Moreover, the commercial designs of the contracting Powers, as well as the welfare of the inhabitants concerned, were deemed to be enhanced rather than thwarted by the plan adopted. It was natural that under such circumstances broadest application of fundamental principles should have met with approval, and that they should have been supported by the

[1] In certain other respects the provisions concerning the regulations for the navigation of the Congo were not identical with those relating to the Niger.

[2] Arts. XXV and XXXIII. It is significant that Belgium at the outbreak of The World War in August, 1914, after its own territory had been invaded, was solicitous, for humanitarian reasons, that the field of hostilities should not extend to Central Africa, and that pursuant to Art. XI of the General Act of the Berlin Conference. European colonies within the basin of the Congo should be neutralized. Belgian Gray Book, Misc. No. 12 [1914], Cd. 7627, Nos. 57, 58, 59, 74, 75 and 76.

[3] Arts. XVII–XXIV. The relation of Great Britain to Nigeria, traversed by the lower waters of the Niger, rendered inapplicable the establishment of an international commission for that river such as was designed for the Congo.

The Persian River Karun. In a note to the representatives of foreign Powers at Teheran, Oct. 30, 1888, the Persian Government announced that commercial steamers of all nations, without exception, besides sailing vessels which formerly navigated the Karun River, might undertake the transportation of merchandise in that river "from Muhammereh to the dyke at Ahvaz, but it is on the condition that they do not pass the dyke at Ahvaz upwards, as from the dyke upwards the river navigation is reserved to the Persian Government and its subjects, and the tolls which the Persian Government will organize shall be paid at Muhammereh. Such vessels are not to carry goods prohibited by the Persian Government, and vessels are not to stay longer than necessary for the unloading and loading of commercial loads." Brit. and For. State Pap., LXXIX, 781.

creation of an international commission given large powers of control.[1]

It should be observed, however, that the Congo Commission "never had an effective life."[2] This circumstance, while not necessarily weakening the value of the general principles enunciated by the Berlin Conference, served to emphasize the insufficiency and inapplicability to the Congo River of the administrative régime thus sought to be established.

(f)

§ 182. Certain General Conclusions.

The true basis of any right possessed by a State to navigate the waters of a river traversing foreign territory is believed to be the general interest of the family of nations that such a privilege be not withheld.[3] That interest must vary according to geographical considerations.[4] It is strongest where a riparian State upstream seeks access to the sea. The international community is truly solicitous that each State in attempting to realize its legitimate aspirations should utilize fully those natural channels of water

[1] J. C. Carlomagno, *El Derecho Fluvial Internacional*, 56–72; E. Engelhardt, *Histoire du Droit Fluvial Conventionnel*, 98–102; A. Bergès, *Du Régime de Navigation des Fleuves Internationaux*, 96–109; G. Kaeckenbeeck, International Rivers, 137–171, and documents quoted; Pierre Orban, *Étude de Droit Fluvial International*, 275–317; Bonfils-Fauchille, 7 ed., §§ 530 and 531, and periodical literature there cited.

See correspondence between Great Britain and Portugal respecting the navigation of the rivers Zambesi and Shiré, 1876–1877, Brit. and For. State Pap., LXVIII, 1345–1352; also correspondence between the same States, 1887–1888, in which the right of Portugal to close the Zambesi was not admitted by Great Britain, *id.*, LXXIX, 1062–1152; Portuguese decree of Nov. 18, 1890, with respect to free navigation of the Zambesi "in accordance with the principles which the Governments of France and Great Britain agreed to establish on the Niger in virtue of the General Act of the Conference of Berlin in 1885", *id.*, LXXXII, 338; Portuguese regulations for the navigation of the Zambesi and Shiré of May 18, 1892, *id.*, LXXXVII, 1108.

See agreement between Great Britain and Germany of March 11, 1913, respecting (in part) the regulation of navigation on the Cross River, a small independent stream flowing from the Cameroons through Nigeria to the sea. Brit. and For. State Pap., CVI, 782, 786.

[2] Joseph P. Chamberlain, in *Yale L. J.*, XXVIII, 519, 522; also Francis Bowes Sayre, Experiments in International Administration, New York, 1919. 84–87.

[3] *Compare* the reasoning of Mr. Jefferson, Secy. of State, in 1792. *Cf.* The Mississippi, *supra*, § 161. *Compare* also theory of Mr. Adams, Secy. of State, in communication to Mr. Rush, Minister to Great Britain, June 23, 1823, Am. State Pap., For. Rel., VI, 757, 758.

Hall, Higgins' 7 ed., p. 136, note 1, commenting on the opinions of various writers of the nineteenth century.

[4] This circumstance, which has been a decisive factor in international practice, appears oftentimes to have been ignored by writers endeavoring to formulate plans for general adoption.

communication which border or pass through its domain, and each may confidently invoke that solicitude in testing or proclaiming the reasonableness of its demands.[1]

The general interest of the family of nations acknowledges also the equities of the several riparian States with respect to the navigation of waters upstream or on the farther side of a boundary formed by the thalweg. It heeds also the claims of non-riparian and of oversea States, but its respect therefor is measured in part according to the navigability of the particular stream by vessels sailing from their ports. It may be doubted whether enlightened States as a whole are concerned with any claim not in fact capable of actual use by a claimant.

The general international interest has given rise to numerous agreements among the States most deeply concerned. These compacts have developed what may be called a fluvial conventional law, measuring and portraying the extent to which States have in practice responded to the requirements of the international society. It is to be observed that treaties have generally not purported to provide for more than the requirements of the contracting parties with respect to the particular river concerned.[2] Even Acts such as those of the Congress of Vienna or of the Berlin Conference must be regarded as having been designed primarily to apply the principles enunciated to the problems peculiar to special groups of rivers within specified areas.[3] Inasmuch as fluvial conditions in Europe, in North America, in South America and in Africa are not the same, and differ sharply according to geographical and

[1] This idea appears to have been reflected by Mr. Gallatin, American Minister to Great Britain, in his discussion with British plenipotentiaries touching the claim of the United States to navigate the St. Lawrence. He contended that "it was a right essential to the condition and wants of human society, and conformable to the voice of mankind in all ages and countries." He added that "the principle on which it rested challenged such universal assent that, wherever it had not been allowed, it might be imputed to the triumph of power or injustice over right." See communication to Mr. Adams, Secy. of State, Aug. 12, 1824, Am. State Pap., For. Rel., VI, 758, 760. Also memorandum on the American claim to the navigation of the St. Lawrence prepared by Mr. Rush, *id.*, 769.

It is not without significance that formal proposal in 1918, that free and secure access to the sea be assured the population of a newly erected Polish State was made by the Chief Executive of an American country, who thereby voiced the actual concern of the family of nations that each new member thereof should enjoy the full benefit of its natural water communications with the ocean. President Wilson, address to the Congress, Jan. 8, 1918, H. Doc. 765, 65 Cong., 2 Sess.

[2] This has been conspicuously true in the case of treaties regulating the navigation of rivers traversing or bounding the United States.

[3] It is not intimated that these Acts did not give expression to a broader design. It is merely suggested that the object of chief concern to the negotiators was the regulation of navigation within particular groups of rivers.

other conditions distinctive of each continent, the attempt still remains futile to lay down rules applicable alike to all international waterways. Riparian States have not sought to do so.

The treaty of peace with Germany of June 28, 1919, gave heed to every possible claim of non-riparian States of every continent to enjoy privileges of navigation in the particular rivers recognized as having an international character. It was not, however, deemed necessary to enunciate in that document a principle of law, and still less, to intimate to what extent it should be applied to streams outside of Europe. The acquisition by certain non-riparian European Powers of a right to participate in the administrative control of rivers named in the treaty was merely an incident in the attempt of the Principal Allied and Associated Powers in terminating the war, to establish a new order of things of their own devising with respect to navigation in streams passing through or bounding the territories of their enemies. The contemplated submission to the League of Nations of the fresh régime to be laid down in the General Convention as drawn up by those Powers, gave hope that no rules of navigation injurious to a stream as a whole, or to any riparian proprietor, would be promulgated. From the ultimate treatment of the Rhine or the Danube (as the result of the Conference relative to the latter), there is not, however, necessarily to be derived the régime which should be applied to the St. Lawrence or the Amazon.

(5)

Diversion of Waters

(a)

§ 183. The Principles Involved.

The diversion of the waters of an international stream for any purposes, such as those of sanitation, navigation, power or irrigation, tends to interfere with the fullest use of the river by all riparian proprietors. There may be said to be an essential conflict between the interest of the stream as a whole, and that of the particular State diverting its waters. Where a river traverses or serves as the boundary of the territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare.

In the case of a non-navigable river, the upstream proprietor of the territory on both sides of the stream may in fact claim the

right to divert at will and without restraint such waters as it may require, and that regardless of the effect produced upon any proprietor downstream. Such a claim appears to have been regarded by Attorney-General Harmon, in 1895, as unopposed by any accepted rule of international law.[1] He maintained that such conduct was incidental to the exercise of rights of sovereignty by a State within its own domain, and hence unrestricted by any limitation not self-imposed.[2]

It may be that in the particular case, the equities of the upstream State resorting to diversion within its own domain are, apart from those derived from the theory of unrestricted sovereignty, as solid as the claims of a proprietor downstream, and notably when the use of the water taken for purposes of irrigation, changes the form without lessening the extent of the benefit of the river to the latter, in spite of the diminished flow of water through the customary channel.[3] In such case there is merely a

[1] 21 Ops. Attys.-Gen., 274, where the opinion was expressed that Art. VII of the Treaty of Guadalupe-Hidalgo of Feb. 2, 1848, did not purport to restrict the taking of water for purposes of irrigation from the Rio Grande where the river lay wholly within the United States. See, also, Moore, Dig., I, 653–654.

[2] In the course of his opinion Mr. Harmon said: "It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river, never large in the dry season, flows, giving much and receiving little." 21 Ops. Attys.-Gen., 283.

[3] In 1901, the State of Kansas brought an original suit in the Supreme Court of the United States to restrain the State of Colorado and certain corporations of the latter State from diverting the waters of the Arkansas River for irrigation purposes in Colorado. Kansas *v.* Colorado, 206 U. S. 46. The complainant recognized the right of Colorado to use the waters for its domestic purposes. It was contended, however, that the diversion not only diminished the flow, but also was inequitable in that it threatened the devastation of a portion of Kansas. Thus, the precise inquiry before the court was whether or not the diversion served to injure the substantial interests of the complainant. In this connection the court said: "But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit of the flow of the Arkansas through Kansas has territorially changed." *Id.*, 100–101. The court concluded that as the great body of the Arkansas Valley in Kansas had suffered no perceptible injury, the complainant was not entitled to the relief sought.

measuring of the value of conflicting claims of opposing States according to the effect upon each of the act of diversion. The situation, may, however, be otherwise, and point to no actual advantage derived from diversion which is comparable in degree to the damage inflicted upon another riparian State. Whether in such case the continued taking of water, regardless of the obvious result of so doing, amounts to an abuse of power, may still be in fact regarded as a mooted question. The solution of it must depend upon the view which is entertained as to the nature and extent of the freedom from external control which a State retains with respect to occurrences within its own domain. The United States appears to be reluctant to admit that the territorial sovereign is legally subject to restraint which it has not itself undertaken by treaty to observe.[1]

In the case of a navigable river a special element projects itself which at once opposes any unrestricted taking of water serving to diminish the depth of channels of navigation and thus to impair their value.[2] Any duty imposed upon a riparian State, either by international law or by contract, to maintain the navigability of an international river, implies an obligation also to check within places subject to the control of such State the commission of any acts which, unless restricted, would prove injurious to navigation generally. This obligation would seem to render improper the tolerance of any diversion productive of such an effect even though it should occur at a point where the river ceased to be navigable and lay wholly within the domain of the acquiescent

[1] Elliott, J., in the course of the opinion of the court, in the case of Minnesota Canal & Power Co. *v.* Pratt, 101 Minn. 197, 230, where the learned judge quoted a despatch of Mr. Root, Secy. of State, of Dec. 19, 1905.

In the resolutions adopted by the Institute of International Law at Madrid, in 1911, respecting the International Regulation of the Use of International Streams, it was declared that "International law having already considered the right of navigation on international rivers, the utilization of the water for manufacturing, agriculture, etc., has failed to contemplate all that this right entails." *Annuaire*, XXIV, 365, 366, J. B. Scott, Resolutions, 168, 169. In the rules adopted, the Institute, while giving heed to obligations to respect rights of navigation, did not see fit to lay down any broad distinction between the obligations arising with respect to a navigable river, and those arising where a stream was not navigable. See, also, Oppenheim, 2 ed., I, § 178a.

[2] See, for example, problem discussed in Brief of Daniel Mullin in behalf of the Canadian Government opposing the application of the Sanitary District of Chicago to the Secretary of War, for a permit to divert not more than 10,000 cubic feet per second of water of Lake Michigan through the Drainage Canal at Chicago. Department of Marine and Fisheries, Canada, Papers Relating to the Application of the Sanitary District of Chicago, Ottawa, 1912, 36–72. This brief is here noted merely as illustrating the nature of the problem discussed in it, and without intimating approval or disapproval of the conclusions expressed therein.

territorial sovereign.[1] The circumstance, however, that regulated diversions can be effected without serious interference with navigability, and that the value of them is oftentimes inestimable has made necessary the conclusion of conventions fixing the rights and duties of riparian States. The United States has acted upon such a theory.

(b)

§ 184. Certain Contractual Arrangements of the United States.

The United States has in the present century concluded significant agreements with Mexico, in relation to the Rio Grande,[2] and with Great Britain, with respect to waters forming the Canadian boundary.[3] Certain provisions of the latter deserve attention. Each contracting party reserved to itself "the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into

[1] See the reasoning of the Supreme Court of the United States in interpreting the Act of Congress of Sept. 19, 1890, 26 Stat. 454, § 10, forbidding interference with the navigability of a stream without the assent of the National Government, in the case of United States *v.* Rio Grande Dam & Irrigation Co., 174 U. S. 690, 700, 707–710. See, also, Art. II of convention between the United States and Great Britain of Jan. 11, 1909, concerning the boundary waters between the United States and Canada, Charles' Treaties, 40.

[2] See convention providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes, May 21, 1906, Malloy's Treaties, I, 1202. The convention made arrangement for the delivery to Mexico of a specified volume of water annually, in the bed of the Rio Grande at the point where the head works of the Old Mexican Canal existed above the city of Juarez, Mexico. Art. I. According to Art. IV the delivery of water was not to be construed as a recognition by the United States of any claim on the part of Mexico to the waters specified; and in consideration of such delivery, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the existing Mexican Canal and Fort Quitman, Texas, and declared to be fully settled and disposed of, and also thereby waived all claims previously asserted or existing, or that might thereafter arise or be asserted against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of the waters of the Rio Grande. In Art. V it was declared that the United States, in entering upon the treaty, did not thereby concede, expressly or by implication, any legal basis for any claims previously asserted or which might thereafter be asserted by reason of any losses incurred by owners of land in Mexico due or alleged to be due to the diversion of the Rio Grande within the United States. It was also declared that the United States did not in any way concede the establishment of any general principle or precedent by the concluding of the treaty. The understanding of both parties was said to limit the arrangement contemplated by the treaty to the portion of the Rio Grande forming the international boundary from the head of the Mexican Canal down to Fort Quitman, Texas.

[3] See convention concerning the boundary waters between the United States and Canada, Jan. 11, 1909, Charles' Treaties, 39. In this connection, see editorial comment, *Am. J.*, IV, 668.

boundary waters."[1] It was agreed, however, that any interference or diversion on either side of the boundary, resulting in injury on the other side thereof, should give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where the diversion or interference occurred.[2] No further uses or obstructions or diversions (in addition to those previously permitted or thereafter to be provided for by special agreement) affecting the natural level or flow of boundary waters, were to be made except by authority of the United States or Canada "within their respective jurisdictions" and with the approval of a joint commission known as the International Joint Commission established by the convention.[3] Save with the approval of the Commission the construction or maintenance of no remedial or protective works or any dams or obstructions were to be permitted by either contracting party on its own side, if the effect thereof would be to raise the natural level of waters on the other side of the boundary.[4] It was declared to be expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream should not be appreciably affected.[5] The amount to be diverted from that river within the State of New York above the Falls of Niagara "for power purposes" was expressly limited, and also the amount to be taken for like purposes above those falls within the Province of Ontario.[6]

[1] Art. II, Charles' Treaties, 40.

[2] In this connection it was stated that "neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary."

[3] Art. III. It was declared in this connection that these provisions were not intended to limit or interfere with the existing rights of the United States, on the one side, and Canada, on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and others for the benefit of commerce and navigation, provided such works were wholly on its own side of the line and did not materially affect the level or flow of the boundary waters on the other. Nor were such provisions "intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

[4] Art. IV. An exception was made, however, with respect to cases provided for by special agreement between the contracting parties. This Article embraced the further agreement that the waters defined as boundary waters, as well as waters flowing across the boundary, should not be polluted on either side to the injury of health or property on the other.

[5] Art. V. It was said to be the desire of both parties to accomplish this object with the least possible injury to investments already made in the construction of power plants on both sides of the river.

[6] Art. V. It should be noted that the provisions of this Article were not to apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for purposes of navigation. In Art. VI arrangement was

To the International Joint Commission to be composed of six commissioners (three to be appointed in behalf of each party)[1] was given broad jurisdiction in cases involving the use or obstruction or diversion of waters. The following rules or principles were adopted for its guidance. Each party was to have on its own side of the boundary similar and equal rights in the boundary waters. The following order of precedence was to be observed among the various uses enumerated, and no use was to be permitted which might tend materially to conflict with or restrain any other use given preference over it in that order: (*a*) uses for domestic and sanitary purposes; (*b*) uses for navigation, including the service of canals for the purposes of navigation; (*c*) uses for power and for irrigation purposes.[2] Discretion was given the Commission to make its approval in any case conditional upon the construction of appropriate remedial or protective works in compensation for a particular use or proposed diversion. A majority of the commissioners was to have power to render a decision.[3]

made for the equal apportionment between the two countries for purposes of irrigation and power, of the waters of the St. Mary and Milk rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan).

It should be noted that by the resolution through which the Senate advised and consented to ratification of the convention, constitutional approval of the treaty was given with the understanding that nothing in it should be construed "as affecting, or changing, any existing territorial or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory, and further, that nothing in this treaty shall be construed to interfere with the drainage of wet swamp and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will, in effect, form part of the treaty." Charles' Treaties, 46.

[1] Art. VII.

[2] Art. VIII. It was declared that the foregoing provisions should not apply to or disturb any existing uses of boundary waters on either side of the boundary. It was agreed that in cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions, the Commission should require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which might be injured thereby.

[3] In the case of an equal division of opinion, separate reports were to be made by the commissioners on each side to their own Government. In such event the contracting parties were to endeavor to agree upon an adjustment.

It was agreed also, in Art. IX, that any other questions or matters of difference arising between the contracting parties, and involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and Canada,

The International Joint Commission which was duly established, fulfilled with success its function with respect to problems of diversion referred to it.[1]

The terms of the convention gave proof that both the United States and Canada perceived that the diversion of waters on either side of the boundary was a matter of common interest, requiring regulation through a common agency, and that in spite of reservations in favor of each territorial sovereign, there was a distinct *mutual advantage derivable from a reciprocal arrangement* in restraint of acts serving to impede navigation by lowering the natural level of the boundary waters.

(6)

§ 185. Bays.

Over all bays within its territory a State may exercise exclusive control.[2] As such waters do not form channels of communication between open seas, foreign powers possess no rights of navigation therein save as incidental to the privilege of access to local ports, and except for purposes of refuge for vessels in distress.[3]

should be referred from time to time to the Commission for examination and report, whenever either the Government of the United States or that of the Dominion should so request. In the event of a reference, the Commission was, after making the requisite examination, to make its reports with conclusions and recommendations (subject to special restrictions imposed by the terms of reference). Such reports were not to be regarded as decisions or to possess the character of arbitral awards. The Commission was to make a joint report to both Governments in cases where a majority agreed. Provision for minority reports was made. In the event of an even division separate reports were to be made by the commissioners on each side to their own Government.

By Art. X it was agreed that "any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants", might be referred for decision to the Commission by the consent of those parties. Provision was made for the scope of the authority and functions of the Commission in cases so referred to it. The power of a majority to render a decision was acknowledged. In case of an equal division of opinion, or of inability of the Commission to render a decision or finding, the parties agreed to have recourse to arbitration.

[1] As illustrative of its work, see International Joint Commission, Application of the Government of the United States for Approval of Certain Contemplated Improvements in the St. Clair River at Port Huron, Mich., Order and Opinion, Washington, 1917; International Joint Commission, Application of the St. Lawrence River Power Company, Interim Order and Opinion, Ottawa, 1918.

As illustrative of its work as referee of questions submitted to it by the Governments of the United States and of the Dominion of Canada, under the provisions of Art. IX of the treaty, see Final Report of the International Joint Commission on the Lake of the Woods Reference, Washington, 1917.

[2] A. H. Charteris, "Territorial Jurisdiction in Wide Bays", Int. Law Association, *Proceedings*, 23d Conference, Berlin, 1906, 103, 107.

[3] Art. I of the treaty between the United States and Great Britain of Oct. 20, 1818, prohibiting American fishermen from enjoying fishing privileges

Such access is, however, commonly accorded foreign vessels of commerce. The use of bays by foreign vessels of war is regarded as dependent upon the consent of the territorial sovereign.[1] That consent is doubtless to be presumed in seasons of peace, at least when such use is sought for the purpose of enabling such ships to enter a local port.[2] No rule of law serves to prevent the territorial sovereign from closing at will particular bays. Their use for its own distinctive military purposes may impel it to take such a step, likewise special considerations pertaining to the safety of the State, or the interest of the public health.

Within bays, as elsewhere within its waters, the fisheries are subject to the exclusive control of the territorial sovereign.

(7)

§ 186. Lakes and Enclosed Seas.

A lake or land-locked sea which forms a part of the domain of a single State is subject to its exclusive control. Although, like Lake Michigan, it connects with and constitutes a part of a system of water communications forming an international boundary and emptying into the ocean, no right of navigation is possessed by any foreign State. It has been observed that by virtue of the Canadian boundary convention of January 11, 1909, rights of navigation in that lake were extended to the inhabitants and vessels of Canada.[3]

Where a lake forms a part of the territorial waters of two or more States, a common right of navigation is enjoyed by the several proprietors. Thus, Lakes Ontario, Erie, Huron and Superior, and their water communications, are treated as "international waters, being dedicated in perpetuity to the common navigation of all the inhabitants" of the countries on both sides of the bound-

within certain British bays, provided, however, that such fishermen might enter such bays for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water. See Malloy's Treaties, I, 631–632.

[1] See reciprocal agreement relative to the stationing of coaling vessels in the waters of Mexico (Magdalena Bay) and the United States, as set forth in correspondence in For. Rel. 1907, II, 845–846. Also, *Rev. Gén.*, XV, 436–439.

See Preliminary Provisions of Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 273, J. B. Scott, Resolutions, 144.

[2] Access to Ports, *infra*, § 187; also Naval War College, Int. Law Topics, 1914, 35–67.

[3] Charles' Treaties, 40; The Navigation of Rivers, The St. Lawrence, *supra*, § 162.

See provisions of Art. IV of treaty of June 5, 1854, Malloy's Treaties, I, 671; Art. XXVIII of the treaty of May 8, 1871 (which was subsequently terminated), *id.*, 711; also documents in Moore, Dig., I, 670–691.

ary.[1] Such a right of navigation is not enjoyed by States other than those to which the waters may be said to belong. Moreover, the bordering States possess the exclusive right to control and utilize the fisheries within their respective territorial waters.[2]

(8)

§ 187. Access to Ports.

As no civilized State appears to be regarded as having the right to isolate itself wholly from the outside world or to remain aloof from all commercial or economic intercourse with it, there would seem to be a corresponding obligation imposed upon each maritime power not to deprive foreign vessels of commerce of access to all of its ports.[3] The territorial sovereign possesses, nevertheless, the broadest right to determine which of them shall be open to commerce, as well as to regulate access thereto.[4] In the absence

[1] See statement in Moore, Dig., I, 675, where it is added: "It may be superfluous to remark that this common right of navigation does not embrace the respective coasting trade of the contracting parties, a limited participation in which was reciprocally conceded by Article XXX of the Treaty of Washington of May 8, 1871."

[2] Mr. Uhl, Acting Secy. of State, to Messrs. Laughlin, Ewell and Houpt, May 23, 1894, 197 MS. Dom. Let. 118, Moore, Dig., I, 672, 674; Mr. Gresham, Secy. of State, to Mr. Hooker, Jan. 2, 1895, 200 Dom. Let. 121, Moore, Dig., I, 675, note; Mr. Bayard, Secy. of State, to Mr. Chipman, M. C., Feb. 2, 1889, 17 MS. Report Book, 327, Moore, Dig., I, 675, note.

LIMITATION OF NAVAL FORCE ON THE GREAT LAKES: By an exchange of notes April 28 and 29, 1817, an agreement was concluded between the United States and Great Britain limiting the naval force of each Government on the Great Lakes to one vessel on Lake Ontario, to two on the upper Lakes, and to one on Lake Champlain, each vessel not to exceed in burden 100 tons, and in armament one 18-pound cannon. All other armed vessels were to be "forthwith dismantled" and no other vessels of war were to be "there built or armed." The arrangement was to be terminable on six months' notice. Am. State Pap., For. Rel., IV, 205–206, Moore, Dig., I, 692. Concerning the negotiation of this agreement and its subsequent interpretation by the high contracting parties, see statement in Moore, Dig., I, 692–698, and documents there cited, particularly the report of Mr. John W. Foster, Secy. of State, to the President, Dec. 7, 1892, Sen. Ex. Doc. No. 9, 52 Cong., 2 Sess. This report was published by the Carnegie Endowment for International Peace, Division of International Law, as *Pamphlet No. 2*, Washington, 1914.

[3] "The government of the United States had, in 1852, the right to insist upon Japan entering upon such treaty relations as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels into Japanese ports." Moore, Dig., V, 740, *citing* Mr. Conrad, Asst. Secy. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions, III, 1. Concerning Commodore Perry's successful mission to Japan, *id.*, V, 736–740.

[4] Mr. Monroe, Secy. of State, to the Chevalier de Onis, Spanish Minister, Jan. 19, 1816, Am. State Pap., For. Rel., IV, 424, 426, Moore, Dig., II, 269; Mr. Conrad, Acting Secy. of State, to Mr. Barringer, Oct. 28, 1852, MS. Inst. Spain, XIV, 369; Moore, Dig., II, 269, Mr. Blaine, Secy. of State, to Mr. Douglass, Minister to Haiti, July 2, 1890, For. Rel. 1890, 530, Moore, Dig., II, 270.

of special agreement, no foreign State is entitled to claim for its merchant vessels a right of entrance, with respect to a particular port, analogous to that which might reasonably be asserted in relation to navigation along the marginal seas, or through a strait.[1] A State may not unlawfully close its ports, even in times of peace, to foreign vessels of war or other foreign public ships.[2] According to American opinion, it is generally understood, however, that in the absence of evidence of some prohibition, ports which are open to foreign vessels of commerce are not closed to those of war.[3] A State whose public vessels are about to visit the ports of a foreign Power, commonly, however, makes previous announcement of the fact to the Government of the latter, especially if several vessels are concerned, in order that steps suitable for their protection and reception may be duly taken.[4] The Naval War College has concluded that not more than three foreign vessels of war

[1] See "Regulations Governing the Visits of Men-of-War to Foreign Ports", issued by Office of Naval Intelligence, Navy Department, September, 1913; corrected to June 10, 1916, *Am. J.*, X, Supp., 121.

[2] Illustrative of the exercise of this right to withdraw or limit the license to foreign vessels of war to enter the ports of a State, Professor Moore calls attention to the Act of Congress of May 15, 1820, "by which foreign armed vessels were for a period of two years, beginning July 1, 1820, forbidden to enter any harbor in the United States except Portland, Boston, New London, New York, Philadelphia, Norfolk, Smithville (N. C.), Charleston, and Mobile, unless by reason of stress of weather or pursuit of an enemy they were unable to make one of those ports." Dig., II, 564; 3 Stat. 597. See, also, 2 Stat. 339, 342; also Rev. Stat., § 2791.

See correspondence between the United States and Venezuela in 1901, relative to objections by the latter to the presence of the U. S. S. *Scorpion* in the harbor of Santa Catalina, a port that was not open to commerce. In this connection Mr. Hay, Secy. of State, called the attention of the American Minister, Mr. Loomis, to a letter from Mr. Long, Secy. of the Navy, pointing out a distinction between the ordinary visit of a man-of-war, and a visit for "scientific purposes." Mr. Long declared that the Navy Department would not order a vessel to the port of a recognized government to conduct surveys or make topographical examinations without having obtained explicit permission therefor; that on the other hand, the Department would neither send notice nor request permission if the visit were not undertaken for such purpose, unless the waters "were expressly denied to passage of men-of-war by national decree, as in the case of the Amazon." For. Rel. 1901, 541–546, Moore, Dig., II, 565–570. Concerning the visit of the U. S. S. *Mayflower* to the Venezuelan island of Margarita, see For. Rel. 1901, 547–550.

[3] Declared Chief Justice Marshall in the course of his opinion in The Schooner Exchange *v.* McFaddon: "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place. 7 Cranch, 116, 141; see, also, Dana's Wheaton, 160, 162.

[4] See correspondence in 1895, between the United States and Turkey, relative to the proposed visit of an American squadron to certain Ottoman ports, For. Rel. 1895, II, 1250–1251; correspondence in 1905, relative to the proposed visits of the second British cruiser squadron under command of Prince Louis of Battenberg to certain ports of the United States, For. Rel. 1905, 476–478; correspondence in 1904, concerning the visit of an American fleet to Austrian ports, For. Rel. 1904, 44–47.

should at the same time sojourn in any naval district of the United States without specific authorization, and that the sojourn of foreign vessels of war in American waters should be limited to fifteen days unless a longer period is specifically authorized. Such vessels are regarded as subject to local regulations respecting anchorage, and also to others (except as to customs inspection) which American war vessels are obliged to respect. The former are deemed to be forbidden to take soundings (except as required for immediate safety of navigation), to use submarine or air craft, or to engage in target or similar practice therein, although it is said that such activities may be specifically authorized.[1]

While public foreign ships, for reasons later discussed, are not subject to the local jurisdiction, the territorial sovereign may not unlawfully, if in its judgment occasion so requires, demand their departure from its ports, and, if need be, employ reasonable means to accomplish that end.[2]

In time of war, according to the Naval War College, any foreign vessel, public or private, is regarded as entering American ports at its own risk. A desire to enter between sunrise and sunset should, it is said, be made known by flying the national flag with a signal for pilot, the vessel remaining outside until permission to enter is granted; and entrance during the night is prohibited. Vessels availing themselves of permission to enter should observe strictly the terms imposed. Vessels entering without permission are said to do so at their peril and to subject themselves to the use of such force as American authorities may deem necessary to direct against them.[3]

Shortly before the United States became a belligerent in April, 1917, the President, in accordance with statutory authority, established a series of "defensive sea areas" with respect to specified ports, harbors and roads, comprising the principal ones under American authority, and issued appropriate regulations therefor.[4]

[1] Naval War College, Int. Law Topics, 1914, 35–67.
It may be noted that the War College did not purport to limit the operation of the regulations suggested further than that they should be applicable to the waters "under the jurisdiction of the United States." Thus no distinction was made between ports and bays or other territorial waters.

[2] Act of June 15, 1917, c. 30, title V, § 10, 40 Stat. 223. See, also, Naval War College, Int. Law Topics, 1914, 35, where it was declared that foreign vessels of war might be fairly required to leave American waters within six hours, if so requested by the authorities, even though the limit of time of their sojourn had not expired. Also *id.*, 43, with respect to certain foreign regulations in regard to departure.

[3] Naval War College, Int. Law Topics, 1914, 436.

[4] Executive Order No. 2584, April 5, 1917, pursuant to an Act of March 4, 1909, Section 44, 35 Stat. 1097, as amended by an Act of March 4, 1917, 39

These prescribed the methods by which vessels might cross a defensive sea area, the entrance to which was prohibited save after authorization by the so-called Harbor Entrance Patrol. It was declared that no permission would be granted to other than a public vessel of the United States to cross such an area between sunset and sunrise, nor during the prevalence of weather conditions that rendered navigation difficult or dangerous. It was announced that a vessel arriving off such an area after sunset should anchor or lie-to at a distance of at least a mile outside its limits until the following sunrise, and that vessels discovered near the limits of such areas at night might be fired upon.[1]

(9)

Air Space over the National Domain

(a)

§ 188. In General.

The various opinions as to the nature and extent of the right of a State to control the air space above its territory were put to the test by The World War.[2] Events of that conflict served to

Stat. 1194. Later Executive Orders, Nos. 2597 and 2898 extended the scope of defensive sea areas to additional waters. *Cf.* Official Bulletin, May 11, 1917, p. 3; *id.*, July 2, 1918, p. 1.

See, also, Executive Order establishing defensive sea areas for Panama Canal Terminal Ports, Aug. 27, 1917, Official Bulletin, Sept. 5, 1917, p. 8.

[1] § 806, Chap. 463, Act of Sept. 8, 1916, authorizing the President to withhold the clearance of vessels of a belligerent country refusing to accord to American ships or American citizens any of the facilities of commerce which such vessels or citizens of that belligerent country might enjoy in the United States or its possessions, or in case American ships or citizens were not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any nationality other than that of such belligerent, until that belligerent should restore to such American vessels and American citizens reciprocal liberty of commerce and equal facilities of trade.

The same Act gave to the President the alternative power to direct that similar privileges and facilities, if any, enjoyed by vessels or citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent.

See, also, Title II of the so-called Espionage Act of June 15, 1917, 40 Stat. Part I, 220.

[2] "On this point, broadly speaking, there are two main schools of thought: 1. Those who maintain that the air space is of its nature free; this theory being that of the freedom of the air space. 2. Those who maintain the theory of the sovereignty of the subjacent State in the air space above its territory.

"The first school may again be subdivided into partisans of:

(*a*) Air freedom without restriction.

(*b*) Air freedom restricted by some special rights (not limited as regards height) of the subjacent State.

(*c*) Air freedom restricted by a territorial zone.

"Those who maintain the sovereignty theory may also be subdivided into partisans of:

make clear the significance of certain factors to be reckoned with in applying theory to the formulation of rules for general guidance; first, the effect of the operation of the law of gravity upon all bodies heavier than air passing over the subjacent land; secondly, the indispensability of the air itself to the inhabitants of the earth, and thirdly, the practical importance of transportation and communication through air space over foreign territory.

It has been perceived that the relationship which the air space

(*a*) Full sovereignty without any restriction.
(*b*) Full sovereignty restricted by the right of innocent passage for aërial navigation.
(*c*) Full sovereignty up to a limited height only.
"The various parties holding these separate views have never yet come to any agreement between themselves." Report of Committee upon Aviation, Int. Law Association, Mr. E. S. M. Perowne, reporter, *Proceedings*, 28th Conference, Madrid, 1913, 529, 530.

For bibliographies of the extensive literature on this subject see Bonfils-Fauchille, 7 ed., 360–362; A. S. Hershey, Int. Law, 235, note; J. F. Lycklama à Nijeholt, Air Sovereignty, Appendices, The Hague, 1910; Harold D. Hazeltine, Law of the Air, London, 1911. The last two works contain a discussion of the several theories advanced.

Cf., also, Enrico Catellani, *Le Droit Aérien* (translated from the Italian by Maurice Bouteloup), Paris, 1912; A. E. Denton, "Law Governing Air Space and Aviation", MS. *Thesis for Master's Degree*, Northwestern University, 1916; Paul Fauchille, *Le domaine aérien et le régime juridique des aérostats*, Paris, 1901; Grünwald, *Das Luftschiff in völkerrechtlicher und strafrechtlicher Beziehung*, Hanover, 1908; Léon Lalande, *La réglementation de la circulation aérienne internationale en temps de paix*, Toulouse, 1913; Sir H. Erle Richards, Sovereignty Over the Air, Oxford, 1912.

See, also, Simeon E. Baldwin, "Law of the Airship", *Am. J.*, IV, 95; Blewett Lee, "Sovereignty of the Air", *id.*, VII, 470; A. K. Kuhn, "The Beginnings of an Aërial Law", *id.*, IV, 109; "Aërial Navigation in its Relation to International Law", Am. Pol. Sc. Assn., *Proceedings*, 1908, 83; G. G. Wilson, "Aërial Jurisdiction", *Am. Pol. Sc. Rev.*, V, 171; J. E. G. de Montmorency, "Air-Space Above Territorial Waters", *Jour. Comp. Leg.*, N. S., XVII, Part 3, p. 172; G. D. Valentine, "The Air — A Realm of Law", *Jurid. Rev.*, XXII, 16 and 85; H. D. Hazeltine, "Law of Civil Aërial Transport", *Jour. Comp. Leg.*, 3 ser., I, Part I, 76; A. Mérignhac, "*Le domaine aérien privé et public, et les droits de l'aviation en temps de paix et de guerre*", *Rev. Gén.*, XXI, 205.

Cf. Proceedings of Institute of International Law in *Annuaire*, XIX, 19–26 (concerning legal status of aircraft); J. B. Scott, Resolutions, 170–171; *Annuaire*, XXI, 76–87 (Report of Paul Fauchille on wireless telegraphy); *Annuaire*, XXIV, 23–104 (Report of Paul Fauchille); *id.*, 105–155, embracing Paul Fauchille's Project of a Convention Respecting Aërial Law, the text of which is contained also in J. B. Scott, Resolutions, 243–256; and L. von Bar's proposed code on aircraft in war, *id.*, 256, *Annuaire*, XXIV, 127–133.

See Int. Law Assn., *Proceedings*, 27th Conference, Paris, 213–281; *Proceedings*. 28th Conference, Madrid, 222–245 (embracing Report of Committee upon Aviation); Hague Papers, 1914, embracing Report of the Aërial Law Committee, E. S. M. Perowne, convener; *Proceedings, Premier Congrès du Comité Juridique International de L'Aviation*, Paris, 1911; *Proceedings, Deuxième Congrès*, Geneva, 1912.

See *Proceedings of the First International Juridical Congress for the Regulation of Aërial Locomotion at Verona*, 1910; also *Rev. Gén.*, XVII, 410; "An Act to Regulate Commerce by Airship", embraced in Report of Committee on Jurisprudence and Law Reform of American Bar Association, 1911, *Reports of American Bar Association*, XXXVI, 379, 381.

bears to the territory beneath it is unlike that existing between the sea and the land adjacent to it;[1] and statesmen have not been blind to the difference.

It may require a national exigency unlikely to occur save in time of war, to afford necessary enlightenment as to the principle decisive of the nature and scope of a right. The abnormal situation confronting a State at such a time may not, however, afford a sound test of what it may fairly assert as a territorial sovereign under ordinary conditions of peace. If the use of a right incidental to the exercise of supremacy by a State within its own domain, such as one pertaining to the control of air space above it, is to be subjected to restraint for the benefit of the outside world, it must be due to a manifestation by the family of nations of a general interest in the abridgment, and one sufficiently acute and well-defined to find expression in distinct and authoritative form. Such an interest is likely to beget appropriate treaties, which, as they become numerous or win the acquiescence of enlightened States generally, tend to establish limits of State action. Defiance of these is increasingly regarded as indicative of an abuse of power.

Two distinct and unrelated uses of air space vitally affect the subjacent territory — those involved in the passage of aircraft, and those connected with the movement of Hertzian waves.

(b)

§ 189. The Control of Aircraft.

It is believed to be the right of a State generally to enact such prohibitions, restrictions and regulations as it may think proper in regard to the passage of aircraft through the air space above its territories and territorial waters.[2] Such a view does not appear to be at variance with any existing practice, and seems to accord with the position taken by the United States.[3] The territorial

[1] Harold D. Hazeltine, Law of the Air, 41–43.

[2] The language of the text is taken from the resolutions submitted by the Aviation Committee, Int. Law Association, 28th Conference, Madrid, 1913, *Proceedings*, 533.

[3] According to Rule 15 of proclamation of President Wilson, Nov. 13, 1914, relating to the neutrality of the Panama Canal Zone, "Aircraft of a belligerent Power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction." 38 Stat. 2039; American White Book, European War, II, 18, 20. See, also, Rule 13 of proclamation of President Wilson, May 23, 1917, respecting the protection of the Panama Canal, Official Bulletin, May 31, 1917, I, No. 18, p. 5; Naval War College, Int. Law Documents, 1917, 243, 245.

According to a proclamation by President Wilson of Feb. 28, 1918, regulat-

sovereign is not impeded by any artificial horizontal frontier fixed at an arbitrary distance above the subjacent land; and it is not fettered as a belligerent in the enactment of prohibitions deemed necessary for the safety of its domain.

Subject to such a right of the subjacent State, it is believed that liberty of passage ought to be accorded freely, as was suggested by the Committee on Aviation of the International Law Association, in 1913, to the aircraft of every nation.[1]

Doubtless the judgment of the territorial sovereign as to the propriety and necessity of prohibitive enactments for the protection of its own domain should be generally respected. It may be fairly admitted that in time of war these should have broadest scope.[2] In time of peace, however, it is not unreasonable to con-

ing the flying of civilian aircraft, it was declared that as a war measure, a license must be obtained from The Joint Army and Navy Board on Aëronautic Cognizance by or in behalf of any person contemplating flight in a balloon, aëroplane, hydroplane or other machine or device over or near any military or naval forces, camp, fort, battery, torpedo station, arsenal, munition factory, navy yard, naval station, coaling station, telephone or wireless or signal station, or any building or office, connected with the National Defense, or any place or region within the jurisdiction or occupation of the United States which might be designated by the President as a zone of war-like operations or of war-like preparation; and the President designated, "for the present", as such a zone "the whole of the United States and its territorial waters and of the insular possessions and of the Panama Canal Zone." See proclamation No. 1432, Official Bulletin, II, No. 249, March 5, 1918, p. 3. Concerning procedure to get licenses under this proclamation, see Official Bulletin, April 13, 1918, p. 4.

See, also, Hawaiian Act of April 19, 1917, prohibiting operation of aëroplanes, balloons and other aircraft with certain restrictions, Hawaiian Session laws, 1917, Act 107.

See Connecticut Act concerning the Registration, Numbering and Use of Airships, and the Licenses of Operators thereof, Conn. Public Acts, 1911, Chap. 86; Massachusetts Act to Regulate the Use of Aircraft, approved May 16, 1913, Mass. Acts, 1913, Chap. 663; North Carolina Act in effect Feb. 27, 1917, rendering it unlawful to make use of any aëroplane, sea-plane or other kind of air machine in shooting wild ducks, etc., Gregory's Revisal Biennial, 1880c.

See French decree of July 31, 1914, forbidding flying throughout France, Algeria, Tunis and the French colonies, except by Government machines, *Journal Officiel*, Aug. 1, 1914; also decree concerning aërial navigation, Nov. 21, 1911, *Journal Officiel*, Nov. 25, 1911, Duvergier, *Lois*, new series, No. 111, 1911, p. 518; British Aërial Navigation Acts, 1911, 1 & 2 Geo. V, c. 4, and 1913, 2 & 3 Geo. V, c. 22; also British Orders made by the Secretary of State under these Acts, March 1, 1913, Brit. and For. State Pap., CVI, 646. See exchange of notes between France and Germany relative to aërial navigation between the territories of those States, July 26, 1913, Brit. and For. State Pap., CVII, 778.

[1] *Proceedings*, 28th Conference, Madrid, 1913, p. 533.

[2] The experience of the several belligerents participating in The World War is believed to have sufficed to convince each of the imperative necessity of controlling without interference the air space over its own domain.

Illustrative of the reasonable exercise by the United States of its belligerent right of control, see proclamation of President Wilson, Feb. 28, 1918, regulating the flying of civilian aircraft, appended to § 10212a, U. S. Comp. Stat., 1918 ed., embodying Title I, § 1. Chap. 30, of the Espionage Act of June 15, 1917.

tend that a State should pursue a different course, and not decline to agree to refrain from restricting passage except for the purpose of protecting itself against known or anticipated dangers, or possibly of defraying the cost of protection.[1] Thus the demands of an interior State, surrounded by land and possessed of meager water communications with the sea, such as Bolivia or Switzerland, to passage by air over the territories of adjacent States, acquire strength from the circumstance that the society of nations is, for the sake of its entire membership, solicitous that there be freest access to, as well as egress from, the territory of each country by every practicable means.

As the development of the science of aëronautics has already established the feasibility of prolonged air flights of vast importance in facilitating international communications, the potential advantages to commercial and economic interests are likely to become increasingly influential in deterring individual States from imposing arbitrary barriers.[2] The same influence may be expected, moreover, to hasten the development of a practice tending to restrict the very right of a territorial sovereign to oppose the passage of foreign aircraft save for purposes and under conditions generally agreed to be reasonable.[3]

(c)

§ 190. The International Flying Convention of 1919.

The International Flying Convention emanating from the Peace Conference, and signed in behalf of certain Powers in October, 1919,

[1] "After the full right of a State to protect itself and its subjects has been conceded, there remains something to be said for the principle of discarding all unnecessary limitations of human freedom and allowing the common enjoyment and use of the air. The great interests of mankind lie in the direction of peace, not war. After the necessary safeguards have been taken for the protection of the safety of States, we should look rather to the enlargement of human freedom and human intercourse, and these matters are too precious to be left to the absolute discretion of each particular State." Blewett Lee, "Sovereignty of the Air", *Am. J.*, VII, 470, 490. See, also, same writer, in *Harv. Law Rev.*, XXXIII, 23.

[2] The transportation, for example, of specie by air-craft for great distances and at a high speed, makes possible such economy of time and cost, and thereby so facilitates the payment of foreign balances as to furnish in itself solid reason for general arrangement in aid of use of air space over foreign territory for this purpose.

[3] The Aërial Law Committee of the International Law Association in its report of 1914, adverted to the following points requiring treatment in an international code, and which were dealt with separately and fully in the project then submitted: (1) the distinction between public and private air vehicles; (2) the nationality and registration of air vehicles; (3) distinguishing marks and documents indicative of nationality and registration of such vehicles; and (4) the right of alighting. Int. Law Assn., *Hague Papers*, 1914, 218.

was a direct response to the pressing need of a general contractual arrangement.[1] While it was there recognized that "every State has complete and exclusive sovereignty in the air space above its territory and territorial waters",[2] each contracting party undertook in time of peace to accord freedom of innocent passage above its territory and territorial waters (embracing those of its colonies) to the aircraft of the other contracting States, provided the conditions established in the convention were observed.[3] It was agreed, moreover, that all regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States should be applied without distinction of nationality.[4]

Each contracting State retained the right, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting parties from flying over certain areas of its territories.[5] Nevertheless, every aircraft of a contracting State was accorded the right to cross another State without landing, following, however, the route fixed by the State over which the flight should take place. Moreover, the establishment of international airways was to be subject to the consent of the States whose territories were flown over.[6] It was declared that in case of war, the provisions of the convention were not to affect the freedom of action of the contracting States either as belligerents or neutrals.[7]

Careful provision was made for establishing the nationality of aircraft,[8] and with respect to certificates of airworthiness and competency,[9] rules to be observed during the various stages of flight,[10] and certain prohibited transportation.[11] Arrangement for the

[1] Senate Doc. No. 91, 66 Cong., 1 Sess.; also *Convention portant réglementation de la navigation aérienne* (13 Octobre 1919), Cmd. 670, London, 1920.

[2] Art. II.

[3] See, in this connection, Blewett Lee, "The International Flying Convention", *Harv. Law Rev.*, XXXIII, 23; Arthur K. Kuhn, "International Aërial Navigation and the Peace Conference", *Am. J.*, XIV, 369.

[4] Art. II. According to Art. XVIII the passage or transit of any aircraft with or without landing over or through the territory of any contracting State, including stoppages reasonably necessary for the purpose of such transit, was not to entail any seizure or detention of the aircraft by or on behalf of such State or any person therein, on the ground that the constitution or mechanism of the aircraft was an infringement of any patent, design or model, duly granted or registered in such State. Every claim for an infringement of such a kind was to be duly made in the country of origin of the aircraft.

[5] Art. III.

[6] Art. XV. It was added, however, that for reasons of general security such an aircraft would be obliged to land if ordered to do so by means of signals provided in an Annex to the Convention.

[7] Art. XXXIX.

[8] Arts. V–X.

[9] Arts. XI–XIV.

[10] Arts. XIX–XXVI.

[11] Arts. XVII–XXX. Thus according to Art. XXVII the carriage by air-

treatment of State, as distinguished from private, aircraft was agreed upon.[1] An International Commission for Air Navigation, to be a part of the League of Nations, and to assume permanent form, was devised, and arrangement made for its organization and functions.[2]

§ 191. The Same.

It should be observed that the privileges of the convention were to be confined to the contracting States, and to those to be permitted to adhere to it, and that the right of adhesion was definitely restricted.[3] The opinion has been expressed that these restrictions, prior to the time when all States may be adherents, are open to objection, on the ground that a right of essentially innocent passage will be denied to outside States equitably entitled to it; and fear is expressed lest the right of a territorial sovereign to fix air routes within its domain may be productive of abuse of power.[4]

craft of explosives and of arms and munitions of war was declared to be forbidden in international navigation. Nor was any foreign aircraft to be permitted to carry such articles between any two points in the same contracting State.

[1] Arts. XXXI–XXXIV. State aircraft were said to embrace military aircraft, and aircraft exclusively employed in State service, such as posts, customs and police. Every other aircraft was deemed to be "private." Moreover, all State aircraft other than military, customs and police aircraft, were to be treated as private aircraft, and as such to be subject to all of the provisions of the convention. Art. XXXI.

According to Art. XXXIII, neither the flight of a military aircraft of a contracting State over the territory of another, nor its landing upon such territory, was to be permitted without special authorization. In case of such authorization, such an aircraft was to enjoy, in the absence of special stipulation, the "privileges of extraterritoriality" customarily accorded to foreign vessels of war. It was declared, however, that a military aircraft which was forced to land, or was compelled or required to land, should not, by reason of that circumstance, acquire a right of extraterritoriality.

[2] Art. XXXV.

[3] According to Art. XLIV: "Any State which took part in the present War but which did not take part in the negotiation of this Convention may express its desire to adhere to this Convention and may be admitted to adhere to it, if such a State is a member of the League of Nations, or until January 1st, 1923, by a unanimous vote of the Signatory and adhering States or, after January 1st, 1923, by an affirmative vote comprising at least three fourths of the total possible votes of the signatory and adhering States, the votes of the different States having the same weight as that provided by Art. XXXV of this Convention for the International Commission for Air Navigation."

See, also, Art. V where it was agreed that "no contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State."

[4] "Must the winding courses of international rivers, where such rivers exist, be followed to the sea? An air line is supposed to be straight. Can the payment of customs duties be imposed or tolls charged, in case of States which do not happen to be contracting parties to the Convention, for transit of their airships over the air space of other States? Must commercial airships flying from America to Scandinavia avoid passing over Great Britain? Will air-

It must be regretted that the convention assumed the form of a closely guarded arrangement for the exclusive benefit of States assigned to a particular group, until enlarged according to their will, rather than a plan designed to respect the equitable claims of every State in need of access by air to distant sea or land over foreign territory, and ready to submit to all reasonable and uniform restrictions to be applied to its craft. The demands of the international society deserved closer scrutiny and broader respect.

(d)

§ 192. Control of Hertzian Waves.

It is doubtless the right of a State to control the passage of Hertzian waves through the air space over its territory. The reason for the exercise of such control, even in time of peace, is the disturbance of the existing local systems of communication, whether by wire or wireless devices, which may otherwise be effected.[1] Such passage does not, however, involve danger to the subjacent land through the operation of the law of gravity upon a body heavier than air. Moreover, disturbances may be prevented without necessarily thwarting the passage of foreign waves or of destroying their value. This circumstance strengthens the equity of the claim that in time of peace the territorial sovereign should not oppose any arbitrary barrier, and should not, therefore, decline to agree to refrain from so doing. General concern in facilitating the communication of intelligence by every available process appears already to have welded an international interest

ships be denied the use of trade winds of the higher air levels? Whatever reduces by prohibition the sum of human rights everywhere is worthy of consideration. Nothing that touches the universal life of humanity is unimportant. If, as everyone hopes and believes, commercial aviation will be an important factor in the future life of nations, States excluded from the Convention have here a very serious ground for objection, and may fairly claim that they are denied the common rights of mankind. Just when a relief had at last been found by human ingenuity for the isolation of the last communities, and a way had been opened to the remotest spots of the earth, here is a treaty which undertakes to deny the relief and to close the way, except to signatory nations. Switzerland should have of common right commercial access to the sea and to States not adjacent by the air, and not be dependent for it upon the consent of other nations. The notion that the adjacent surrounding countries may forbid entirely the innocent passage of Swiss commercial aircraft cannot fairly be based upon the idea that this result is requisite for the safety of these countries, for everybody knows better. Nations not parties to the Convention ought to seek admission to it, and if it is denied, they are entitled to feel that their citizens have less rights than other men and are denied a substantial part of human freedom." Blewett Lee, "The International Flying Convention", *Harv. Law Rev.*, XXXIII, 23, 34–35.

[1] Harold D. Hazeltine, Law of the Air, 96; also Bonfils-Fauchille, 7 ed., §§ 531[17]–531[18]; R. Thurn, *Die Funkentelegrafie*, Berlin, 1913.

which is real because it is vital, and is thus likely to become decisive in establishing the duties and acknowledging the rights of individual States. The International Regulations of Wireless Telegraphy, adopted by the Institute of International Law in 1906, emphasized the significance of such an interest theoretically existing.[1]

§ 193. The Same.

In the establishment of an international régime, enlightened States have thus far proceeded with caution. The international conferences at Berlin in 1903[2] and 1906,[3] as well as that at London in 1912, were productive of agreements imposing slight restraint upon the contracting parties, and did not purport to indicate how far a State may normally interrupt the passage of foreign waves over its own domain.

Certain provisions of the convention of 1912 deserve attention.[4] According to Article I, the contracting parties bind themselves to apply the provisions of the convention to all radio stations (both coastal stations and stations on shipboard) which are established or worked by the contracting parties and open to public service between the coasts and vessels at sea.[5] There is acknowledged

[1] *Annuaire*, XXI, 217; J. B. Scott, Resolutions, 164. According to Art. I: "The air is free. States have over it, in time of peace and in time of war, only the rights necessary for their preservation." It is provided in Art. II that in the absence of special provisions, the rules applicable to ordinary telegraphic correspondence are applicable to wireless telegraphic correspondence. Art. III declares that: "Each State has the right, in the measure necessary to its security, to prevent, above its territory and its territorial waters, and as high as need be, the passage of Hertzian waves whether they issue from a government apparatus or from a private apparatus, situated on land, on a vessel, or on a balloon." Art. IV provides that, "in case of prohibition of correspondence by wireless telegraphy, the government must immediately notify the other governments of the prohibition which it decrees."

[2] *Nouv. Rec. Gén.*, 2 ser., XXXIII, 398–475. See declaration of Brig. Gen. A. W. Greely in behalf of the American delegation Aug. 5, 1903, *id.*, 409.

[3] For the text of the International Wireless Telegraph Convention, signed at Berlin Nov. 3, 1906, and to which the United States became a party, see Charles' Treaties, 151; also supplementary agreement of same date, *id.*, 158, and final protocol of same date, *id.*, 160. For the provisions of specified Articles of the International Telegraph Convention, signed at St. Petersburg, July 10/22, 1875, made applicable to international wireless telegraphy by Art. XVII of the Convention of 1906, *id.*, 179–181.

[4] Charles' Treaties, 185. The treaty was proclaimed by the President July 8, 1913. Concerning the convention see *Documents de la Conférence Radiotélégraphique Internationale de Londres*, published by the *Bureau International de l'Union Télégraphique*, Berne, 1913; also "Radio Communication Laws of the United States and the International Radiotelegraphic Convention", Department of Commerce, Bureau of Navigation, Radio Service, Washington, July 27, 1914.

[5] It is also agreed in Art. I "to make the observance of these provisions obligatory upon private enterprises authorized either to establish or work

in Article III a reciprocal obligation that coastal stations and stations on shipboard shall exchange radiograms without distinction of the radio system adopted by such stations; and it is also provided that every station on shipboard shall be bound to exchange radiograms with every other station on shipboard without such distinction.[1] It is declared in Article VIII that the working of radio stations shall be organized as far as possible in such manner as not to disturb the service of other radio stations; and according to Article IX, radio stations are bound to give absolute priority to calls of distress from whatever source, to answer similarly such calls, and to take such action with regard thereto as may be required.[2] It is provided in Article XIV that any radiogram proceeding from a station on shipboard and received by a coastal station of a contracting country, or accepted in transit by the administration of a contracting country, shall be forwarded.[3]

In time of war, the right of a belligerent to control the passage of Hertzian waves over its territory must be acknowledged.[4] The United States has availed itself thereof.[5]

coastal stations for radiotelegraphy open to public service between the coast and vessels at sea, or to establish or work radio stations, whether open to general public service or not, on board of vessels flying their flag."

[1] In the same Article it is declared that "in order not to impede scientific progress, the provisions of the present Article shall not prevent the eventual employment of a radio system incapable of communicating with other systems, provided that such incapacity shall be due to the specific nature of such system and that it shall not be the result of devices adopted for the sole purpose of preventing intercommunication."

[2] The resolution of the Senate advising and consenting to ratification of the convention, contained the proviso that "The Senate advise and consent to the ratification of the said convention with the understanding to be expressed as a part of the instrument of ratification that nothing in the Ninth Article of the Regulations affixed to the convention shall be deemed to exclude the United States from the execution of her inspection laws upon vessels entering in or clearing from her ports." Charles' Treaties, 222.

[3] Art. XIV also provides that each of the high contracting parties "reserves to itself the right of fixing the terms on which it will receive radiograms proceeding from or intended for any station, whether on shipboard or coastal, which is not subject to the provisions of the present convention."

According to the same Article: "Any radiogram intended for a vessel shall also be forwarded if the administration of the contracting country has accepted it originally or in transit from a non-contracting country, the coastal station reserving the right to refuse transmission to a station on shipboard subject to a non-contracting country."

[4] See, in this connection, Rules for the International Regulation of Wireless Telegraphy, adopted by the Institute of International Law in 1906, *Annuaire*, XXI, 327, J. B. Scott, Resolutions, 164.

[5] Act of Aug. 13, 1912, to regulate radio communication, 37 Stat. 302; executive orders of President Wilson, No. 2585, April 6, 1917, and No. 2605-A, April 30, 1917. See also joint resolution approved July 16, 1918, 65 Cong., 2 Sess., Chap. 154, authorizing the President, in time of war, to supervise or take possession of, and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, and

It will be found that neutral States are burdened with the obligation not to permit the establishment and operation within places under their control, of belligerent radio stations. The burden of the duty of a neutral with respect to the passage of waves destined for a belligerent power, and conveying intelligence of military value is discussed elsewhere.[1]

(10)

Transit by Land

(a)

§ 194. In General.

It may be doubted whether as yet practice has established general acquiescence in the principle that a State owes a legal duty to another to agree to yield to it on equitable terms privileges of transit by land across the national domain. It must be clear, however, that the principle which the international society invokes in its demand that the territory of each of its members be accessible to and from the sea is broad enough to affect the use of any appropriate channel of communication, and is not incapable of practical application to modes of transit by land as well as water.[2] It must be apparent that the strength of the claim to a privilege of transit across foreign territory depends upon the nature and importance of the channel of communication to the domain of a State, and that it varies according to the geographical position and relative isolation of the territory of the claimant. Thus the demands for privileges of transit to and from Switzerland over the territories of States adjacent to it could be pressed with greater force than demands for like privileges across American territory from the Atlantic to the Pacific. Again, the obvious and special needs of a State, such as Switzerland, of means of transit by convenient routes across foreign territory offering direct communica-

to provide just compensation therefor; proclamation of President Wilson, No. 1466, July 22, 1918. Official Bulletin, July 24, 1918, Vol. II, No. 368, p. 1; Effect of War on Normal Relations between Opposing Belligerents, Interference with Means of Communication, *infra*, §§ 606–607.

[1] Neutrality, *infra*, §§ 848 and 855.

[2] "The new theory of servitudes on land differs from the old, which was based on expediency and advantage, in that the new depends on an assertion of right which arises from an asserted principle that a nation ought not to be barred from the sea, the common property and highway of mankind, and thus deprived of the opportunity to engage in ocean-borne commerce." Robert Lansing, "Some Legal Questions of the Peace Conference", American Bar Association, *Reports* (1919), XLIV, 238. 248.

tion with the sea, should receive greater consideration than those of States not so circumstanced and yet strongly desirous of freest access to foreign land-locked areas.

Claims of transit over foreign territory must always be regarded as subordinate to the requirements of the sovereign thereof. When it becomes a belligerent its special needs are accentuated; and even in seasons of peace the superiority of its position is not to be questioned.[1] There is no room for a conflict of equal equities. The fact remains, however, that under normal conditions certain commercial privileges of transit may be yielded without impairing rights of governmental administrative control or those involved in the exercise of jurisdiction, and without subjecting the grantor to economic injury. This is believed to be true although the territorial sovereign agrees not to exact transit duties, or to insist upon the use of special routes, or to impose undue restrictions of any sort. The position, therefore, of the State whose territory, notwithstanding its vital importance as a channel of commerce to special groups of other States or to international trade generally, offers in time of peace an obstacle rather than an aid to transit, is likely to be increasingly regarded as untenable.

(b)

§ 195. Certain Conventional Arrangements.

The United States has on occasion entered into conventions containing provision for transit by land. By means of Article XXXV of the treaty with New Granada (Colombia) of December 12, 1846, the former acquired a right of way or transit for commercial purposes across the Isthmus of Panama by any mode of interoceanic communication.[2] According to Article XXIX of the Treaty of Washington of May 8, 1871, it was agreed that for a term of years goods arriving at certain American ports and destined for British North American possessions might be "entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States", under such rules, regulations and conditions for the protection of its revenue as it might prescribe; it was declared that and under like rules, regulations and conditions, goods might be conveyed in transit,

[1] Thus the right of a State to forbid the passage across its territory of foreign military forces could not be challenged. *Infra*, § 201.

[2] Malloy's Treaties, I, 312. See, in this connection, documents in Moore, Dig., III, 5–19.

without payment of duties, from such British possessions through the territory of the United States for export from its ports.[1]

§ 196. The Same.

Conventions resulting from The World War made significant provisions for transit by land. Thus Germany, by the Treaty of Versailles of June 28, 1919, and Austria, by the Treaty of Saint-Germain-en-Laye, of September 10, 1919, were obliged to undertake to grant freedom of transit through their respective territories, by the routes most convenient for international transit, by rail as well as by water, to persons, goods and vehicles of transportation coming from or going to the territories of any of the Allied or Associated Powers, whether or not contiguous, and without the imposition of transit or customs duties, or undue delays or restrictions, or unreasonable charges for transportation, or adverse discriminatory treatment.[2] The obligation not to maintain control over transmigration traffic through those territories, save with respect to specified measures, was accepted. Arrangements in pursuance of these general requirements were amplified and given also particular application to international transport by rail.[3] It was provided, however, that after periods of years, the continued right of an Allied or Associated Power to claim the benefits of the general stipulations respecting freedom of transit,

[1] Malloy's Treaties, I, 712. By the same Article goods arriving at British North American ports and destined for the United States were to be under like conditions conveyed in transit through British territory, and similarly, goods were to be conveyed in transit on like terms from the United States, through the British possessions to other places in the United States, or for export from British American ports.

Cf. President Harrison, message of Feb. 2, 1893, Richardson's Messages, IX, 335; House Misc. Doc. No. 210, 53 Cong., 2 Sess., 37, declaring that this Article of the treaty was not considered to be in effect.

According to Rev. Stat., § 3005, as amended by the Act of May 21, 1900, Chap. 487, 31 Stat. 181: "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

See, also, the minor provisions contained in Art. XXXII of the treaty with Mexico of April 5, 1831, Malloy's Treaties, I, 1095, and in Art. VI of the treaty with that State of Feb. 2, 1848, *id.*, 1111.

Not infrequently the conventions of the United States have accorded the nationals of the contracting parties a reciprocal exemption from all transit duties. See, for example, Art. VI of the treaty with Japan of Feb. 21, 1911, Charles' Treaties, 79.

[2] Arts. 321–326 of the treaty with Germany; also Arts. 284–289 of the treaty with Austria.

[3] Arts. 365–370, and 372–374, of the treaty with Germany; also Arts. 311–317, and 319–325, of the treaty with Austria.

and certain special ones respecting railways, should depend upon the concession of reciprocal privileges.[1]

It may be observed that Germany agreed that the Czecho-Slovak State might require within a specified period of time the construction at its expense of a railway line across German territory between the stations of Schlauney and Nachod,[2] and that Austria agreed that Italy might within a like period require the construction or improvement of the new trans-alpine lines of the Col de Reschen and the Pas de Predil.[3] "In view of the importance to the Czecho-Slovak State of free communication between that State and the Adriatic", Austria recognized the right of the Czecho-Slovak State to run its own trains over certain sections included within Austrian territory on specified lines.[4] Moreover, the so-called "running powers" were to embrace the right to establish running sheds with small shops for minor repairs to locomotives and rolling stock, and to appoint representatives where necessary to supervise the working

[1] According to Art. 378 of the treaty with Germany, and Art. 330 of the treaty with Austria, such stipulations (which were specified) were to be subject to revision by the Council of the League of Nations at any time after the expiration of a fixed period of years (which was five in the German treaty and three in the Austrian) following the coming into force of the treaty. Failing such revision, or the prolongation by the Council of the period during which reciprocity could not be demanded, the principle of reciprocity was to become applicable.

It was declared in the treaty with Austria that the benefits of the stipulations could not be claimed by States to which territory of the former Austro-Hungarian Monarchy had been transferred, or which had arisen out of the dismemberment of that Monarchy, except upon the footing of giving, in the territory passing under their sovereignty in virtue of the same treaty, reciprocal treatment to Austria.

See, in this connection, communication of M. Clemenceau, President of the Peace Conference, June 16, 1919, to the President of the German Delegation, with respect to the requirements of the German treaty, Misc. No. 4 (1919), [Cmd. 258], p. 62; also David Hunter Miller, "The International Régime of Ports, Waterways and Railways", *Am. J.*, XIII, 669, 670–672, quoting the foregoing communication.

Cf., also, reciprocal provisions for freedom of transit contained in Art. XVII of treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, British Treaty Series No. 8 (1919), [Cmd. 223], p. 9; also those contained in Art. XV of the treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, of Sept. 10, 1919, British Treaty Series, 1919, [Cmd. 461].

[2] Art. 373 of the Treaty of Versailles of June 28, 1919. "The two towns mentioned, Nachod in Czecho-Slovakia, and Schlauney (or Schlanei) in Germany, are about two and one-quarter miles distant from each other in a direct line. The chief purpose of the proposed rail connection is to facilitate the transport of coal from upper Silesia. The road to be built would probably be less than a mile in length, as the existing lines are at one point only about half a mile apart." David Hunter Miller, in *Am. J.*, XIII, 684.

[3] Art. 321 of the Treaty of Saint-Germain-en-Laye, of Sept. 10, 1919. Arrangement was here made for the ultimate adjustment of the cost.

[4] Art. 322 of the same treaty.

of trains.[1] To Austria was accorded "free access to the Adriatic." That State was with such object to be permitted to enjoy freedom of transit over the territories and in the ports severed from the former Austro-Hungarian Monarchy.[2]

The foregoing provisions appear to mark the establishment of a conventional régime which if feasible in operation may be expected to win increasing approval.[3] It may be doubted, however, whether the United States, in view of the location, extent and condition of its continental possessions, would consent to a rule compelling it on the demand of a foreign State to agree to a reciprocal arrangement conferring privileges of transit across American territory such as have been yielded by Austria and Germany. Nor would it be disposed to admit that the requirements of the underlying principles are such as to call for a uniform application with respect to every territory of every State.

(11)

The Protection of Areas by Neutralization and Other Processes. International Waterways

(a)

§ 197. In General.

A group of States may undertake to accord permanent protection from hostile operations to a particular area of land or water within or between the territories of any of their number.[4] The arrangement may provide that certain persons and things shall be immune from attack,[5] or that hostilities shall not be committed within the area, or that it shall not serve a belligerent purpose, such, for example, as a means of facilitating the transportation of military forces. The agreement may even mark the

[1] Art. 323, and also 324. See, also, in this connection, convention relative to transit through Salonica, concluded between Greece and Serbia, May 10, 1914, *Am. J.*, XIII, Supp., 441.

[2] Art. 311 of Austrian treaty of peace of Sept. 10, 1919.

[3] It may be noted that according to Art. XXIII of the Covenant of the League of Nations and constituting a part of the treaties of peace with both Germany and Austria, the Members agree to make provision to secure and maintain freedom of communications and of transit and of equitable treatment for the commerce of all Members of the League.

[4] Such an attempt may be made even though the area constitutes a part of the territory of a State, which it is not sought otherwise to neutralize.

[5] See, for example, Arts. I and XXI of the public act of Nov. 1, 1865, ratified at the Conference of Paris of March 28, 1866, with respect to the works, establishment and administration of the Danube, Brit. and For. State Pap., LV, 94, 99, quoted in Joseph P. Chamberlain, The Danube, Dept. of State, confidential document, 1918, 87.

attempt to impose a condition of permanent neutrality upon the area.[1]

Two distinct aspects of such undertakings deserve consideration. The one concerns a matter of feasibility or expediency; the other involves a question of law; and both appear in a new light since occurrences of The World War.

A number of States, such, for example, as those whose territories are traversed or separated by an international river, may profess concern as to conditions of navigation in time of conflict, and conclude an agreement designed to protect the stream and its establishments should war ensue. Upon its outbreak, if the contracting States are aligned as opposing belligerents, there is likely to be a sharp conflict of interest with respect to the proper uses of the river, and one so vital as to encourage disregard of the compact by that party which would suffer a relative strategic detriment should it observe the restraints imposed. The danger of contempt for the arrangement is shown to be proportional to the opportunity which it leaves open to any contracting belligerent party to utilize the stream for a military end. An agreement imposing a duty to protect merely the works and establishments pertaining to navigation, offers a frail bond of restraint. Nor are provisions devised to localize hostilities by forbidding their commission in a particular stream in close proximity to, or in the very path of belligerent operations likely to prove a real deterrent. So long as a waterway is permitted to remain a means of military communication and transportation serving one belligerent and barred against its foe, the latter must be expected to make extraordinary effort to obstruct passage and stop navigation.[2] Con-

[1] "Neutralization is the imposition by international agreement of a condition of permanent neutrality upon lands and waterways." Cyrus F. Wicker, Neutralization, I.

[2] Declares an authoritative commentator with respect to the belligerent uses of the Danube during The World War: "The active naval operations on the river, with the mines which were their consequence, all clear breaches of the treaty of Berlin, illustrate the difficulty in the way of attempts by treaty to prevent strong States from using any force at their disposal to beat the enemy, and emphasize the impossibility of preventing naval activity on a river forming a military line unless military activity on each side of and across that river is also prevented. . . .

"Experience in two wars, 1877 and 1914, has conclusively shown that neutralization of the Danube is impracticable. If troops are allowed to cross the river, if shore batteries can bombard forts and towns on the hostile opposite bank, then reasonable means of defense on the water should not be prohibited. The existing treaty limitations (treaty of Berlin, Article LII) on fortifications and the use of warships on the river were never effectively enforced, and the result has been to limit the freedom of Roumania to protect her own territory." Joseph P. Chamberlain, The Danube, Dept. of State, confidential document, 1918, 76, 107–108.

ventions which ignore such probabilities and purport merely to impose minor restraints upon the contracting parties fall far short of those designed to attach to an area a status of permanent neutralization. They reveal no collective design to isolate it from warlike operations, and still less a joint undertaking to guarantee the maintenance of such a condition.[1] An international arrangement may, however, give appropriate expression to such a purpose. If it provides for the impressment of permanent neutralization, forbidding all acts within the area or uses thereof as would be denied a belligerent with respect to neutral territory, and especially if it is buttressed by a common guaranty of interested powers, there is automatically established a check which, by reason of its very nature, minimizes the grounds and invalidates the excuses for a possible breach.

The States most concerned in the treatment to be applied to an international waterway or other area may not, however, be disposed to consent to an arrangement of large and permanent design. Such reluctance gives rise to the inquiry whether a legal duty rests upon a State to acquiesce in a plan contemplating permanent neutralization or in one of less magnitude. It must be recognized that normally no State is obliged to agree to abandon the right when a belligerent to commit hostile acts within a zone of land or water belonging to or controlled by its enemy, or to yield to foreign powers the right to attach an artificial condition such as a new status to a portion of its own domain. On the other hand, it must be acknowledged that a particular area, especially if it be an international waterway, may bear such a relationship to a special group of maritime States through its connection with their territories, and to others as a necessary channel of communication between oceans or a means of access to interior ports, as to establish a solid and equitable demand for neutralization. Thus the society of maritime States may be practically united in such a claim. The point to be emphasized is that this

[1] See, in this connection, Cyrus F. Wicker, Neutralization, 3–4, 7, 39.
The Straits of Magellan were said to be "neutralized forever" and free navigation guaranteed to the flags of all nations, by the provisions of Art. V of the treaty between the Argentine Republic and Chile of July 23, 1881. Brit. and For. State Pap., LXXII, 1103. Prior to the negotiation of this treaty, Mr. Evarts, Secy. of State, in a communication to Mr. Osborn, Jan. 18, 1879, declared that the United States would not tolerate any exclusive claims of any foreign nation over the straits, and would hold responsible any government undertaking to lay any impost or check on American commerce passing through. MS. Inst. Chile, XVI, 238, Moore, Dig., I, 664, note. See, also, Jean Marie Abribat, *Le Détroit de Magellan au Point de Vue International*, Paris, 1902.

claim of the international society may in a particular case, as in that of the Dardanelles, be strong enough to justify a demand for acquiescence on the part of any individual State technically possessed of a preponderant territorial interest. It is equally important to observe, however, that that society will not assert a paramount claim save when the requirements of justice are deemed to offer no alternative, and least of all when a territorial sovereign, by arrangement with any others, preserves itself the area from hostile operations in all seasons, for the benefit of all States fairly entitled to its use.

(b)

§ 198. The Panama Canal.

The status of the Panama Canal is the result of a contractual relationship established between the United States and Great Britain by the terms of the Clayton-Bulwer Treaty of April 19, 1850,[1] and renewed and modified by the superseding provisions of the Hay-Pauncefote Treaty of November 18, 1901,[2] in which the Republic of Panama at the very beginning of its life as a State acquiesced.[3]

The convention of 1850 contemplated the application of the principle of neutralization to any trans-Isthmian ship canal or other means of interoceanic communication that might be constructed. To that end the contracting parties pledged themselves to appropriate guaranties, and each also undertook specifically to refrain from obtaining for itself exclusive control over any ship canal, and to abstain from occupying, colonizing or assuming dominion over any part of Central America, and from the acquisition of special advantages in trans-isthmian commerce or navigation that should not accrue to the citizens of both. The erection or maintenance of fortifications was definitely forbidden. Moreover, outside States were to be invited to enter into stipulations with the contracting parties similar to those of the treaty, with a view to permitting general participation in the "honor and advantage" of the work designed. The convention failed, however, to be the means of facilitating the construction of a trans-isthmian canal, an achievement that awaited the conclusion of fresh agreements of the twentieth century.[4]

[1] Malloy's Treaties, I, 659. *Cf.*, in this connection, The Monroe Doctrine, *infra*, § 94.

[2] Malloy's Treaties, I, 782.

[3] Convention of Nov. 18, 1903, Malloy's Treaties, II, 1349. *Cf.*, also, Panama, *supra*, § 20.

[4] Declared Mr. Hay, Secy. of State, in a personal communication to Mr.

The Hay-Pauncefote Treaty, which by its terms superseded the Clayton-Bulwer Treaty, "without impairing the 'general principle' of neutralization" established therein,[1] permitted the construction of an essentially American canal under American control. It was to be maintained and protected by the United States, which was not denied the right of fortification, or burdened with the duty of sharing the work of maintenance or protection with Great Britain

Cullom, Chairman of the Senate Committee on Foreign Relations, Dec. 12, 1901: "The Clayton-Bulwer Treaty of 1850, which contemplated the construction of a canal under the joint auspices of the two Governments, to be controlled by them jointly, its neutrality and security to be guaranteed by both, was almost from the date of its ratification the subject of frequent discussion and occasional irritation between the two Governments. Nearly half a century elapsed without any step being taken by either toward carrying it into practical effect by the construction of a canal under its provisions. Instead of being, as was intended, an instrument for facilitating the construction of a canal it became a serious obstacle in the way of such construction. In the meantime the conditions which had existed at the time of its ratification had wholly changed. The commerce of the world had multiplied many fold. The growth of the United States in population, resources, and ability had been greater still. The occupation and development of its Pacific coast and its commercial necessities upon the Pacific Ocean created a state of things hardly dreamt of at the date of the treaty. At last the acquisition of the Hawaiian and the Philippine Islands rendered the construction of the canal a matter of imperative and absolute necessity to the Government and people of the United States, and a strong national feeling in favor of such construction arose, which grew with the progress of events into an irrevocable determination to accomplish that object at the earliest possible moment. . . .

"But the Clayton-Bulwer Treaty stood in the way. Great Britain did not manifest, and it is believed did not entertain, the remotest idea of joining or aiding in such a work. The United States was able to bear alone the entire cost of the canal, but was apparently prohibited by the existing treaty from undertaking the enterprise which, although carried out at its own expense, would redound to the benefit of the world's commerce quite as much as to its own advantage. The President, loyal to treaty obligations, was unwilling to countenance any demand, however widespread, for proceeding with the construction of the canal until he could obtain by friendly negotiation, on which he confidently relied, the consent of Great Britain to the abrogation of the Clayton-Bulwer Treaty, or such a modification of its terms as would enable the United States untrammeled to enter upon the great work whose successful accomplishment was vitally necessary to its own security, and would benefit the people of all other nations according to their respective interests in the commerce of the world.

"Such was the situation in which the negotiations for the supersession of the treaty were commenced and have been conducted, and we cannot but recognize the fair and friendly spirit in which the successive overtures of the United States toward that end have been met by Great Britain." Diplomatic History of the Panama Canal, Senate Doc., No. 474, 63 Cong., 2 Sess., 53, 54–55.

[1] Art. I and preamble. Concerning the history of negotiations between the United States and Great Britain following the amendments upon which the Senate conditioned its approval of a convention signed Feb. 5, 1900, and which were unacceptable to the latter State, see Diplomatic History of the Panama Canal, Senate Doc. No. 474, 63 Cong., 2 Sess., Part I.

"The President was, however, not only willing, but desirous, that the 'general principle' of neutralization referred to in the preamble of this [the Clayton-Bulwer] Treaty should be applicable to this canal now intended to be built, notwithstanding any change of sovereignty or of international rela-

or other powers of any continent.[1] On its part the United States agreed to adopt "as the basis of neutralization" certain rules, substantially as embodied in the convention of Constantinople, of October 29, 1888.[2] These announced (*a*) that the canal should be free and open to the vessels of commerce and of war of all nations observing the rules,[3] on terms of entire equality, and without discrimination in respect of the conditions or charges of traffic, or otherwise, and that those conditions and charges should be just and equitable; (*b*) that the canal should never be blockaded, and that no right of war should be exercised or any hostility be committed within it, the United States, however, to be at liberty to maintain such military police along the canal as might be necessary to protect it against lawlessness and disorder; (*c*) that vessels of war of

tions of the territory through which it should pass. This 'general principle' of neutralization had always in fact been insisted upon by the United States, and he recognized the entire justice of the request of Great Britain that if she should now surrender the material interest which had been secured to her by the first Article of the Clayton-Bulwer Treaty, which might result in the indefinite future should the territory traversed by the canal undergo a change of sovereignty, this 'general principle' should not be thereby affected or impaired." Dept. of State, memorandum, Diplomatic Hist. of Panama Canal, Senate Doc. No. 474, 63 Cong., 2 Sess., 66.

Art. IV contained the agreement that "no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization of or the obligation of the High Contracting Parties under the present treaty."

[1] See communication of Sir Edward Grey, British Foreign Secy., to Mr. Bryce, British Ambassador at Washington, Nov. 14, 1912, in relation to Panama Canal tolls, For. Rel. 1912, 481, 482, 484. *Compare* memorandum of President Taft, Aug. 12, 1912, *id.*, 475, 476–477.

"The whole theory of the treaty is that the canal is to be an entirely American canal. The enormous cost of constructing it is to be borne by the United States alone. When constructed it is to be exclusively the property of the United States, and is to be managed, controlled, and defended by it. Under these circumstances, and considering that now by the new treaty Great Britain is relieved of all the responsibility and burden of maintaining its neutrality and security, it was thought entirely fair to omit the prohibition that 'no fortification shall be erected commanding the canal or the waters adjacent.'" Dept. of State memorandum, sent by Mr. Hay to Senate Committee on Foreign Relations, Diplomatic Hist. of Panama Canal above cited, 61, 64.

[2] For the text of the Suez Canal Convention, see Brit. and For. State Pap., LXXIX, 18; *Am. J.*, III, Supp., 123. With respect to the Suez Canal see Bonfils-Fauchille, 7 ed., § 512, and literature there cited; Oppenheim, 2 ed., I, 183; bibliography contained in Frank M. Anderson and Amos S. Hershey, Handbook for the Diplomatic History of Europe, Asia, and Africa (1870–1914), National Board for Historical Service, Washington, 1918, 107–108; Library of Congress, List of Books and Periodical Literature Relating to Interoceanic Canals and Railway Routes, 1900, 95–131.

[3] There was omission of the words "in time of war as in time of peace", contained in the proposed convention of Feb. 5, 1900, Senate Doc. No. 160, 56 Cong., 1 Sess. There was also omission of a rule forbidding the erection of fortifications, and which had been contained in that convention, and which was embraced in the Rules of the Suez Canal Convention of 1888.

Concerning the repeal of certain provisions of the Panama Canal Act of Aug. 24, 1912, exempting American vessels engaged in the coastwise trade of the United States from the payment of tolls, see *supra*, § 54.

a belligerent should not revictual nor take any stores in the canal except so far as might be strictly necessary, the transit of such vessels to be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as might result from the necessities of the service, and prizes to be in all respects subject to the same rules as vessels of war of the belligerents; (*d*) that no belligerent should embark or disembark troops, munitions of war or warlike materials in the canal, except in case of accidental hindrance of transit, in which case the transit should be resumed with all possible despatch; (*e*) that the provisions of the Article (embracing the rules) should apply to waters adjacent to the canal, within three marine miles of either end, and that vessels of a belligerent should not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case depart as soon as possible, but that a vessel of war of one belligerent should not depart within twenty-four hours from the departure of the vessel of war of the other belligerent; (*f*) that the plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal should be deemed to be part thereof, for the purposes of the treaty, and in time of war as in time of peace, should enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the Canal.[1]

By the treaty with Panama of November 18, 1903, whereby the United States, as has been elsewhere noted,[2] became the lessee in perpetuity of a zone traversing the territory of the former State, it was agreed that the Canal when constructed should be "neutral in perpetuity", and should "be opened upon the terms provided for by Section I of Article Three of, and in conformity with all the stipulations of, the Hay-Pauncefote Treaty.[3] It was declared that the Government of the Republic of Panama should have the right to transport over the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind.[4] To the United States was accorded the right to use its police and its land and naval forces, or to establish fortifications

[1] See Neutrality Proclamation of President Wilson with respect to the Panama Canal Zone, Nov. 13, 1914, American White Book, European War, II, 18.

[2] Panama, *supra*, § 20. See Malloy's Treaties, II, 1349.

[3] Art. XVIII.

[4] Art. XIX. It was here also provided that the exemption was to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of the police force charged with the preservation of public order outside of the zone, as well as to their baggage, munitions of war and supplies.

for the protection of the Canal or of vessels making use of it, or of the railways or auxiliary works thereof.[1]

The treaties with Great Britain and Panama did not apparently contemplate the impressment upon the Canal of a status of neutralization. There was an absence of any collective guaranty appropriate to such an end, and no design of uniting interested maritime States in such an undertaking. The work of maintenance and defense was left to a single power. No obligation was assumed by the United States not to bar the use of the waterway by an enemy, and not to protect it by force. No plan was devised to remove from an enemy (except possibly Great Britain or Panama, should either of those States unhappily wage war against the United States)[2] the right to attack the Canal with a view to its seizure for strategic or other purposes.[3] Nor was the United States prevented from permitting, when a neutral, such uses of the waterway by belligerent maritime States as it might lawfully accord them in its own ports.[4]

[1] Art. XXIII.

[2] "In the event of the remote and well-nigh impossible contingency of a war between the United States and Great Britain, each party is remitted to its natural right of self-defense, but, even in that emergency, by force of the sixth clause of Article III — which is the only clause in the treaty by its terms expressly applying in time of war as in time of peace — the plant, establishment, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, and shall enjoy complete immunity from attack or injury by the enemy, and from acts calculated to impair their usefulness as part of the canal." Mr. Hay, Secy. of State, to Mr. Cullom, Chairman of Senate Committee on Foreign Relations, personal, Dec. 12, 1901, *Diplomatic Hist. of Panama Canal*, above cited, 53, 59.

[3] The question presents itself, however, whether the long-continued use of the canal by the public as well as private vessels of a foreign State, under the rules of the treaty of 1901, would not impose upon it a duty, when at war with the United States, such as would be imposed on Great Britain were it the enemy of the United States. It might be urged with force that the acceptance and use of privileges of transit, which the United States was not obliged itself indiscriminately to accord, created a corresponding duty not to commit acts which in time of war the rules expressly forbade.

[4] Chas. H. Stockton, Outlines, 144.

"The latter word [neutralisation] is frequently used in reference to the Suez Canal; but, strictly speaking, it is not correct, inasmuch as the passage of belligerent warships is permitted, whilst in neutralised territory the passage of belligerents' forces is prohibited. Lord Cromer, speaking of the term 'neutralisation' as applied to the Suez Canal, cited Lord Pauncefote as saying that it 'had reference only to the neutrality which attaches by international law to the territorial waters of a neutral State, in which a right of innocent passage for belligerent vessels exists, but no right to commit any act of hostility.'" Phillipson and Buxton, Question of the Bosphorus and Dardanelles, London, 1917, 239, *citing* Earl of Cromer, Modern Egypt, London, 1908, II, 384. It may be observed that Lord Cromer in the course of his statement referred to Lord Pauncefote as "an excellent authority on this subject." Dr. Hershey, in his Essentials of International Law, 1912, p. 211, Note 38, also adverted to Lord Cromer's statement.

Concerning the right of the United States to fortify the Canal, see George

The permanence of the isolation of the Canal from scenes of hostility, to the extent of the requirements of the Hay-Pauncefote Treaty, thus appears to depend technically upon the military and naval power of the United States. To this, however, must be added the vast influence of the moral (and possibly naval) support of Great Britain which, although unburdened by a legal obligation, must always be regarded as constituting in fact a co-guarantor.

c

The Supremacy of the Territorial Sovereign Over the National Domain

(1)

§ 199. In General.

States are agreed that within the national domain the will of the territorial sovereign is supreme. That will must, therefore, be exclusive, opposing the assertion of any other, and excluding the lawfulness of obedience to the commands of such other. There can be no conflict of right in the matter.[1]

In the application of this principle international differences frequently arise in cases where it is believed that the territorial sovereign has abused its rights as such, or where it is contended conversely, that within the national domain some public foreign agency has committed acts in derogation of the rights of that sovereign. Controversies also arise as to the extent to which a State has, for any reason, consented to relax its right of exclusive control in favor of a foreign power. It will be observed that in all of these situations the particular problem concerns the relation of the territorial sovereign to a foreign State or its nationals by reason of conduct or occurrences taking place within the domain of the former. This is true whether the acts complained of have been committed by that sovereign or by some foreign individual or agency in opposition to its will.

B. Davis, "Fortification at Panama", *Am. J.*, III, 885; Peter C. Hains, "Neutralization of the Panama Canal", *id.*, III, 354; H. S. Knapp, "The Real Status of the Panama Canal", *id.*, IV, 314; Crammond Kennedy, "The Canal Fortifications and the Treaty", *id.*, V, 620; Richard Olney, "Fortification of the Panama Canal", *id.*, V, 298; Eugene Wambaugh, "The Right to Fortify the Panama Canal", *id.*, V, 615.

[1] Declares Hall: "And it being a necessary result of independence that the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion." Higgins' 7 ed., p. 49. See, also, Beale's Cases on Conflict of Laws, III, Summary, § 23.

See Rights of Jurisdiction, In General, *infra*, § 218.

(2)

Acts in Derogation of the Supremacy of the Territorial Sovereign

(a)

§ 200. Generally Illustrative Instances.

Any act committed within the territory of a State in obedience to the command of a foreign power and contrary to the will of the territorial sovereign marks contempt for its supremacy therein.[1] A few instances may be noted as illustrative.

The operations or movements of a foreign military or naval force within the territory of a State are of such a character and constitute a serious invasion of its rights. The United States has always so regarded the acts of such foreign agencies within its own domain,[2] and has likewise deplored their commission under normal circumstances by its own forces abroad.[3] For the same

[1] Mr. Jefferson, Secy. of State, to Mr. Ternant, French Minister, May 15, 1793, denouncing as contrary to the law of nations the condemnation by the French Consul at Charleston of a British vessel captured by a French frigate. Am. State Pap., For. Rel., I, 147–148. See, also, The Apollon, 9 Wheat. 362.

[2] Mr. Clay, Secy. of State, to Mr. Vaughan, British Minister, Feb. 18, 1828. MS. Notes For. Leg., III, 430. Moore, Dig., II, 4; Mr. Buchanan, Secy. of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., II, 4; Mr. Forsyth, Secy. of State, to Mr. La Branche, Chargé d'Affaires to Texas, Jan. 8, 1839, MS. Inst. Texas, I, 15, Moore, Dig., II, 363; Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador, March 9, 1911, For. Rel. 1911, 419; Mr. Knox, Secy. of State, to the Mexican Chargé d'Affaires, April 10, 1911, *id.*, 453.

"Indeed, as you know, I have already declined, without Mexican consent, to order a troop of Cavalry to protect the breakwater we are constructing just across the border in Mexico at the mouth of the Colorado River to save the Imperial Valley, although the insurrectos had scattered the Mexican troops and were taking our horses and supplies and frightening our workmen away." President Taft, Annual Message, Dec. 7, 1911, *id.*, XII. President Taft announced the purpose, however, to be in such a position that when danger to American lives and property in Mexico threatened, and the existing government was rendered helpless by the insurrection, he could "promptly execute congressional orders to protect them, with effect."

[3] Mr. Monroe, Secy. of State, to the Chevalier de Onis, Spanish Minister, Feb. 7, 1816, MS. Notes to For. Leg., II, 128, Moore, Dig., II, 362; Mr. Seward, Secy. of State, to Mr. Welles, Secy. of the Navy, Aug. 4, 1862, 58 MS. Dom. Let. 15, Moore, Dig., II, 363.

Concerning certain general orders in 1864, of Major-General Dix, U. S. A., relative to the pursuit into Canada of a band of persons which had raided St. Albans, Vermont, see Moore, Dig., II, 367–368.

In cases of the accidental killing or injury by public vessels of the United States within the territorial waters of foreign States, of citizens of such States, ample indemnities have been paid and full apologies expressed. See President Jackson, special message to Congress, June 18, 1834, H. Ex. Doc. 492, 23 Cong., 1 Sess., Moore, Dig., II, 369. See, also, For. Rel. 1889, 547–549, relative to consequences of target practice in 1887, of the U. S. S. *Omaha*, while in Japanese waters, Moore, Dig., II, 369

reason, the pursuit and arrest of deserters by foreign expeditions without the consent of the local authorities is necessarily looked upon with disapproval.[1]

Foreign civil officials are bound to respect the same principle. Thus they cannot lawfully, without the consent of the territorial sovereign, make an arrest within its domain,[2] or rescue any one from the custody of its officials,[3] or take to, or detain therein, any person however lawfully arrested within the territory of their own State.[4] Private citizens are under the same obligations and cannot, for example, lawfully enter and take from the territory of a foreign State, without its consent, the person of any individual found therein.[5]

The exercise of certain administrative functions by foreign civil agents is regarded as likewise inconsistent with the lodgment of supreme control in the territorial sovereign. The practice of Russian consuls in the United States of subjecting to certain invidious discriminations American citizens of Jewish faith, by refusing to *visé* their passports, was described by President Cleveland in 1895, as "an obnoxious invasion of our territorial jurisdiction."[6] It may be noted that Germany, in 1895, regarded with disapproval the authorization by the United States of its own officials to inspect or order the disinfection in German ports of foreign vessels bound for the United States.[7]

[1] Mr. Monroe, Secy. of State, to Mr. Baker, Dec. 6, 1815, MS. Notes For. Leg., II, 113, Moore, Dig., II, 362; Mr. Seward, Secy. of State, to Mr. Stanton, Secy. of War, April 15, 1853, 60 MS. Dom. Let. 231, Moore, Dig., II. 370; Case of incursion in 1888, from Mexico into Texas of armed force to arrest Antanicio Luis, an alleged deserter, described in Moore, Dig., II, 371, and documents there cited.

[2] Mr. Bayard, Secy. of State, to Mr. Manning, Minister to Mexico, Feb. 26, 1887, MS. Inst. Mexico, XXI, 646, Moore, Dig., II, 373; Nogales Case, 1893, For. Rel. 1893, 457, 471, *id.*, 1896, 439–454, Moore, Dig., II, 380; Mr. Hay, Secy. of State, to Sir Julian Pauncefote, British Ambassador, Jan. 21, 1899, MS. Notes to British Legation, XXIV, 427, Moore, Dig., II, 381. See, also, Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador at Washington, March 14, 1911, concerning the cases of Edward M. Blatt and Lawrence F. Converse, For. Rel. 1911, 606.

[3] Nogales Case, 1887, described in Moore, Dig., II, 376–379, and documents there cited from For. Rel. 1887 and 1888, part. II.

[4] Case of Peter Martin, For. Rel. 1877, 266, Brit. and For. State Pap., LXVIII, 1223, Moore, Dig., II, 371–373.

[5] Case of Madeline His, For. Rel. 1894, 646–675, Moore, Dig., II, 384–389, and documents there cited.

[6] President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxxii, Moore, Dig., II, 10. See, also, correspondence between the United States and Russia, 1893, For. Rel. 1893, 547 and 548; and in 1895, For. Rel. 1895, II, 1056–1074, especially Mr. Adee, Acting Secy. of State, to Mr. Breckinridge, Minister to Russia, Aug. 22, 1895, For. Rel. 1895, II, 1067. The more important of the foregoing documents are contained in Moore, Dig., II, 8–13.

[7] Declared Mr. Gresham, Secy. of State, to Baron Saurma, German Am-

(b)

§ 201. The Passage of Foreign Forces.

When, in times of peace, a passage through the territory of a particular State is sought for reasons of convenience in behalf of a foreign military force, the permission of the territorial sovereign is requested and oftentimes granted.[1] The presence of such forces at international exhibitions or on social occasions within American territory has been a frequent occurrence.[2] Consent by the United States to the entering of a foreign force into the territory of any State of the Union is commonly conditioned upon that also of the particular Commonwealth concerned.[3]

(c)

§ 202. The Landing of Foreign Forces.

Respect for the inviolability of the territory of a State rests on the theory that it possesses the power and will to exercise control therein, and to a degree sufficient to assure the administration of justice, in a broad sense, throughout the national domain. Even countries not dealt with as full members of the family of nations,

bassador, Jan. 26, 1895: "This Government does not claim that under any treaty or the rules of international law it can authorize its officers to inspect foreign vessels or order their disinfection in German ports, or to administer oaths to officers of foreign ships within the jurisdiction of the German Empire." For. Rel. 1895, I, 513, 514; Moore, Dig., II, 13–14.

See, also, For. Rel. 1904, 519–521, concerning the unwillingness of the Netherlands to permit the United States to station officers at certain ports to conduct medical examinations under the Act of Congress of March 3, 1903. Concerning the attitude of Austria-Hungary, *id.*, 1904, 92–94.

[1] See, for example, Mr. Seward, Secy. of State, to Governor Washburne, of Maine, Jan. 17, 1862, 56 Dom. Let. 211, Moore, Dig., II, 390; Mr. Cadwalader, Acting Secy. of State, to Mr. Cameron, Secy. of War, Oct. 20, 1876, 115 MS. Dom. Let. 502, Moore, Dig., II, 392; Mr. Bayard, Secy. of State, to the Secy. of War, April 16, 1885, 155 MS. Dom. Let. 120, Moore, Dig., II, 393; correspondence in For. Rel. 1897, 325–326; *id.*, 1898, 358–363, relative to passage of Alaskan Relief Expedition through Canadian territory, Moore, Dig., II, 393–395.

See, in this connection, refusal of the United States while a neutral, to permit, in 1915, the passage of certain Canadian troops through the State of Maine. Correspondence in American White Book, European War, IV, 81.

[2] Mr. Foster, Secy. of State, to Mr. Patenôtre, French Minister, Dec. 17, 1892, MS. Notes to France, X, 263, Moore, Dig., II, 395.

[3] Mr. Seward, Secy. of State, to Governor Washburne, of Maine, Jan. 17, 1862, 56 Dom. Let. 211, Moore, Dig., II, 390; Mr. Foster, Secy. of State, to the Governor of Illinois, July 5, 1892, 187 MS. Dom. Let. 142, Moore, Dig., II, 395; Mr. Hill, Asst. Secy. of State, to Mr. Buchanan, President of the Pan-American Exposition, Jan. 14, 1901, 250, MS. Dom. Let. 217, Moore, Dig., II, 396; Mr. Knox, Secy. of State, to the Mexican Ambassador, June 7, 1911, For. Rel. 1911, 503.

Concerning the jurisdiction of a State over foreign forces permitted to enter its territory, *infra*, § 247.

are held accountable for the possession of such power and disposition. When States are not found wanting in this regard, the United States is not disposed to sanction the use within their borders of its own public forces for the advancement or benefit of American interests.[1] When, however, in any country, the safety of foreigners in their persons and property is jeopardized by the impotence or indisposition of the territorial sovereign to afford adequate protection, the landing or entrance of a foreign public force of the State to which such nationals belong, is to be anticipated.[2] Justification is to be found in the circumstance that such conduct is designed primarily to assure the performance of certain functions of government, the continued non-performance of which would produce an irreparable injury to persons entitled to demand as of right protection from the local authorities.[3]

The United States has not hesitated to act upon this principle.[4] A notable instance occurred in China in 1900. That country was then at peace with the several foreign powers, including the United States. In the Northern Provinces of the Empire, in the course

[1] Mr. Adee, Acting Secy. of State, to Mr. Sill, Minister to Korea, July 8, 1895, MS. Inst. Korea, I, 537, Moore, Dig., II, 401; Mr. Hay, Secy. of State, to the Chinese Minister, June 22, 1900, For. Rel. 1900, 274, Moore, Dig., V, 479, in reply to the memorandum of the Chinese Minister of June 22, 1900, For. Rel. 1900, 273.

[2] It has been observed that on grounds of self-defense, and with no political design foreign forces may, under certain circumstances, not unlawfully penetrate the territory of a State. Certain Non-Political Acts of Self-Defense, *supra*, §§ 65–68. The situations here considered are those which are not only non-political and not savoring of intervention, but which are also not illustrative of attempts to defend the safety of the territory of a State from foreign activities injurious to it. The instances described in the text are rather cases where the object of the foreign force entering the national domain is to safeguard persons or property found or established therein. Thus the forcible according of protection is to defend persons or things regarded as foreign to the territorial sovereign, but which have for the time being no immediate connection with the territory of the State whose force is employed to shield them. The activities which are observed illustrate the strength of the connection between a State and its nationals and their property in a foreign land, when abnormal conditions prevail therein.

[3] See memorandum on the Right to Protect Citizens in Foreign Countries by Landing Forces, by J. R. Clark, Jr., Solicitor of Department of State, 1912; especially 22–23, and 30–31, also Appendix giving chronological list of occasions on which the Government of the United States had taken action by force for the protection of American interests; including certain instances in which similar action had been taken by other governments in behalf of their nationals.

[4] Mr. Toucey, Secy. of Navy, to Captain Jarvis, U. S. S. *Savannah*, March 13, 1860, S. Ex. Doc. 29, 36 Cong., 1 Sess., Moore, Dig., II, 400; President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, XVIII, Moore, Dig., II, 401; Mr. Hill, Acting Secy. of State to the Secy. of the Navy, Sept. 11, 1900, 247 MS. Dom. Let. 597, Moore, Dig., II, 401. *Compare* Mr. Hay, Secy. of State, to Mr. Merry, Minister to Central America, March 3, 1899, For. Rel. 1899, 554.

of the so-called "Boxer" movement, there occurred unprecedented disturbances against foreign life and property. As early as May 26, the American Minister had been authorized to arrange with the American Admiral for legation guards. On May 31, some 350 guards — American, English, Russian, French, Japanese and Italian — arrived at Peking. On June 11, Mr. Sugiyama, Chancellor of the Japanese Legation, was killed by regular Chinese troops. On June 20, Baron von Ketteler, the German Minister, was murdered by soldiers of the Imperial Chinese Army in pursuance of orders of their superiors. From that day until August 14, the several foreign legations were constantly attacked and besieged by forces comprising in part regular troops, under orders from the Imperial authority. In several provinces foreigners were murdered, tortured or attacked. In Peking the foreign cemeteries were desecrated, in some cases the graves being opened and the remains scattered abroad. An international expedition composed of troops of the several Powers was duly sent to raise the siege of that city. This was accomplished after overcoming the constant resistance of the Chinese forces.[1]

For numerous other kindred purposes American forces have been landed on foreign territory which, in most instances, has been that of a country not familiar with European civilization, and not,

[1] President McKinley, Annual Message, Dec. 3, 1900, For. Rel. 1900, XI–XVI; edicts and decrees of the Empress Dowager, *id.*, 1900, 85, 168, 169, 170, 172; communications of Mr. Conger, American Minister, to Mr. Hay, Secy. of State, *id.*, 1900, 144, 151, 159, 161–169, 190; joint note of the Allied Powers, Dec. 22, 1900, *id.*, 244; *id.*, 132. An abstract of the more important American documents relative to the disturbances in China during the "Boxer" movement is contained in Moore, Dig., V, 476–493.

The position of the United States in acting concurrently with the other Powers was set forth in a notable circular despatch of Mr. Hay, Secy. of State, July 3, 1900, in which he said in part: "The purpose of the President is, as it has been heretofore, to act concurrently with the other powers; first, in opening up communication with Peking and rescuing the American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and, fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters. It is, of course, too early to forecast the means of attaining this last result; but the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire." For. Rel. 1900, 299, Moore, Dig., V, 481, 482.

The text of the final protocol of Sept. 7, 1901, between the Allied Powers, on the one hand, and China, on the other, is contained in Malloy's Treaties, II, 2006. See Intervention, The Conduct of the United States, *supra*, § 83; William Roscoe Thayer, Life and Letters of John Hay, Boston, 1915, II, Chap. XXVI.

at the time, recognized for all purposes as a member of the family of nations. In such cases the object has occasionally been more than merely to accord simple protection in a disturbed area, and has involved the infliction of penalties upon persons responsible for the injury or death of American residents.[1] Revolutionary conflicts in territories of countries of a higher order and recognized as States, have at times given rise to conditions calling for the landing of forces, for the protection of American interests.[2] It seems to require emphasis that such use of those forces has not, in a variety of cases, possessed political significance, and that the propriety of their employment has been attributable to the consequences otherwise to be anticipated from the continued delinquency of the territorial sovereign.

(3)

The Exercise by a State of Certain Rights as Sovereign within Its Own Domain

(a)

§ 203. The Private Ownership and Control of Property.

A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory. Thus it may determine not only the processes by which title may be acquired, retained or transferred,[3] but also what individuals are to be permitted to enjoy privileges of ownership.[4]

A State may not unreasonably forbid aliens, especially if they reside outside of its domain, to acquire or retain property belong-

[1] See, for example, punishment of natives in Formosa, in 1867, by a naval force under Commander G. C. Belknap, U. S. N., Report of Secy. of the Navy, 1867, 7–8, and noted in Memorandum of J. R. Clark, Jr., Solicitor of Department of State, 1912, p. 58.

[2] See, for example, cases of the landing of American forces to protect American interests in Nicaragua in 1910, For. Rel. 1910, 749–754; also case of the landing of such forces in Honduras, 1910–1911, as set forth in Appendix to Memorandum of J. R. Clark, Jr., Solicitor of Department of State, 1912, 69–70, with documents there quoted. The situation is somewhat meagerly set forth in For. Rel. 1911, 295–305.

[3] "It is an established principle of international law that every State has the right to regulate the conditions upon which property within its territory, whether real or personal, shall be held and transmitted." Mr. Gresham, Secy. of State, to Mr. Huxton, Dec. 20, 1893, 194 MS. Dom. Let. 598; Moore, Dig., II, 33.

[4] Declared Taney, C. J., in the course of the opinion of the Court in the case of Mager *v.* Grima, 8 How. 490, 493: "Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper,

ing within its territory, and whether movable or immovable.[1] At the present time States do not appear to be disposed to prevent the acquisition of or succession to movable property by aliens. Numerous treaties of the United States have provided for the enjoyment by such persons of that privilege.[2]

direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union at this day, real property devised to an alien is liable to escheat."

"It is a fundamental principle of the law of nations that not only may rights conferred upon citizens be reserved from non-resident aliens, but even that aliens permanently residing in the country may be denied rights which are given citizens; and this rule applies not only to civil rights, but to property rights as well. In this connection it is necessary to do more than cite, as to civil rights, the all but universal and the unquestioned practice of denying to aliens the right of suffrage; and as to property rights, the very general denial to aliens of the right to hold real property and to have the same descend in the same manner in which real property may be held by and may descend to citizens." Mr. Adee, Acting Secy. of State, to the Italian Ambassador, at Washington, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 671.

[1] *Droit d'aubaine.* Declares Wheaton: "The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by which all the property of a deceased foreigner (movable and immovable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent. In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'auboine* had been either abolished or modified, by treaties between France and other States, and it was entirely abrogated by a decree of the constituent Assembly, in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code Napoleon, in 1803; but this part of the Civil Code was again repealed by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.

"The analogous usage of the *droit de détraction*, or *droit de retraite* (*jus detractûs*) by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries." Dana's 8 ed., 138–139.

By Art. XI of the treaty of amity and commerce between the United States and France of Feb. 6, 1778, Malloy's Treaties, I. 471, there was mutual abolition of the *droit d'aubaine*, and also of the *droit détraction*.

[2] For example, Art. II of the treaty with Great Britain of March 2, 1899, provides that: "The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases." Malloy's Treaties, I, 774.

A State may be unwilling to permit the succession to and retention of title to immovable property within its domain by persons other than its own nationals, or by aliens who are non-residents. No rule of international law is believed to prescribe a different course.

The Government of the United States has exhibited restraint in generally refraining from attempts to hinder the several States of the Union from shaping their own policies with regard to lands within their respective territorial limits.[1] It is not understood that the United States is a party to any treaty now in force, which permits aliens residing in foreign territory to succeed to and retain lands in the several States of the Union, save in those where the right is accorded by the local law. Even this exceptional provision is rarely found.[2]

The United States has in certain treaties agreed to permit the nationals of the other contracting party to enjoy the right of succession by inheritance or otherwise, and to allow the successor to a title a reasonable time (sometimes specified) within which

[1] See, however, Art. XI of the treaty of amity and commerce with France, of Feb. 6, 1778, Malloy's Treaties, I, 471; also Art. VII of the convention with France of Sept. 30, 1800, *id.*, 498. See, in this connection, Carneal *v.* Banks, 10 Wheat. 181, at 189, where Chief Justice Marshall in the course of the opinion of the Court declared: "This court decided, in the case of Chirac *v.* Chirac (2 Wheat. 259), that the treaty of 1778, between the United States and France, secures the citizens and subjects of either power the privilege of holding lands in the territory of the other."

[2] By the terms of Art. VII of the consular convention with France of Feb. 23, 1853, it was declared that "in all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right." Malloy's Treaties, I, 531.

Concerning the application of this Article to the District of Columbia, see Geofroy *v.* Riggs, 133 U. S. 258; and to Nebraska, see Bahuaud *v.* Bize, 105 Fed. 485.

See, also, Art. V of treaty with Switzerland of Nov. 25, 1850, Malloy's Treaties, II, 1765, and concerning its interpretation, *cf.* Hauenstein *v.* Lynham, 100 U. S. 483.

It may be doubted whether Art. VI of the treaty with Sweden of April 3, 1783, revived by Art. XVII of the treaty of July 4, 1827, Malloy's Treaties, II, 1727 and 1754, conferred upon a national of Sweden the right to succeed to and hold lands in an American State whose local laws opposed the privilege. See Meier *v.* Lee, 106 Iowa, 303. But see, *contra*, Adams *v.* Akerlund, 168 Ill. 632.

to dispose of it.[1] Subject to such engagements, the rights of aliens with respect to lands in the several States are to be ascertained by reference to the local laws.[2]

As a result of Acts of Congress enacted in 1897 and 1905,[3] no alien or person who is not a citizen of the United States, or who has not declared his intention to become such in the manner provided by law, is permitted to acquire title to or own any land in

[1] See, for example, Art. II treaty with Austria, May 8, 1848, Malloy's Treaties, I, 34; Art. II treaty with Bavaria, Jan. 21, 1845, *id.*, 57; Art. XII treaty with Bolivia, May 13, 1858, *id.*, 117; Art. XI treaty with Brazil, Dec. 12, 1828, *id.*, 136; Art. II treaty with Brunswick-Lüneburg, Aug. 21, 1854, *id.*, 157; Art. XII treaty with Colombia (New Granada), Dec. 12, 1846, *id.*, 305; convention with Great Britain, March 2, 1899, *id.*, 774; Art. I convention with Guatemala, Aug. 27, 1901, *id.*, 876; Art. VII treaty with Hanseatic Republics, Dec. 20, 1827, *id.*, 903; Art. II convention with Hesse, March 26, 1844, *id.*, 947; Art. X treaty with Mecklenburg-Schwerin, Dec. 9, 1847, *id.*, 1078; Art. X treaty with Russia, Dec. 18, 1832, *id.*, II, 1517; Art. II treaty with Saxony, May 14, 1845, *id.*, 1610; Art. III treaty with Spain, July 3, 1902, *id.*, 1702; Art. V treaty with Switzerland, Nov. 25, 1850, *id.*, 1765; Art. II treaty with Württemberg, April 10, 1844, *id.*, 1893.

For a discussion of the judicial interpretation of the several treaties of the United States, see "Aliens under the Federal Laws of the United States", by Samuel MacClintock, *Illinois Law Rev.*, IV, 95. In the course of a summary the writer declares, at p. 109: "These treaties [save those with France of 1853, and Switzerland of 1850] generally grant to subjects of the foreign power, who, but for their alienage, would be entitled to acquire the lands in question, the right, notwithstanding alien disabilities of the *lex rei sitae*, to acquire lands in the States and Territories and in the District of Columbia. (Johnson *v.* Elkins, 1 App. D. C. 430; Jost *v.* Jost, 1 Mackey, 486.) The estates so acquired, though held by the alien, as if by a citizen, are defeasible, under the condition that the lands acquired under them must be sold to a person able to hold them, and within the times provided for in the treaties. (Chirac *v.* Chirac, 2 Wheat. 275; Schultze *v.* Schultze, 144 Ill. 290.) The power to sell, provided for in the treaties, is a property right and not a mere personal privilege. (De France *v.* Howard, 1 Fed. Rep. 776.) If the conditions of the treaty are broken, the lands will not immediately escheat to the State, but a special proceeding, corresponding to inquest of office found, is necessary to vest the title in the State, especially where the treaty gives a reasonable time in which to sell the land. (Wunderle *v.* Wunderle, 144 Ill. 40; Society etc. *v.* New Haven, 8 Wheat. 492; Slater *v.* Mason, 15 Pick. 345.)"

[2] For a résumé of the statutes and judicial decisions of the various States of the Union with respect to the acquisition, inheritance or holding of lands by aliens, see Moore, Dig., IV, 32–38. Also Donaldson *v.* State, 67 N. E. 1029.

Concerning the right of aliens at common law to succeed to lands, see Story, J., in Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603, 619; McCreery's Lessee *v.* Somerville, 9 Wheat. 354; Field, J., in Phillips *v.* Moore, 100 U. S. 208.

[3] An Act of March 3, 1887 (24 Stat. 476), established prohibitions with respect to real estate in the Territories of the United States and in the District of Columbia. An Act of March 2, 1897 (29 Stat. 618 and 619), of which certain provisions are referred to in the text, was by its terms withheld from application to the District of Columbia, but amended the Act of 1887 with respect to lands in the Territories. An Act of Feb. 23, 1905 (33 Stat. 733), amended the Act of 1897, so as to extend to aliens the same rights and privileges concerning the acquisition, holding, owning and disposition of real estate in the District of Columbia as were conferred upon them in respect of real estate in the Territories by the Act of 1897. It should be observed that the

any of the Territories of the United States, or within the District of Columbia, save under exceptional conditions that are specified. Thus, the prohibition is not applicable to cases in which the right to hold or dispose of land in the United States is secured by existing treaties to citizens or subjects of foreign countries.[1] Nor does it apply to land owned (March 2, 1897) by aliens, which was acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives; nor does it apply to any alien who becomes a *bona fide* resident of the United States. It is declared that any alien who becomes such a resident, or who duly declares his intention to become a citizen of the United States, may acquire and hold lands, provided, however, that if such resident alien shall cease to be a *bona fide* resident of the United States, he shall have ten years from the time of the cessation of that residence in which to alienate such lands.[2]

The restrictions imposed by the United States in its legislation and reflected in its treaties may appear to reveal a disposition in contrast to that manifested by certain other enlightened States.[3]

Act of 1887 prohibited the acquisition, holding or owning of real estate or of any interest therein by alien corporations. The same Act declared that no corporation or association, more than twenty per cent of the stock of which was or might be "owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States", should thereafter acquire or hold or own any real estate. These provisions were superseded in so far as they were declared to be applicable to the Territories, by the Act of 1897. Whether the Act of 1905, amending the Act of 1897 so as to render its provisions applicable to the District of Columbia, served also to render the prohibitions relative to corporate acquisition and ownership of land inapplicable to the District of Columbia, is one on which no opinion is ventured. See, in this connection, 4 U. S. Comp. Stat. Ann., §§ 3498 and 3499, with notes.

[1] It is declared, however, that such rights, so far as they may exist by force of any treaty, are to continue to exist so long as such treaty is in force, and no longer.

[2] It is provided that the Act of 1897 is not to be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town or village, or in any mine or mining claim, in any of the Territories of the United States (and by virtue of the Act of 1905, within the District of Columbia).

The Act of 1897 makes provision for the acquisition by aliens of lands by inheritance or in the collection of debts, requiring, however, ultimate sale within a specified period. Arrangements for escheat proceedings and condemnations and sales thereunder are also specified.

Concerning the history of the legislation of the United States, see Samuel MacClintock, in *Illinois Law Rev.*, IV, 27.

See the liberal provisions of Art. VI of convention between the United States and Denmark providing for the cession of the Danish West Indies, of Aug. 4, 1916, with respect to the rights of Danish citizens not residing in the islands but owning property therein at the time of the cession. U. S. Treaty Series, No. 629, *Am. J.*, XI, Supp., 53, 58.

[3] See, for example, the British Act of May 12, 1870, 33 Vict. c. 14, § 12; also Moore, Dig., IV, 43–50, with respect to the laws of certain other States. See Arts. III and XIV of the treaty between the United States and China

It should be borne in mind, however, that the extensive area of American territory, both within and without the limits of the several States of the Union, and open and increasingly subjected to use and acquisition by residents of foreign origin and nationality, requires special safeguarding in order to prevent the natural transfer, by inheritance or otherwise, of important interests to aliens not residing in the United States. The continued ownership by such individuals of large and numerous tracts of land within American territory might be fairly regarded as essentially detrimental to the welfare of the nation.

(b)

§ 204. Pursuits and Occupations. Practice of Learned Professions.

A State may lawfully exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law.

In the United States, local legislative enactments have not infrequently manifested such a purpose. Thus in 1909 a statute of Pennsylvania rendered it unlawful for unnaturalized foreign-born residents to kill wild game except in defense of their persons or property.[1] The United States Supreme Court has repeatedly held within recent years that such discriminatory legislation is not necessarily unconstitutional, and it has not intimated that constitutional discriminatory legislation was at variance with the principles of international law.[2] It should be observed, however, that discriminatory legislation may in fact assume a form which violates the Fourteenth Amendment affording the inhabitants of every State equal protection of its laws. In such case the resident alien may invoke this constitutional provision which is judicially applied for his benefit as well as for that of every other

of Oct. 8, 1903, Malloy's Treaties, I, 263 and 268, respectively, in relation to the rights of American merchants and missionaries, respectively, to acquire interests in land in China. See, also, Mr. Root, Secy. of State, to Mr. Rockhill, American Minister to China, March 2, 1906, For. Rel. 1906, I, 277.

[1] Patsone *v.* Pennsylvania, 232 U. S. 138.

[2] See, for example, Patsone *v.* Pennsylvania, *supra;* also Heim *v.* McCall, 239 U. S. 175; Crane *v.* New York, 239 U. S. 195, where it was held that a State statute regarding the employment of laborers, otherwise valid, was not unconstitutional under the equal provision clause of the Fourteenth Amendment because it made distinctions between aliens and citizens.

aggrieved inhabitant of the State concerned.[1] If it adjudges a local discriminatory enactment to be unconstitutional, the Supreme Court of the United States appears to be indisposed to determine also whether the law is violative of any treaty rights invoked by the alien litigant.[2]

The United States has not infrequently undertaken by treaty to accord the nationals of other States residing within its territories the same measure of protection for their persons and property, and the same rights and privileges for their commerce and navigation, as are possessed by the "natives." [3] In consequence, there have been numerous adjudications involving the inquiry

[1] Truax *v.* Raich, 239 U. S. 33, where it was held that a statute of Arizona, of 1914, requiring that employers should only employ a specified percentage of alien employees, denied to alien inhabitants of that State the rights accorded them under the Fourteenth Amendment to the equal protection of its laws. In the course of the opinion of the court, Mr. Justice Hughes declared, pp. 39–40, 41–42, 43: "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in McCready *v.* Virginia, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in Patsone *v.* Pennsylvania, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (Hauenstein *v.* Lynham, 100 U. S. 483; Blythe *v.* Hinckley, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. . . . The discrimination against aliens in the wide range of employment to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. . . . The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

Mr. Justice McReynolds rendered a dissenting opinion.

[2] *Id.*, 43.

[3] See, for example, Art. III of the treaty with Italy of Feb. 26, 1871, Malloy's Treaties, I, 970, where it was provided that "the citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." See, also, Art. I of the same treaty, where it was provided that such individuals "shall enjoy, respectively, within the States and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing." See, also, Art. I of treaty with Japan of Feb. 21, 1911, Charles' Treaties, 77.

whether a particular local law, discriminatory in design or effect, was in conflict with such requirements.[1] The resulting interpretations which, when expressed by the Supreme Court, have been deemed to bind the executive department of the Government,[2] have revealed the fact that the treaty provisions of the nineteenth century were wholly inadequate to shield from practical discrimination important interests of numerous resident aliens engaged in industrial occupations.[3] Those interests were, for example, affected adversely by statutes confining the benefits of laws creating a right of action in case of death caused by the negligence of an employer, or limiting the benefits of so-called workmen's compensation acts, to the resident heirs of individuals killed in the course of employment.[4] In view of these circumstances, the United States and Italy sought, by a convention concluded February 23, 1913, to broaden the scope of the existing treaty of commerce and navigation of 1871, so as to cover this situation.[5] The attempt was fairly successful.[6]

[1] See, for example, Maiorano *v.* Baltimore & Ohio R. R. Co., 213 U. S. 175; Patsone *v.* Pennsylvania, 232 U. S. 138; Heim *v.* McCall, 239 U. S. 175.

[2] In this connection, see Mr. Adee, Acting Secy. of State, to the Italian Ambassador at Washington, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 670.

[3] See, for example, Maiorano *v.* Baltimore & Ohio R. R. Co., 213 U. S. 175, where it was correctly held that the provisions of the treaty with Italy, of 1871, did not confer upon the non-resident alien relatives of a national of Italy a right of action for damages for his death in Pennsylvania, although such an action was afforded by a statute of that State to native resident relatives, when the statute as construed by the highest court of that State did not give to non-resident alien relatives such a right.

[4] See discussion between the Department of State and the Italian Embassy at Washington, respecting the Maiorano case in For. Rel. 1909, 391–393, and *id.*, 1910, 657–673.

[5] See convention with Italy, of Feb. 25, 1913, Charles' Treaties, 442, to the effect that "The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

[6] It may be observed that within recent years a marked tendency in both Federal and State legislation to refrain from discriminations adverse to non-resident alien beneficiaries has manifested itself. See, for example, the provisions of the Federal Act imposing liability on common carriers by railroads engaged in interstate or foreign commerce, for injuries to employees from negligence, as set forth in Act of April 22, 1908, 35 Stat. 65–66, and § 9, added April 5, 1910, 36 Stat. 291. See McGovern *v.* Philadelphia & Reading Ry. Co., 235 U. S. 389, where it was held that this Act should be interpreted as applicable to non-resident alien relatives of a decedent.

In certain State legislation, as a means of removing obstacles in the way of

It is believed that, in general, the existing treaties of commerce concluded by the United States with European powers in the course of the nineteenth century have in certain respects ceased to be responsive to the legitimate needs of the nationals of the latter residing in American territory. Nor have the requirements of international law imposed restraints sufficient in fact to protect such individuals from essentially harsh treatment, either resulting from, or in spite of, technically flawless enactments.

A State may reasonably exercise a rigid control over the practice of learned professions within its territory. Thus, it may prescribe tests of the fitness of persons to be permitted to practice, and that regardless of their nationality. Unless restrained by treaty, it may not unlawfully discriminate against aliens. Nor is it under any obligation to accept as assurances of fitness the degrees issued by foreign institutions of learning, and especially certificates emanating from those not operating under governmental supervision or enjoying local official recognition. The territorial sovereign must be free to establish for itself the extent and mode of recognizing the attainments of persons trained in foreign countries. The United States has necessarily acknowledged the propriety of the application of this principle with respect to Americans seeking to practice a learned profession in a foreign State. It has demanded, however, that governmental regulations be applied impartially to American residents, and without discrimination favorable to those of other alien nationalities.[1]

judicial interpretation, it has been expressly declared that non-resident alien relatives should not be excluded from benefits provided. See, for example, Wisconsin Statutes, 1915 ed., Chap. 178, Section 4256, where it is declared that "a nonresident alien surviving wife and minor children shall be entitled to the benefits" of the section.

[1] Mr. John Davis, Acting Secy. of State, to Mr. Matthews, Consul at Tangier, Aug. 11, 1883, 108 MS. Inst. Consuls, 82, Moore, Dig., II, 182; Mr. Frelinghuysen, Secy. of State, to Mr. Wallace, Minister to Turkey, March 27, 1884, For. Rel. 1884, 553, Moore, Dig., II, 183; Mr. Bayard, Secy. of State, to Mr. Chase, Aug. 3, 1886, 161 MS. Dom. Let. 134, Moore, Dig., II, 181; also case of expulsion of Paul Edwards from Belgium in 1900, For. Rel. 1900, 45–53, Moore, Dig., IV, 93–94.

Concerning the requirements of certain foreign States respecting the practice of medicine within their respective territories, see documents cited in Moore, Dig., II, 181–184. For the laws of the Argentine Republic, For. Rel., 1905, 35–38; *id.*, 1906, I, 11.

The convention relating to the practice of the liberal professions, signed at the Second Pan-American Conference at Mexico, Jan. 28, 1902, Moore, Dig., II, 184, was the subject of a resolution of approval and confirmation at the Third Pan-American Conference at Rio de Janeiro, Aug. 22, 1906. For. Rel. 1906, II, 1609–1610.

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§ 205. Taxation.

In levying taxes to defray the expenses of government, no duty is imposed upon a State to leave unburdened either property owned by aliens, or persons who may themselves be aliens.[1] Nor does any principle of international law forbid the territorial sovereign to impose, in some instances, a heavier burden upon the interests of such individuals than is placed upon those of its own nationals.[2] The existing practice of enlightened States in so far as it is manifested by conventional arrangements tends, however, to place aliens generally upon an equal footing with nationals.[3] Save in cases indicating a marked abuse of power, or a disregard of the terms of a treaty, the United States does not appear to find in the taxation of its nationals or of their property abroad reasons for diplomatic remonstrance or interposition.[4]

A State may doubtless wrongly determine that persons or property within its territory is subject to taxation. Thus, it may, for example, attempt to impose a tax on the person of an alien who is in no sense a permanent resident within its domain. Or it may endeavor to tax tangible property as such which happens to be merely temporarily therein and which belongs elsewhere.[5]

[1] Mr. F. W. Seward, Acting Secy. of State, to Mr. Acosta y Foster, April 8, 1878, 122 MS. Dom. Let. 403, Moore, Dig., II, 56; Mr. Cadwalader, Asst. Secy. of State, to Mr. Melizet, Mar. 16, 1875, 107 MS. Dom. Let. 172, Moore, Dig., IV, 20; Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., IV, 21; Mr. Evarts, Secy. of State, to Mr. Kasson, Minister to Austria-Hungary, Jan. 17, 1880, MS. Inst. Austria-Hungary, III, 80, Moore, Dig., II, 56. See, also, Frantz's Appeal 52, Pa. St. 367. With respect to Forced Loans and War Taxes, *cf.* Neutral Persons and Property within Belligerent Territory, *infra*, §§ 630, 631.

[2] See, for example, Act 130 of the Louisiana law of July 11, 1894, imposing an inheritance tax of ten per cent. on the value of all successions passing to non-resident aliens. Acts passed by the General Assembly of the State of Louisiana, regular session, 1894, p. 165. See, also, E. M. Borchard, Diplomatic Protection, 95–96, § 41.

[3] The following Articles of treaties of the United States may be noted: Art. X treaty with the Argentine Republic (Confederation), July 27, 1853, Malloy's Treaties, I, 23; Art. VII convention with France, Feb. 23, 1853, *id.*, 531; Art. I treaty with Japan, Feb. 21, 1911, Charles' Treaties, 77; Art. II treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1701; Art. II treaty with Serbia, Oct. 14, 1881, *id.*, 1614. See, also, provisions contained in Art. IV of the treaty with China of Oct. 8, 1903, Malloy's Treaties, I, 263; award of Hon. Wm. R. Day, Arbitrator in the matter of the claims of John D. Metzger & Co., against the Republic of Haiti, For. Rel. 1901, 264, 272–276.

[4] Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., II, 63, 64; see, also, Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 25, April 1?, 1878, MS. Inst. Haiti, II. 143, Moore, Dig., IV, 23.

[5] See, in this connection, an illuminating paper by Joseph H. Beale, entitled "Jurisdiction to Tax", *Harv. Law Rev.*, XXXII, 587.

It must be clear that the right of the territorial sovereign to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him. Internationally, a sufficient relationship always exists between the State and its national, and that regardless of his residence.[1] It will be observed, however, that circumstances other than nationality may also suffice to create the necessary relationship. It must be equally clear that the right of the territorial sovereign to tax property as such depends upon its having such a connection with the taxing State as to justify the conclusion that it is an asset belonging thereto, protected by its power and from which contribution should be made to support the government. These fundamental principles require constant recognition. The extent to which they have met with judicial approval in the United States in certain cases of a domestic (rather than an international) character may be noted.

In general, all immovable property within the territory of a State, regardless of the residence or nationality of the owner, is, with a few notable exceptions which are explainable on precise grounds,[2] subject to taxation;[3] likewise, all movable property therein, provided it may be fairly regarded as incorporated in the mass of property there belonging.[4] Difficulties may arise

[1] Thus no international problem arises if a State endeavors to tax personally a non-resident national and to collect what is levied against him out of his property found within its territory. In case no such property is there to be found, all diplomatic protection may be withheld from such a national who declines to pay what is assessed against him. The imposition of such a penalty is hardly a matter of international concern.

It may be observed that the Income Tax Law of Sept. 8, 1916, contemplated the taxation generally of every "citizen" as well as "resident" of the United States. 39 Stat. 756.

Cf., United States *v.* Bennett, 232 U. S. 299, in which the constitutionality of § 37 of the Tariff Act of 1909, imposing a tax on foreign-built yachts, was upheld, and the law applied to a yacht owned by an American citizen but which had not been within the jurisdiction of the United States during any part of the period for which the tax was levied.

[2] The property owned by a foreign government and used as its embassy or legation may be noted as an exception. Concerning the taxation of diplomatic officers, *infra*, § 440; concerning that of consular officers, *infra*, § 472.

[3] See, for example, Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224. Conversely, a State cannot lawfully tax immovable property in a foreign country. Mr. Root, Secy. of State, to Mr. Leishman, American Minister to Turkey, Feb. 27, 1906, For. Rel. 1906, II, 1408.

[4] *Cf.* how this principle has been worked out and applied, for example, in Hays *v.* Pacific Mail Steamship Co., 17 How. 596; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; Blackstone *v.* Miller, 188 U. S. 189; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194; Ayer & Lord Tie Co. *v.* Kentucky, 202 U. S. 409; New York Central Railroad *v.* Miller, 202 U. S. 584; Union Tank Line Co. *v.* Wright, 249 U. S. 275. Also *cf.* Beale's Cases on Conflict of Laws, III, Summary, § 35; Lorenzen's Cases on Conflict of Laws, 291, note; *Harvard Law Rev.*, XX, 138, note.

in ascertaining whether a particular chattel falls within such a category, and is to be so regarded. Normally, the problem is oftentimes one of fact rather than of law. It has been held, however, that a vessel having no permanent location within another State of the Union, possesses an artificial *situs* for purposes of taxation at the domicile of the owner.[1] It is acknowledged that moneys, notes and evidences of credit may be taxed in the State where they are employed and found, irrespective of the legal home of the owner.[2] It has been declared, however, that the mere presence of notes within a State which is not the domicile of the owner does not bring the debts of which they are the written evidence within the taxing power of that State.[3]

§ 206. The Same.

The domicile of an individual within its limits has been deemed to justify a State in taxing him upon shares owned by him in foreign corporations doing no business within its territory, on the theory that such intangible interests of the shareholder may be justly regarded, for purposes of taxation, as belonging to, or having a so-called *situs* within, the State of the domicile.[4] Again, it is declared to be the right of a State to tax a person domiciled within its territory, on moneys derived from business in a foreign State and deposited with a bank therein. Such a tax appears to be regarded as one of a personal character, rather than as a tax on property.[5]

Doubtless the foregoing principles would be judicially applied in the United States to property owned by aliens as well as nationals. It is unlikely that in American tribunals, the additional element of the foreign nationality of the owner would be deemed to lessen the reasonableness of a tax, otherwise sustainable on the theory of domicile, as in the case of a pure chose in action, or on the theory of the place of abiding, in the case of corporeal property.

[1] Southern Pacific Co. *v.* Kentucky, 222 U. S. 63, where the principle stated in the text was applied to ships owned by the Plaintiff in Error, itself incorporated in Kentucky, when the vessels were enrolled at the port of New York, engaged in the Atlantic coastwise trade, and had never touched at any Kentucky port. They were deemed to be taxable in Kentucky as the property of a Kentucky corporation.

[2] New Orleans *v.* Stempel, 175 U. S. 309; Metropolitan Life Ins. Co. *v.* New Orleans, 205 U. S. 395; Burke *v.* Wells, 208 U. S. 14; De Ganay *v.* Lederer, 250 U. S. 376, where the property was owned by a non-resident alien.

[3] Buck *v.* Beach, 206 U. S. 392.

[4] Hawley *v.* Malden, 232 U. S. 1; also Darnell *v.* Indiana, 226 U. S. 390; Kidd *v.* Alabama, 188 U. S. 730.

[5] Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54.

Difficulties which have perplexed American courts in determining where property of various kinds may be lawfully taxed as such have commonly been of an essentially domestic nature; and if the effort to find the solution has at times betrayed confusion of thought, or apparent inconsistency, probably the result although commonly favorable to the assertion of the taxing power by the territorial sovereign, has not been one which would be regarded by foreign States when applied to property of their nationals as internationally illegal.[1]

A State may lawfully tax all persons as such who, regardless of their nationality, have, by reason of the closeness of their connection with its territory, established such a relationship with it as to justify the inference that they are residents thereof.[2] Such a relationship does not require the acquisition of a domicile as that term is understood either in America or England. It is founded rather on the sheer fact of residence.[3] Thus, an American citizen who had satisfied every requirement of the common law for the retention of a legal home in American territory, might still, in consequence of long-continued residence in a foreign country, be there subjected not unreasonably to the payment of an income tax.[4]

[1] These difficulties seem to have been due in part, first, to the belief that corporeal property is, under any circumstances, taxable as such in a place where it is not to be found, and where, in consequence, it can not be levied upon, and secondly, to the belief that although notes and other evidences of indebtedness may be treated as chattels and taxed accordingly as such, there remains between them and the domicile of the owner a peculiar relationship serving at times to restrict the State where they are found in dealing with them as assets belonging within its domain, and at others, to extend the theoretical control of the State of the domicile over them as though they were in fact within its limits. See, in this connection, dissenting opinion of Mr. Justice Day, in Buck *v.* Beach, 206 U. S. 392, 409. It is believed that tangible property, embracing all that possesses a corporeal character, is to be taxed as such only where it is to be found and can be levied upon; and that difficulties in determining whether it strictly belongs where it is found, hardly justify recourse to a fiction even as a means of preventing property to escape taxation altogether.

It is probable, however, that as a practical matter, any objections on such a score which might be raised by an aggrieved foreign State, could be met substantially by the suggestion that the particular tax imposed was of a personal character rather than a tax on property, and that the connection of the owner with the domain of the territorial sovereign sufficed to subject him to the imposition of it.

[2] Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., II, 63, 64.

[3] This is well illustrated by the exaction by Japan of an income tax from foreign missionaries. For. Rel. 1900, 760–762; see, also, Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, Nov. 21, 1874, For. Rel. 1875, I, 488–489; Moore, Dig., II, 58–60. *Compare* the attempt of the authorities of Frankfort-on-the-Main, in 1887, to levy an income tax on Mrs. S. R. Honey, the wife of an American citizen, domiciled in the United States, For. Rel. 1888, I, 623, 630, 642, 650, 655, Moore, Dig., II. 60–61.

[4] Memorandum of law officer of Department of State, March 1, 1909, For.

Personal taxes levied upon individuals subject thereto may assume a variety of forms. When they are levied upon aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in a broad sense uniform and general in its operation. Such individuals may be subjected, for example, to the payment of a poll tax,[1] or of an income tax;[2] and in the latter case the tax may doubtless be assessed according to the amount of income from whatsoever source derived, and whether or not from assets outside of the taxing State.[3] It may be doubted, moreover, whether any rule of international law forbids discrimination on grounds of alienage. When a tax is levied upon the income of a non-resident alien, it is obviously in the nature of a tax upon his property within the control of the territorial sovereign rather than a personal tax.[4]

According to American opinion the State of the domicile of a decedent may tax the succession to the *universitas* as incidental

Rel. 1909, 285. *Compare* Mr. Porter, Acting Secy. of State, to Mr. Emmet, June 8, 1885, For. Rel. 1885, 848, Moore, Dig., IV, 22, where the statement as to principle is believed to place undue stress upon domicile.

[1] Opinion of Justices, 7 Mass. 523; Opinion of Justices, 8 N. H. 573; Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65.

[2] Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, Nov. 21, 1874, For. Rel. 1875, I, 488–489, Moore, Dig., II, 58–60. As to the procedure to be followed by an American citizen abroad who alleges that he is not properly liable to the exaction of an income tax in the country of his sojourn, *cf.* Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 31, 1899, For. Rel. 1899, 50; Moore, Dig., II, 61; also, Mr. Bayard, Secy. of State, to Mr. Honey, Mar. 21, 1887, For. Rel. 1888, I, 631, Moore, Dig., II, 61, note.

See Memorandum of the Solicitor of the Department of State, on the payment of income taxes by American Consular Officers in Great Britain, March 1, 1909, For. Rel. 1909, 285; correspondence with Germany in 1906, concerning the exemption of American citizens in the territory of that Empire from the payment of church taxes, For. Rel. 1906, I, 658–660; correspondence with Haiti in 1907, respecting the requirement of that State compelling foreign firms to take out retail licenses in lieu of the enforcement of the Haitian tax law of 1876, For. Rel. 1907, II, 728–742.

In 1910, the Department of State, noting that several European Powers opposed the collection of a supplemental income tax from foreigners engaged in business in Bulgaria, on the ground that by the operation of the capitulations existing under the Turkish régime which were "still in force in Bulgaria", the government of that country lacked the right to enforce the collection of any new taxes upon foreign residents without the consent of their respective governments, gave its approval to representations made by the American Chargé d'Affaires, that American citizens be accorded the same treatment as that applied to other foreigners engaged in business in Bulgaria. For. Rel. 1910, 128.

[3] Foreign Relations 1900, 760–762.

[4] Thus, according to the Act of Sept. 8, 1916, 39 Stat. 756, provision was made for the taxation upon the entire net income received in the preceding calendar year from all sources within the United States "by every individual, a non-resident alien, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise." See, in this connection, De Ganay *v.* Lederer, 250 U. S. 376, sustaining a tax under the Income

to the *persona* of the decedent.[1] This principle would doubtless be applied in the case of an alien who had established a legal home in the United States. It could not, however, logically be applied where an alien decedent, although residing therein, was acknowledged to have retained a legal home in the country of his nationality. It is the power of the State of the domicile to control the succession as such in connection with the probate of the estate of a decedent which justifies the claim of that State to tax the succession. On the other hand, it is judicially declared that the power of a State to control the transfer of the assets of the estate of a decedent within its domain at the time of his death, embracing both chattels and debts due the decedent (when the debtors are within its reach), justifies it in taxing the transfer which in legal contemplation is subject to its control.[2] Obviously this principle is applicable in the case of the estate of a non-resident regardless of his nationality.[3]

Tax Law of Oct. 3, 1913, upon the income from certain stocks, bonds, and mortgages owned by a non-resident alien, and in the hands of his agent in the United States.

It should be observed that according to the Act of Oct. 3, 1917, 40 Stat. 337, it was declared that the existing Income Tax Law should not be construed as taxing the income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to foreign governments.

[1] Frothingham *v.* Shaw, 175 Mass. 59; Eidman *v.* Martinez, 184 U. S. 578; Blackstone *v.* Miller, 188 U. S. 189, 204; Bullen *v.* Wisconsin, 240 U. S. 625, 631, where it was said by Mr. Justice Holmes in the course of the unanimous opinion of the Court: "As the States where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock." See, also, Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 59.

[2] Blackstone *v.* Miller, 188 U. S. 189, 205, where it was said: "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax."

[3] It is not believed that a local statute imposing a higher duty on legacies made to non-resident aliens than upon those to residents of the State necessarily violates any requirement of international law. See Mager *v.* Grima, 8 How. 490, where a statute of Louisiana imposed a tax of ten per cent on legacies, when the legatee was neither a citizen of the United States, nor domiciled in Louisiana. *Cf.*, also, Frederickson *v.* Louisiana, 23 How. 445. Treaty provisions may, however, raise obstacles, especially where the property concerned is land and is devised to non-resident aliens. See, for example, Succession of Rixner, 48 La. Ann. 552, Moore, Dig., IV, 24; McKeown *v.* Brown, 167 Iowa, 489. It should be observed, however, that the contractual limitations established by treaty may be "manifestly intended not to control or limit the right of either of the governments to deal with its own citizens and their property within its borders", but rather be "solely intended to restrict the power of both of the governments to deal with citizens of the other and their

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§ 207. Customs.

In order to protect its revenues and its industries, as well as the morals of the inhabitants of its domain, a State may control and regulate imports into its territory, and in so doing, apply such restrictions as it may see fit.[1] Incidentally, the territorial sovereign may impose appropriate penalties upon persons who unlawfully attempt to violate its prohibitory laws. Such penalties may assume the form of the confiscation of articles of which the importation is forbidden, or the fine or imprisonment of an offender.[2]

Tonnage duties may be levied on vessels from foreign ports,[3] or upon foreign vessels; while additional duties may be charged upon articles imported in foreign vessels.[4] The alien ownership of an article may also be the ground for the imposition of a duty. In practice, however, it is the foreign origin or means of transportation, rather than the foreign ownership of property, which commonly affords the basis of the exaction of duties.

A State may also levy discriminating duties, that is, "duties in excess of what would be charged, in the particular country, on one of its own vessels and the cargo imported in it." [5] It has been

property within its dominions." Opinion of Chief Justice White in behalf of the Court in Petersen *v.* Iowa, 245 U. S. 170, 173, *affirming* In re Estate of Anderson, 166 Iowa, 617; Duus *v.* Brown, 245 U. S. 176, *affirming* In re Estate of Peterson, 168 Iowa, 511. *Contra*, In re Stixrud's Estate, 58 Washington, 339, 109 Pac. 343.

[1] Mr. Fish, Secy. of State, to Mr. Williamson, Minister to Central America, Feb. 15, 1875, MS. Inst. Costa Rica, XVII, 232, Moore, Dig., II, 66; Mr. Hay, Acting Secy. of State, to Mr. Chen Lan Pin, Aug. 23, 1880, For. Rel. 1880, 304, 305, Moore, Dig., II, 72, 73.

[2] See, for example, provisions of the Act of Oct. 3, 1913, with reference to the forfeiture of obscene books, lottery tickets, etc., sought to be imported into the United States, and also the penalties imposed by the Act upon an officer, agent or employee of the Government, knowingly aiding or abetting the violation of the law prohibiting the importation of such articles. 38 Stat. 194 and 195.

See Mr. Blaine, Secy. of State, to Mr. Bingham, M. C., Jan. 11, 1890, 176 MS. Dom. Let. 86, Moore, Dig., II, 68. Also For. Rel. 1901, 252–260, concerning complaint by a naturalized American citizen of the confiscation by Guatemala of silver belonging to him. Moore, Dig., II, 69.

[3] Report of Mr. Bayard, Secy. of State, to the President regarding Section 14 of the Act of June 26, 1884, and the Act of June 19, 1886, relative to the imposition of tonnage and lighthouse dues on vessels from certain foreign ports or places, and the suspension of the collection thereof, Jan. 14, 1889, For. Rel. 1888, II, 1857–1864, Moore, Dig., II, 74. See, also, Section 36, Tariff Act of Aug. 5, 1909, on Imports into the United States.

[4] See, for example, the discriminating duty on goods imported in foreign vessels, in the Act of Oct. 3, 1913, 38 Stat. 195, and the limitations with respect to its application. Also, Mr. Hay, Acting Secy. of State, to Mr. Chen Lan Pin, Aug. 23, 1880, For. Rel. 1880, 304, 305, Moore, Dig., II, 72, 73.

[5] J. B. Moore, Principles of American Diplomacy, 1918, 172.

declared that since the Act of Congress of May 24, 1828, the United States has made "a standing offer . . . for the reciprocal abolition of all discriminating duties, without regard to the origin of the cargo or the port from which the vessel came." [1] Arrangements in pursuance of this Act have been effected by treaty,[2] and by executive proclamation suspending the collection of discriminating charges.[3]

No rule of international law prevents a State from entering into reciprocal commercial arrangements with any other, providing, for example, for a reduction in the existing tariff rate on special articles to be imported into the territory of one of the contracting parties from that of the other; [4] or from concluding a treaty giving to a particular State certain privileges of importation which, by the terms of the agreement, are not to be conceded to any other.[5]

The suddenness of the change of the tariff laws of a State does not necessarily justify complaint by foreign powers whose nationals may be thereby adversely affected. That the territorial sovereign may at any time exercise the right to amend its tariff, is always to be anticipated.[6] The situation is otherwise, however, where a State has given any class of aliens special reason to believe that no change is to be anticipated within a certain period of time. The United States has, under special circumstances, protested against the repeal of such laws without reasonable notice.[7] Ar-

[1] J. B. Moore, Principles of American Diplomacy, 1918, 173. For the Act of May 24, 1828, see 4 Stat. 308, Rev. Stat. § 4228. The Act as amended July 24, 1897, 30 Stat. 214, specified the conditions upon which the President might suspend discriminating duties. See, in this connection, Moore, Dig., II, 70–72.

[2] See, for example, commercial arrangement between the United States and Germany, July 10, 1900, in conformity with the Customs Act of the United States, of July 24, 1897, Malloy's Treaties, I, 558; Arts. VII and VIII of treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1703.

[3] Mr. Hay, Acting Secy. of State, to Mr. Chen Lan Pin, Aug. 23, 1880, For. Rel. 1880, 304, Moore, Dig., II, 72.

[4] Commercial convention with Cuba, of Dec. 11, 1902, and approved by Act of Congress of Dec. 17, 1903, Malloy's Treaties, I, 353. See United States *v.* American Sugar Refining Co., 202 U. S. 563, in relation to the date when the agreement took effect.

[5] Commercial agreement with the Hawaiian Islands, Jan. 30, 1875, Malloy's Treaties, I, 915.

[6] Thus, the Tariff Act of Aug. 5, 1909, 36 Stat. 118, provided, in Sec. 42, ·nt except as otherwise therein specially provided, the Act should take ef' ; day following its passage. See Mr. Adee, Acting Secy. of State, to rniss, Minister to Haiti, Sept. 22, 1906, For. Rel. 1906, II, 883.

[7] Mr. Frelinghuysen, Secy. of State, to Mr. Hall, Minister to Central America, Aug. 20, 1884, For. Rel. 1884, 41, Moore, Dig., II, 67; also, case in Guatemala referred to in correspondence contained in For. Rel. 1888, I, 159–163, Moore, Dig., II, 68. See objections made by the United States in 1910, and 1911, to the levying by Germany of an export duty on potash salts, For. Rel. 1911, 198–243.

bitrary action in the exaction of duties from aliens may, as in any case of the harsh treatment of such individuals, afford just ground of complaint in their behalf.[1]

(e)

§ 208. Industrial Property.

A State is free to fix the process by which rights of industrial property may be acquired within its territory, and also to determine what persons may enjoy the privilege of acquiring them.[2] In the absence of treaty, there may doubtless be lawful discriminations against aliens. The territorial sovereign is not obliged to issue patents for inventions or designs to the nationals of a foreign State, or to permit them to register trade-marks. Strongest reasons of policy may, however, prevent the exercise of this prerogative. The legislation of the United States, with respect to patents for inventions and designs, has extended its benefits to the inventors of every nationality, without reference to treaties.[3]

The existing statutory law provides that the owner of a trademark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided he be domiciled within the territory of the United States, or reside in or be located

[1] Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Oct. 23, 1906, For. Rel. 1906, II, 891; Mr. Fish, Secy. of State, to Gen. Sickles, Minister to Spain, March 21, 1873, For. Rel. 1873, II, 932, Moore, Dig., II, 319; Mr. J. Davis, Acting Secy. of State, to Mr. Hamlin, Minister to Spain, Sept. 4, 1882, For. Rel. 1882, 478, Moore, Dig., II, 319; Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, Jan. 31, 1883, MS. Inst. Mexico, XX, 568, Moore, Dig., II, 323; Same to same, Feb. 20, 1883, For. Rel. 1883, 625, Moore, Dig., II, 324. See objections of Mr. Evarts, Secy. of State, in 1879, to certain Haitian consular charges in the United States "so considerable as virtually to be an export tax", in despatches to Mr. Preston, Haitian Minister, Jan. 22, 1879, and to Sir E. Thornton, British Minister, July 14, 1879, contained respectively in For. Rel. 1879, 586 and 501, Moore, Dig., II, 320 and 322.

[2] See, for example, with respect to patents, Mr. Frelinghuysen, Secy. of State, to Mr. Mann, Dec. 27, 1884, 153 MS. Dom. Let. 515, Moore, Dig., II, 34; also Mr. Bayard, Secy. of State, to Mr. Avery, May 4, 1887, 164 MS. Dom. Let. 78, Moore, Dig., II, 34.

[3] Rev. Stat., § 4886, amended March 3, 1897, 29 Stat. 692, U. S. Comp. Stat. 1918, § 9430; also Rev. Stat., § 4929, amended May 9, 1902, 32 Stat. 193, U. S. Comp. Stat. 1918, § 9475.

Cf. Mr. Bayard, Secy. of State, to Mr. Herbert, British Chargé, Jan. 18, 1889, MS. Notes to Great Britain, XXI, 38, Moore, Dig., II, 42, 43; also memorandum from the American Ambassador to the German Government, Oct. 19, 1894, For. Rel. 1895, I, 529, Moore, Dig., II, 40.

See, also, agreement by exchange of notes June 22 and June 26, 1906, between the United States and Denmark, in which it was formally declared that "under the laws of the United States, it is not necessary, in order to secure the protection of Danish industrial designs or models, that the articles they represent shall be manufactured in the United States." For. Rel. 1906, I, 533.

in any foreign country, which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration of such trade-mark, by complying with certain specified requirements.[1]

The United States adhered to the Convention for International Protection of Industrial Property, concluded at Paris, March 20, 1883,[2] and was a party to the Additional Act concluded at Brussels, December 14, 1900.[3] It was also a party to the Industrial Property Convention of June 2, 1911, and to the final protocol of that date.[4] According to the international arrangement established thereby, the nationals of the contracting parties are accorded the right to enjoy in all of the other countries of the Industrial Union, "with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages which the respective laws now grant or may hereafter grant to the citizens of that country." [5] It is provided also that nationals of States which do not form part of the Union, who are domiciled or own effective and *bona fide* industrial or commercial establishments in the territory of any of the countries of the Union, are to be assimilated to the subjects or citizens of the contracting parties.[6]

[1] Act of Feb. 18, 1909, 35 Stat. 628, U. S. Comp. Stat. 1918, § 9485. According to the Act of Feb. 20, 1905, 33 Stat. 725, U. S. Comp. Stat. 1918, § 9488, the applicant for registration, or for renewal of registration of a trade-mark, "who is not domiciled within the United States", is obliged, before the issuance of a certificate of registration to designate a person residing within the United States for service of process or notice in respect to proceedings affecting the right of ownership of the trade-mark.

Concerning the interpretation of the Act of March 3, 1881, 21 Stat. 502, see Mr. Bayard, Secy. of State, to Mr. Herbert, British Chargé, Jan. 18, 1889, MS. Notes to Great Britain, XXI, 38, Moore, Dig., II, 42; also Mr. Hay, Secy. of State, to the Secy. of the Interior, Nov. 4, 1898, 232 MS. Dom. Let. 466, Moore, Dig., II, 36.

[2] Malloy's Treaties, II, 1935.

[3] Malloy's Treaties, II, 1945; Pelletier, Michel, & Vidal-Naquet, *La convention d'Union pour la protection de la propriété industrielle du 20 mars 1883 et les conférences de revision postérieures*, Paris: 1902.

[4] 38 Stat. 1645 (English translation 1658), Charles' Treaties, 367. Concerning the interpretation of Art. I of the treaty between the United States and Austria-Hungary of Nov. 25, 1871, see J. & P. Baltz Brewing Co. *v.* Kaiserbrauerei, Beck & Co., 74 Fed. 222; Saxlehner *v.* Eisner & Mendelson Co., 179 U. S. 19.

[5] Art. II. It is declared in the same Article that the nationals of each contracting party shall have in all of the other countries of the Union the same protection as the nationals of those countries, and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the national laws of each State upon its own citizens. It is added that "any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on the members of the Union."

[6] Art. III. According to Art. 286 of the treaty of peace with Germany,

Reasons of policy encourage States to extend the benefits of their copyright laws to aliens. The United States has entered into numerous agreements appropriate to such an end.[1] It became a party to the Copyright Convention concluded at the Fourth International American Conference at Buenos Aires, August 11, 1910, providing for the reciprocal recognition of copyrights granted by the signatory States.[2]

The legislation of the United States extends the benefit of copyright to the work of an author or proprietor who is an alien, only when such individual is domiciled within the United States at the time of the first publication of his work; or when the State of which he is a national, either by agreement or law, grants to citizens of the United States the benefit of copyright on substantially the same basis as to its own nationals, or copyright protection substantially equal to the protection secured to a foreign author under the Act of Congress or by treaty; or when that State is a party to an international agreement providing for reciprocity in the granting of copyright, by the terms of which the United States may, at its pleasure, become a party thereto.[3] It is provided that the existence of such reciprocal conditions is to be determined by the President by proclamation made from time to time, as the purposes of the Act may require.[4]

An amendatory Act of December 18, 1919, provided that "all

of June 28, 1919, it was agreed that the convention of June 2, 1911, should again come into effect, as from the coming into force of the treaty, subject to the exceptions and restrictions resulting from the latter. *Cf.*, also, Arts. 306–311 with respect to industrial property.

[1] See, for example, Copyright Convention between the United States and Japan, of Nov. 10, 1905, and correspondence relating thereto, For. Rel. 1906, II, 968–986, Malloy's Treaties, I, 1037; Convention on Literary and Artistic Copyrights, concluded at the Second International American Conference Jan. 27, 1902, Malloy's Treaties, II, 2058.

[2] This convention was ratified by the President, March 12, 1911, and was proclaimed by him July 13, 1914, ratification having been deposited with the Government of Argentina, May 1, 1911, 38 Stat. 1785. See Herbert A. Howell, "International Copyright Relations of the United States", *Yale Law J.*, XXVII, 348.

[3] Act of March 4, 1909, § 8, 35 Stat. 1077, U. S. Comp. Stat. 1918, § 9524. See Report of Mr. Moore, Third Assist. Secy. of State, to the President, June 27, 1891, interpreting the conditions upon which the nationals of foreign States were entitled to the benefits of Section 13 of the Act of March 3, 1891, For. Rel. 1892, 261, Moore, Dig., II, 45. See, also, Bong. *v.* Campbell Art Co., 214 U. S. 236, to the effect that under that section of the Act of 1891, no rights were conferred on the nationals of countries which were parties to a copyright union to which the United States might also become a party, independent of the President's proclamation. See, especially, the language of Mr. Justice McKenna, in the opinion of the Court, *id.*, 248.

[4] See Presidential proclamations contained in "The Copyright Law of the United States of America", Library of Congress, Copyright Office, Copyright Office Bulletin, No. 14, 1919, pp. 39–40.

works made the subject of copyright by the laws of the United States first produced or published abroad after August 1, 1914, and before the date of the President's proclamation of peace, of which the authors or proprietors are citizens or subjects of any foreign State or nation granting similar protection for works by citizens of the United States, the existence of which shall be determined by a copyright proclamation issued by the President of the United States, shall be entitled to the protection conferred by the copyright laws of the United States from and after the accomplishment, before the expiration of fifteen months after the date of the President's proclamation of peace, of the conditions and formalities prescribed with respect to such works by the copyright laws of the United States." [1]

[1] Chap. 11, 41 Stat. 368–369, amending §§ 8 and 21 of the Copyright Act of March 4, 1909.

§ 21 provided that in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the book, should secure to the author or proprietor an *ad interim* copyright, which should have all the force and effect given to copyright by the Act, and should endure until the expiration of four months after such deposit in the copyright office. 41 Stat. 369.

By a proclamation of April 10, 1920 (to take effect as from Feb. 2, 1920), pursuant to the existing statutory law, there was granted to the subjects of Great Britain and the British Dominions, Colonies, and Possessions (with the exception of the self-governing Dominions of Canada, Australia, New Zealand, South Africa and Newfoundland), the protection of the American copyright law of March 4, 1909, and the Acts amendatory thereof. The enjoyment of the rights and benefits of the Copyright Act was conditional upon compliance with the requirements and formalities prescribed by the laws of the United States. Protection was also granted to contrivances, including records, perforated rolls, and other devices by means of which a musical work might be mechanically performed. The proclamation served to put into effect an arrangement which had been proposed by the British Government in August, 1918. An order in council of Feb. 9, 1920, in conformity with the British Copyright Act of 1911, extended copyright protection to works first published in the United States between Aug. 1, 1914, and the termination of the war, which had not been republished prior to Feb. 2, 1920, in the parts of the British Dominions to which the order applied. The enjoyment of rights conferred by the British Copyright Act of 1911, was conditional upon publication of the work in Great Britain not later than six months after the termination of the war, and was to commence from and after such publication. The order in council embraced in its application contrivances by means of which musical works might be mechanically performed, including records, perforated rolls, etc. 41 Stat. (Proclamations) 50. *Cf.* Dept. of State, statement for the Press, April 14, 1920, No. 1.

The British Government in interpreting the expression "termination of the war" as used in the order in council of Feb. 9, 1920, advised the Department of State that the expression as so used was "intended to mean the date of the general termination of the war and not the date of the termination of the war between His Majesty and any particular State", and added that the actual date would be fixed by an order of His Majesty in council, and that if

(f)

Concessions

(i)

§ 209. Monopolies.

In the granting of concessions a State enjoys large discretion. It may at will grant a monopoly, such, for example, as an exclusive privilege to lay and operate a cable, and that, to an alien.[1] In such case no ground of foreign complaint is apparent unless the action of the grantor violates the provisions of a treaty.[2] When the object of a concession is to facilitate the accomplishment of an end which, in the judgment of the territorial sovereign, may be appropriately or best attained through the instrumentality of a single grantee, the creation of a monopoly in favor of an alien who is not a national of a State whose treaty with the grantor provides unconditionally for the enjoyment of the most-favored-nation privileges, is not necessarily conclusive of a breach of the agreement.[3] In such case the real source of grievance is the decision of the territorial sovereign to attain its end by means of a single agency immune from dangers of competition. While the method of choosing or favoring a special concessionaire might, in the particular

it should happen that such date should be in advance of the date of the President's proclamation of peace, the British Government would be prepared to take the necessary steps to vary the order in council of Feb. 9, 1920, by substituting for the expression "termination of the war", a date corresponding to that of the Presidential proclamation. Dept. of State, statement for the Press, July 8, 1920, No. 1.

On December 9, 1920, a proclamation of the President granted to the subjects of Denmark the protection of the American copyright laws. It adverted to satisfactory official assurance given by the Government of Denmark that the Royal decrees of Feb. 22, 1913, issued by virtue of the authority conferred by the Danish Copyright Law of April 1, 1912, extending to American authors the rights and privileges conferred by that law (including reproduction by mechanical instruments and cinematographic representation), were not canceled during the war, and that if protection was granted in the United States to works by Danish authors which had been published during the war, protection in Denmark for American authors would take effect automatically.

[1] Opinion of Atty.-Gen. Griggs, June 15, 1899, 22 Ops. Attys.-Gen., 514, 516; also Opinion of same, 23 Ops. Attys.-Gen., 425, 427.

[2] In a communication from Mr. Foster, Secy. of State, to Messrs. McKesson and Robbins, Nov. 12, 1892, it was declared that while the grant of a monopoly "is inconsistent with American ideas and probably would be prejudicial to American interests, any official protest against it, unless based upon treaty obligations, would necessarily have the appearance of attempting to interfere with the sovereign right of a country to regulate its own export and import trade." 189 MS. Dom. Let. 151, Moore, Dig., II, 77.

[3] *Compare* Mr. Forsyth, Secy. of State, to Mr. Hunter, Chargé to Brazil, Dec. 17, 1834, MS. Inst. Brazil, XV, 15, Moore, Dig., II, 76. See, also, Case of Boston Ice Co. in Colombia, For. Rel. 1888, I, 411, 420, 429; Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 27, 1888, For. Rel. 1888, I, 134, 136, 137, Moore, Dig., II, 76.

case, possibly justify the charge of an unjust discrimination, it is believed that the determination to create a monopoly, even in favor of an alien entitled to no special privileges by virtue of any treaty with his country, would hardly suffice to do so.

Charges of unjust discrimination find better support when concessions are granted which do not purport to be monopolies. This is true, for example, where the grant of special privileges or the right to participate in them, is confined to the nationals of two or more specially favored States. Even in such case, however, the reasonableness of foreign complaint must depend upon the terms of a particular convention between the grantor and the aggrieved State. Thus, the basis of the claim of the United States in 1909, of a right to participate, through American citizens, in a foreign loan to China, to be divided among financial institutions representative of certain powers, was the political and commercial relationship which had been established by treaty in favor of the United States and for the benefit of its citizens.[1]

(ii)

§ 210. Cancellation of Concessions.

In creating a concession the territorial sovereign may prescribe the conditions upon which it is to be operated or enjoyed. Those may, for example, provide that the failure of the grantee to perform certain acts shall serve either automatically to put an end to the concession, or to give the grantor the right to cancel or revoke it at will. In exercising the right of cancellation or revocation, the grantor is obviously obliged to conform to the terms of the agreement.[2] The United States has been confronted with numerous cases where a grantor ignored this obligation and by so doing abused its power.

[1] Respecting the assistance rendered by the Department of State through the medium of the American Legation of Peking, in 1909, to an American group of capitalists to participate in the Hukuang railway loan, see For. Rel. 1909, 144–215; *id.*, 1910, 269–291; Message of President Taft, Dec. 7, 1911, *id.*, 1911, XVII. *Compare* Circular telegram of Mr. Adee, Acting Secy. of State, to the American Embassies at Paris, London, Berlin, St. Petersburg and Tokio, and to the American Legation at Peking, March 19, 1913, For. Rel. 1913, 170.

[2] Relative to the effect of a provision in a concession to an alien that all questions arising therefrom, and not amicably settled by the contracting parties, shall be adjusted by the courts of the grantor's State, and that no recourse shall be had to diplomatic interposition, see Senate Doc. No. 413, 60 Cong., 1 Sess., 79–85; letter of John W. Foster to S. M. Cullom, Chairman of Senate Committee on Foreign Relations, April 14, 1908, concerning Venezuelan claims, 9–17; Moore, Dig., VI, 293–309, and documents there cited; *cf.* Claims, *infra*, § 304.

Whether a territorial sovereign has cause for canceling or revoking a concession, and whether the means employed by it in pursuing such a course are legitimate, raise questions which, in the event of disagreement between the grantor and the grantee, should normally be adjusted by judicial process.[1]

(g)

§ 211. The Landing and Protection of Submarine Cables.

A State may lawfully exercise complete control of the landing of submarine cables on its shores. Without its consent the effecting of such a landing amounts to illegal conduct.[2] Consent need not be given save on terms which the territorial sovereign itself regards as equitable.[3] If the landing of a cable is effected without its permission or otherwise against its will, that sovereign may fairly prohibit the operation of the line until the conditions which it deems necessary to impose are accepted and observed.[4]

It is not unreasonable for a State to withhold consent to the landing of a cable on its shores until assured that its use, whether directly or indirectly as a part of a foreign system, will not serve to establish a domestic or foreign monopoly in the transmission of messages to foreign territory.[5] With the increasing use of

[1] *Cf.* For. Rel. 1905, 124–135, relative to cancellation of the American China Development Company's Canton-Hankau Railway Concession.

[2] See opinion of Mr. Richards, Acting Atty.-Gen., to Mr. Sherman, Secy. of State, Jan. 18, 1898, 22 Ops. Attys.-Gen., 13, For. Rel. 1897, 166, Moore, Dig., II, 452. This opinion was affirmed by Mr. Griggs, Atty.-Gen., March 25, 1899, 22 Ops. Attys.-Gen., 408. In support of the proposition stated in the text, Mr. Richards quotes President Grant, Annual Message, Dec., 1875, Sen. Doc. No. 122, 49 Cong., 2 Sess., 70; Mr. Fish, Secy. of State, to Mr. Eckert, Jan. 2, 1877, *id.*, 11, 12; Lacombe, J., in United States *v.* La Compagnie Française des Cables Télégraphiques, 77 Fed. 495, 496; Marshall, C. J., in The Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 136. See, also, Naval War College, Int. Law Situations, 1907, 139–143.

[3] Declared Mr. Bayard, Secy. of State, to Mr. Scrymser, March 7, 1886: "The President has the power to grant or withhold, in his discretion, permission to land a foreign cable on the shores of the United States, and to impose whatever conditions thereon he may deem proper in the public interest, subject to whatever action Congress may take thereon." 159 MS. Dom. Let. 258, Moore, Dig., II, 463, note. As to conditions regarded by the United States as essential, see correspondence in 1899, relative to the landing of a submarine cable by the German-Atlantic Telegraphic Company, For. Rel. 1899, 310–315, Moore, Dig., II, 464–466.

[4] Opinion of Mr. Richards, Acting Atty.-Gen., 22 Ops. Attys.-Gen., 13, 27. The opinion discussed fully the question as to the rights of the Executive in the absence of congressional legislation, to grant permission for the landing of a cable, and adverted to the conflicting views of certain Secretaries of State.

[5] In August, 1920, the United States prevented by means of a naval force the British cable ship *Colonia* from laying a cable within the territorial waters of the United States near Miami, Florida, and which was to be laid from those waters to Barbados, where it was to connect with a British cable line to Brazil.

automatic relays, there is believed to be need of a general agreement to facilitate the transmission, in time of peace, of messages over connecting cables by the elimination of a censorship in foreign territory constituting merely an intervening link in a chain of communications rather than the destination to which intelligence is addressed.

The protection of submarine cables from injury attributable to willful misconduct or culpable neglect has necessarily become a matter of international coöperation.[1] The United States is a party to the International Convention for the Protection of Submarine Cables concluded March 14, 1884.[2]

The President refused to consent to the cable connection between the United States and Brazil (via Barbados) except upon the renunciation by the American owner of the Miami-Barbados cable of its rights to utilize what was deemed to be a monopolistic concession in Brazil acquired by the British owner of the cable between Barbados and Brazil, and with which the American owner had a favorable contract. See allegations contained in Bill of Complaint and Order to Show Cause in case of United States *v.* Western Union Telegraph Company, in the District Court of New York, for the Southern District of New York, In Equity, No. E. 20–269, January, 1921, also memorandum in behalf of the United States, in support of application for a preliminary injunction. It is not understood that in this case the rights of the United States under international law to control cable connections with foreign territory were necessarily involved, but rather the extent of the right of the President as such to exact conditions and exercise control over cable connections in behalf of the nation, and incidently to invoke the aid of a court of equity as against the American corporate owner of a cable with which a connection was sought to be thwarted. On March 11, 1921, the Circuit Court of Appeals affirmed the decision of the District Court refusing the Government a preliminary injunction.

[1] See, generally, concerning the protection of submarine cables: Franz Scholz, *Krieg und Seekabel*, Berlin, 1904; C. Phillipson, Two Studies in International Law, 1908; Victor Perdrix, *Les cables sous-marins et leur protection internationale*, Paris, 1902; Pierre Jouhannaud, *Les cables sous-marins, leur protection en temps de paix et en temps de guerre*, Paris, 1904; Wilson, Submarine Telegraphic Cables in their International Relations, Naval War College, August, 1901; Bibliography in Clunet, *Tables Gén.*, I, 457–458, 879–880; Bonfils-Fauchille, 7 ed., § 583; Rivier, I, 386–387; L. Renault, "*De la protection internationale des cables télégraphiques sous-marins*", *Rev. Droit Int.*, 1 ser., XII, 251; "*La protection des télégraphes sous-marins et Conférence de Paris, Octobre–Novembre, 1882*", *id.*, XV, 17; also *id.*, 619.

See, also, The Cutting of Submarine Telegraphic Cables, *infra*, § 723.

[2] Malloy's Treaties, II, 1949. See provisions of the Act of Feb. 29, 1888, 25 Stat. 41, for the enforcement of the convention, U. S. Comp. Stat. 1918, §§ 10087–10099. The United States is also a party to a Declaration of Dec. 1, 1886, respecting the interpretation of certain Articles of the Convention of 1884; and to a final protocol of July 7, 1887, fixing May 1, 1888, as the date of the taking effect of the Convention. *Id.*, II, 1956, and II, 1958.

Concerning the International Conference of Paris, 1891, see *Documents de la Conférence Télégraphique Internationale de Paris;* published by the International Bureau of Telegraphic Administration, Berne, 1891.

(h)

Police and Other Regulations

(i)

§ 212. Display of Foreign Flags.

That a State may not unlawfully forbid the display of foreign flags within its territory, appears formerly to have been acknowledged by the Department of State. Thus the law of Mexico of 1859, forbidding a foreign consular officer to display his national flag except when the town of his residence was besieged, or mutiny or sedition arose therein, was apparently at one time not regarded by the United States as an arbitrary exercise of power.[1] Moreover, the possession of such a right of a territorial sovereign found some recognition in the consular regulations of the United States, and in its instructions to diplomatic officers.[2]

In 1912, the Department of State declared that the flag of a consul's nation may be displayed by him at all times and not merely on certain holidays; and this was said to be the course followed by American consuls throughout the world, and in accordance with the practice of other nations.[3]

Frequently a state makes no attempt to prevent, or openly consents to the official or unofficial display of foreign flags. In such case any violent or forcible removal of them without previous

[1] Mr. Day, Asst. Secy. of State, to Mr. Barron, Oct. 20, 1897, 221 MS. Dom. Let. 560, Moore, Dig., II, 134–135. *Compare*, Art. XIV of Regulations concerning immunities of consuls, adopted by the Institute of International Law at its session at Venice, Sept. 26, 1896, *Annuaire*, XV, 304, 307; translation in Stowell, Consular Cases and Opinions, 1, 3, J. B. Scott, Resolutions, 126.

[2] Secs. 70 and 73 of Consular Regulations of the United States, 1896, Moore, Dig., II, 134; Instructions to Diplomatic Officers of the United States, 1897, sec. 64, Moore, Dig., II, 134; Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, July 20, 1899, published as enclosure in For. Rel. 1905, 876.

[3] Mr. Knox, Secy. of State, to the Mexican Ambassador at Washington, June 21, 1912, For. Rel. 1912, 903–905, where it was said that since the reason for displaying the flag above the consular premises "as recognized in international law" was, as expressed in the consular treaties of the United States with other countries, "in order that the consular office or dwelling may be easily and generally known for the convenience of those who may have resort to them", a consul would seem to have the right to display his country's flag at all times. Hope was expressed that the Mexican Government would see fit "fully to recognize the rules and principles of international law governing this matter", and to refrain from insisting upon a strict compliance by American consuls with the provisions of the Mexican law of 1859, "thus permitting them to display the American flag in such manner and at such times as their discretion dictates, unless in particular cases some good reason exists and can be shown why this should not be done."

notice is regarded as "a readiness to offend the just sensibilities of the country" to which the emblem belongs.[1]

In 1899, Secretary Hay declared that in countries liable to domestic disturbances and in which they were recurrent, it had become the usage of resident aliens to display their national flag in order to indicate the foreign ownership of property, and thereby to insure its protection.[2] The Department of State appeared to be disposed to favor the continuance of this custom.

A State may be called upon to prevent the display upon its merchant vessels of the national emblem of a foreign power.[3] The United States, although appearing to doubt whether a legal duty attributable to international law is imposed upon a State to prevent the use within its territory of a foreign national emblem for purposes of local advertising,[4] is disposed to urge the coöperation of a foreign territorial sovereign to prevent the abuse within its domain of the American flag in such a way.[5]

An obligation clearly rests upon a State to make reasonable effort to prevent intentional insult to a foreign flag when displayed within its territory and with its consent. When an over-zealous public official, military or civil, is guilty of such an act, his conduct should be disavowed, and the offender subjected to punishment.[6]

[1] Mr. Seward, Secy. of State, to Mr. Molina, Sept. 28, 1863, MS. Notes to Central America, I, 240, Moore, Dig., II, 136.

[2] Mr. Hay, Secy. of State. to Mr. Merry, Minister to Nicaragua, May 8, 1899, For. Rel. 1899, 582, Moore, Dig., II, 136. See, also, correspondence relating to display of foreign flags over private establishments in Haiti in 1903, For. Rel. 1903, 596–597, Moore, Dig., II, 138.

[3] Mr. Sherman, Secy. of State, in a communication to Mr. Storer, Minister to Belgium, Feb. 7, 1898, said: "A line of steamers plying between England and the United States under the British flag has for some years past used the United States union jack as its house flag. Upon inquiry being made by the Ambassador in London the British Board of Trade intervened, in virtue of its authority in matters of shipping and navigation, and I am just informed that the line in question has been constrained to adopt another distinctive house flag." For. Rel. 1898, 159–160, Moore, Dig., II, 137, note. *Cf.* For. Rel. 1904, 101–103, regarding complaint by the American Minister at Rio de Janeiro that a Brazilian line of sailing vessels was using a house flag resembling one of the flags of the United States, also Moore, Dig., II, 138.

[4] See incident relating to use of the American flag for advertising purposes in Belgium in 1897, For. Rel. 1898, 157–162, Moore, Dig., II, 137.

[5] Mr. Wilson, Acting Secy. of State, to Mr. Moses, American Minister to Greece, June 18, 1909 (adverting to a case in Brazil in 1864, mentioned in Moore, Dig., II, 135), For. Rel. 1909, 337, where the attempt was successfully made to enlist the coöperation of the Greek Government in preventing the use by Greeks who had returned from a sojourn in America, of the American flag, in advertisements of saloons and cigar stores.

See, also, For. Rel. 1909, 393–394, with reference to the use of the American flag for advertising purposes in certain cities of Italy, and the coöperation of the Government of that State, notwithstanding the absence of an appropriate local law, in causing a discontinuance of the practice.

[6] Mr. Foster, Secy. of State, to Mr. Patenôtre, French Minister, July 13,

There is believed to be no disposition on the part of enlightened States to pursue under such circumstances a different course.[1]

(ii)

§ 213. Quarantine Regulations.

Save for the general inhibition that no State shall exercise its power arbitrarily with respect to the outside world, the territorial sovereign is subject to slight restraint in establishing quarantine regulations for the protection of the health of the inhabitants of its domain. Thus, for example, it may reasonably demand a rigid inspection of the passengers, crews, and cargoes of all vessels entering its ports; and it may close its ports against vessels proceeding from places believed or known to be infected.[2] Again, a quarantine may be established against animals sought to be imported from countries within which dangerous diseases are prevalent;[3] and also against certain food products such as fruit, coming from places where similar conditions exist.[4]

1892, For. Rel. 1892, 174, Moore, Dig., II, 138; Mr. Adee, Acting Secy. of State, to Viscount de Santo-Thyrso, Portuguese Minister, July 28, 1897, For. Rel. 1897, 433, Moore, Dig., II, 140; Mr. Hay, Secy. of State, to Dr. von Holleben, German Ambassador, Jan. 25, 1900, MS. Notes to German Legation, XII, 398, Moore, Dig., II, 141. See correspondence with Mexico, in November, 1910, For. Rel. 1911, 355–356.

Concerning the action of Colonial authorities at Bermuda in punishing British sailors responsible for hauling down the American flag flying from a hotel at Hamilton, July 4, 1920, and the official regret expressed by British naval authorities, see Dept. of State statement for the Press, July 23, 1920, No. 1.

[1] It may be noted that by the provisions of the so-called Espionage Act of June 15, 1917, 40 Stat. 219, amended May 16, 1918, U. S. Comp. Stat. 1918, § 10212*c*, there were prohibited "when the United States is at war", certain acts profaning or contemptuous of the American flag; and also the willful display of the flag of any foreign enemy.

[2] Report of Colombian Minister of Foreign Affairs, 1894, For. Rel. 1894, 193, 197.

As to the force which a State may not unreasonably employ in order to compel obedience to its port regulations, see treatment accorded the French Steamer *La France* by Brazilian authorities in 1885, Mr. Trail, Chargé at Rio de Janeiro, to Mr. Bayard, Secy. of State, Jan. 21, 1887, For. Rel. 1887, 54, 55, Moore, Dig., II, 144. *Compare*, award in favor of Italy in 1893 against Portugal in the Case of Lavarello, for arbitrary operation of quarantine laws in 1884, Moore, Arbitrations, V, 5021–5034.

See provisions of the existing statutory law of the United States as expressed in U. S. Comp. Stat. 1918, §§ 9155–9165.

[3] Mr. Adee, Acting Secy. of State, to Dr. Vogel, Swiss Legation, Aug. 13, 1896, MS. Notes to Switzerland, I, 412, Moore, Dig., II, 152.

See Circular, by Mr. Knox, Secy. of State, to American diplomatic officers, Feb. 7, 1913, concerning regulations in compliance with the so-called Plant Quarantine Act of Aug. 12, 1912, 37 Stat. 315, in respect to foreign inspection and certification, For. Rel. 1913, 2.

[4] See, for example, order issued by Germany in 1898, prohibiting the importation of American fruit in order to prevent the introduction of the San José scale, For. Rel. 1898, 307–346, Moore, Dig., II, 153.

Foreign States are inclined to make complaint when quarantine regulations are directed against such parts of their territories as may at all times have been free from infection, or in case of the continuance of such regulations as against ports from which the presence of a contagious disease has been completely eradicated.[1]

In the absence of Federal legislation, the laws of the States of the United States, with respect to quarantine, are regarded as normally valid.[2] In the enactment of such laws it is regarded as a constitutional requirement that there be no discrimination against an entire class of persons, such as those of Asiatic races, whether nationals or aliens.[3]

(iii)

§ 214. Pilotage.

A State is doubtless free to impose compulsory pilotage on vessels both foreign and domestic which enter or leave its ports.[4] Opportunity for discrimination in the amount of charges exacted of foreign ships or of those arriving from particular foreign States, is frequently removed by conventional arrangement.[5]

(iv)

Religious Freedom

§ 215. In General.

A State may doubtless exercise a broad control over the religious training and worship of the inhabitants within its territory.[6]

[1] Mr. Madison, Secy. of State, to American Ministers at Paris, London, and Madrid, May 13, 1805, MS. Inst. to American Ministers, VI, 294, Moore, Dig., II, 142; Mr. Foster, Secy. of State, to Mr. de Lôme, Spanish Minister, Oct. 1, 1892, MS. Notes to Spain, X, 669, Moore, Dig., II, 144; Mr. Gresham, Secy. of State, to Mr. Caruth, Minister to Portugal, Sept. 19, 1893, MS. Inst. Portugal, XVI, 36, Moore, Dig., II, 148. Concerning the objection of the Department of State to the absolute exclusion of the mails as a sanitary measure in 1888, see Mr. Bayard, Secy. of State, to Mr. Walker, Chargé at Bogota, April 17, 1888, For. Rel. 1888, I, 422, Moore, Dig., II, 145, and documents cited *id.*, 146.

[2] Louisiana *v.* Texas, 176 U. S. 1, 21, *citing* Morgan Steamship Company *v.* Louisiana Board of Health, 118 U. S. 455.

[3] Wong Wai *v.* Williamson, 103 Fed. 1, 9. See correspondence with Japan in 1900, concerning alleged discrimination against Japanese subjects in the matter of quarantine against the bubonic plague established in San Francisco, For. Rel. 1900, 737–757, Moore, Dig., II, 156–158. *Cf.*, also, Mr. Hay, Secy. of State, to Mr. Takahira, Japanese Legation, Nov. 26, 1901, For. Rel. 1901, 377, Moore, Dig., II, 158.

[4] Homer Ramsdell Co. *v.* La Compagnie Générale Trans-Atlantique, 182 U. S. 406; also The Delaware, 161 U. S. 459. "In the waters of the United States the regulation of pilotage has been left to the legislatures of the several States." Moore, Dig., II, 160.

[5] Art. VII of treaty between the United States and Spain of July 3, 1902, Malloy's Treaties, II, 1703; Art. XI of treaty between the United States and Japan, of Feb. 21, 1911, Charles' Treaties, 80.

[6] Mr. Buchanan, Secy. of State, to the Rev. Mr. Baird, Oct. 22, 1845, 35

States having an established religion or church, at the present time generally accord to resident aliens who may dissent from its doctrines, a large degree of religious freedom. Their privileges are oftentimes expressed in treaties, if not in local laws.[1] So widespread has become the habit of tolerance that any attempt to abridge completely the freedom of worship of a resident alien would now be regarded as contrary to the practice of enlightened States.[2] The possession of an established church may incline the territorial sovereign to forbid the general propagation of doctrines at variance with those of its own, as well as attempts to proselyte.[3] The same circumstance may cause it to restrict the adherents of other persuasions with respect to the location and forms of their places of worship, and also with regard to the scope of the functions of their clergy or representatives.[4]

MS. Dom. Let. 299, Moore, Dig., II, 171; Mr. Fish, Secy. of State, to Mr. Delaplaine, Chargé at Vienna, June 2, 1875. MS. Inst. Austria, II, 352, Moore, Dig., II, 172; Mr. Evarts, Secy. of State, to Mr. Kasson, Minister to Austria-Hungary, May 19, 1879, MS. Inst. Austria-Hungary, III, 13, Moore, Dig., II, 174; Mr. Fish, Secy. of State, to Mr. Seward, Minister to China, May 2, 1876, MS. Inst. China, II, 385, Moore, Dig., II, 175; Count D. Tolstoi, Russian Minister of the Interior, to Mr. Hunt, March 3, 1883, 37 MS. Desp. Russia, Moore, Dig., II, 177; Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, Dec. 5, 1890, MS. Inst. Peru, XVII, 440, Moore, Dig., II, 178.

[1] Art. II of Spanish Constitution, given in despatch of Mr. Collier, American Minister, to Mr. Root, Secy. of State, Feb. 17, 1906, For. Rel. 1906, II, 1351; Law of Bolivia of Aug. 27, 1906, For. Rel. 1906, I, 106.

See, also, Art. IV of treaty between the United States and Spain of July 3, 1902, Malloy's Treaties, II, 1702; Art. XIV of treaty between the United States and Colombia of Dec. 12, 1846, *id.*, I, 306; Art. XIV of treaty between the United States and China of Oct. 8, 1903, *id.*, I, 268.

[2] Mr. Buchanan, Secy. of State, to the Rev. Mr. Baird, Oct. 22, 1845, 35 MS. Dom. Let. 299, Moore, Dig., II, 171; Count D. Tolstoi, Russian Minister of the Interior, to Mr. Hunt, Mar. 3, 1883, 37 MS. Desp. Russia, Moore, Dig., II, 177; Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, Dec. 5, 1890, MS. Inst. Peru, XVII, 440, Moore, Dig., II, 178; Note of Russian Foreign Office to the American Ambassador, Aug. 9 (21), 1895, For. Rel. 1895, II, 1078, Moore, Dig., IV, 111; correspondence between the United States and Germany in 1898 regarding certain Mormon Missionaries, For. Rel. 1898, 347–354, Moore, Dig., IV, 134; Case of Lewis T. Cannon and Jacob Müller, expelled from Prussia in 1900, referred to in Note of Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, Feb. 14, 1901, For. Rel. 1901, 165, Moore, Dig., IV, 135.

[3] Mr. Fish, Secy. of State, to Mr. Delaplaine, Chargé at Vienna, June 2, 1875, MS. Inst. Austria, II, 352, Moore, Dig., II, 172; Mr. Frelinghuysen, Secy. of State, to Mr. Smith, Jan. 27, 1885, 154 MS. Dom. Let. 74, Moore, Dig., VI, 340; correspondence between the United States and Germany in 1898, For. Rel. 1898, 347–354, Moore, Dig., IV, 135.

Concerning the position of the United States in objecting to discrimination against missionaries of the Mormon Society since its abandonment of polygamy, see Mr. Adee, Acting Secy. of State, to Mr. Eustis, Ambassador to France, July 29, 1895, MS. Inst. France, XXIII, 139, Moore, Dig., II, 177; Mr. Uhl, Asst. Secy. of State, to Mr. Doty, U. S. Consul at Tahiti, June 25, 1895, For. Rel. 1897, 124, Moore, Dig., IV, 133.

[4] See despatch of Mr. Collier, Minister to Spain, to Mr. Root, Secy. of

The United States always demands for its own nationals abroad the enjoyment of as large privileges of religious freedom as are accorded the nationals of other States.[1] In all matters relating thereto it uniformly enjoins upon its diplomatic officers and upon its citizens, the duty to exercise a careful regard for the sensibilities of foreign native peoples.[2] However deeply interested in the cause of religious liberty, and however disposed to express friendly suggestions in that regard to other powers,[3] the United States does not undertake to plead the cause of aliens within foreign lands,[4] save in cases where their religious persecution is conceived to be directly injurious to the rights of the nation or of its citizens.[5]

It has been observed that by the terms of the treaty concluded by the Principal Associated and Allied Powers with Poland in June, 1919, arrangement was made for the protection of religious as well as of racial and linguistic minorities in the latter state.[6]

§ 216. American Missionaries in Eastern Countries.

In the Turkish Empire, as a result of the first Capitulations, there occurred what Mr. Engelhardt described as "an abdication . . . of absolute autonomy in religious matters."[7] Nor was

State, of Feb. 17, 1906, concerning the status of non-Catholic religious denominations in Spain, For. Rel. 1906, II. 1351; see, also, Mr. Day, Secy. of State, to the Rev. Mr. Strong, June 3, 1898, 229 MS. Dom. Let. 113, Moore, Dig., II, 178.

[1] Mr. Root, Secy. of State, to Mr. Leishman, Minister to Turkey, Dec. 14, 1905, For. Rel. 1906, II. 1377.

[2] Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Sept. 1, 1899, For. Rel. 1899, 112, Moore, Dig., II, 179; Mr. Fish, Secy. of State, to Mr. Adee, Chargé at Madrid, Dec. 8, 1876, MS. Inst. Spain, XVIII, 52, Moore, Dig., II, 175; Mr. Frelinghuysen, Secy. of State, to Mr. Wallace, Minister to Turkey, Jan. 9, 1884, MS. Inst. Turkey, IV, 77, Moore, Dig., VI, 336; Mr. Bayard, Secy. of State, to Mr. Jackson, July 17, 1885, MS. Inst. Mexico, XXI, 329, Moore, Dig., VI. 337.

[3] Mr. Seward, Secy. of State, to the Rt. Rev. Horatio Potter, Nov. 23, 1866, 74 MS. Dom. Let. 417, Moore, Dig., II, 172; Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Sept. 1, 1899, For. Rel. 1899, 112, Moore, Dig., II, 179.

[4] Mr. Cass, Secy. of State, to Mr. Williams, Oct. 22, 1860, MS. Inst. Turkey, II, 27, Moore, Dig., VI, 333; Mr. Frelinghuysen, Secy. of State, to Mr. Gifford, Dec. 19, 1884, 153 MS. Dom. Let. 470, Moore, Dig., VI, 339; Mr. Day, Secy. of State, to the Rev. Mr. Strong, June 3, 1898, 229 MS. Dom. Let. 113, Moore, Dig., II, 178.

[5] *Supra*, § 55. *Compare*, Mr. Hay, Secy. of State, to Mr. Wilson, Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, Moore, Dig., VI. 362; Mr. Hay, Secy. of State, to American Representatives at London, Paris, Berlin, St. Petersburg, Vienna, Rome, and Constantinople, Aug. 11, 1902, For. Rel. 1902, 42, Moore, Dig., VI, 365.

[6] Treatment of Nationals, *supra*, § 55. See British Treaty Series No. 8, 1919 [Cmd. 223].

[7] Translated from an article entitled "*Le Droit d'Intervention et la Turquie*".

the Porte ever able to regain complete control of what had been relinquished at a time before international law was established. As a result, the United States long denied the right of the Ottoman Government to restrict in various ways the activities of American missionaries there engaged in propagating Christianity. The United States protested, for example, against the closing of established places of worship found to be without an imperial permit, as required under existing, although obsolete laws; it insisted that the conversion of a dwelling house into a chapel or school without the sanction of such a permit did not justify local interference;[1] it complained of the rigor of the censorship of religious literature;[2] it objected to the persecution of Turkish subjects employed by or otherwise connected with American missionary institutions.[3]

In China, the United States acquired, by treaty, rights of religious freedom for American citizens in the domain of that State. Discrimination against native Chinese converts to Christianity has been protested against; indemnification of those persecuted by reason of their faith has been urged; and finally, by treaty the United States has secured assurance of complete protection for such individuals.[4]

Rev. Droit Int., 1 ser., XII, 363, 373, 375, quoted in Moore, Dig., V, 813–814. See, also, Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, April 20, 1887, For. Rel. 1887, 1094, Moore, Dig., V, 802; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831. See, also, *infra*, § 259–261.

[1] Mr. Foster, Secy. of State, to Mr. Thompson, Minister to Turkey, Nov. 29, 1892, For. Rel. 1892, 609, 611–612, Moore, Dig., V, 822; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831; President Harrison, Annual Message, Dec. 6, 1892, For. Rel. 1892, xv, Moore, Dig., V, 823; Mr. Wharton, Acting Secy. of State, to Mr. MacNutt, No. 249, Oct. 1, 1891, For. Rel. 1891, 757, Moore, Dig., V, 832, note.

[2] See documents cited in Moore, Dig., V, 829–830; also correspondence concerning restrictions upon the sale of the Bible contained in For. Rel. 1905, 898–911, and *id.*, 1906, II, 1414–1416.

[3] Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, April 20, 1887, For. Rel. 1887, 1094, Moore, Dig., V, 802; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831; Mr. Gresham, Secy. of State, to Mr. Newberry, Chargé d'Affaires *ad. int.*, May 15, 1893, 632, Moore, Dig., V, 825, note d; Mr. Adee, Acting Secy. of State, to Mr. Terrell, Minister to Turkey, Sept. 6, 1895, For. Rel. 1895, II, 1281–1282, Moore, Dig., V, 827. James Harry Scott, The Law Affecting Foreigners in Egypt, Edinburgh, 1907, Chap. VII, "Religious Protection."

[4] Art. XXIX treaty between the United States and China of June 18, 1858, Malloy's Treaties, I, 220; Art. IV treaty of July 28, 1868, *id.*, I, 235; Art. XIV treaty of Oct. 8, 1903, *id.*, I, 268. See, also, Mr. Denby, Minister to China, to the Tsung-li Yamên, April 9, 1897, For. Rel. 1897, 83, Moore, Dig., V, 459; Mr. Hay, Secy. of State, to Mr. Conger, Minister to China, Oct. 30, 1900, For. Rel. 1900, 224, Moore, Dig., V, 460–461.

(v)

§ 217. Freedom of Speech.

A State may exercise a censorship over what is written and spoken within its territory. No power can justly complain because its nationals within a foreign country are not, in accordance with the local law, permitted to enjoy entire freedom of speech.[1] In countries where liberal forms of government prevail, such a right may be lodged in the people, as in the case of the United States, where it is guaranteed by the Constitution.[2] The Department of State has always denied the existence of any duty on the part of the Government to suppress public utterances regarded as hostile to other friendly States.[3] In its dealings with China, however, where the press is controlled by a governmental censorship as a matter of public police, and where publications in various forms have been circulated which have served to endanger the safety of the lives and property of foreign residents, the United States has frequently requested the suppression of anti-foreign publications.[4]

It is not believed that any duty imposed upon a territorial sovereign to check utterances within its domain proving to be injurious to the safety of a foreign State could be removed by

[1] Mr. Fish, Secy. of State, to Mr. Washburne, March 1, 1873, MS. Inst. France, XIX, 67, Moore, Dig., II, 166.

[2] The First Amendment declares that Congress shall make no law "abridging the freedom of speech, or of the press."

[3] Mr. Seward, Secy. of State, to Blacque Bey, Turkish Minister, Jan. 20, 1869, MS. Notes to Turkey, I, 29, Moore, Dig., II, 164; Mr. Fish, Secy. of State, to Mr. Roberts, Spanish Minister, June 1, 1869, MS. Notes to Spanish Legation, VIII, 280, Moore, Dig., II, 165; Same to Mr. Robb, Feb. 25, 1873, 98 MS. Dom. Let. 12, Moore, Dig., II, 165; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Jan. 7, 1891, MS. Inst. Turkey, V, 194, Moore, Dig., II. 167; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Dec. 4, 1883, MS. Inst. Great Britain, XXVII, 69; same to same, Nov. 24, 1884, *id.*, 349, Moore, Dig., II. 170.

See, also, Mr. Knox, Secy. of State, to the Mexican Ambassador, Jan. 23, 1911, For. Rel. 1911, 393; same to same, June 7, 1911, where it was said: "I need not point out to your excellency that this free speech and freedom of the press are two of the most sacred rights guaranteed by the Constitution of this country; that they are absolutely inviolable rights; and that although it may for a moment appear that such rights should be to a greater or less extent curtailed, a continuous national growth and development of more than a century and a quarter demonstrates beyond the possibility of a doubt that the public intelligence necessary to a firm and permanent stability and progress requires that such rights shall remain inviolate."

[4] Mr. Blaine, Secy. of State, to Mr. Denby, Minister to China, Dec. 3, 1889, MS. Inst. China, IV, 475, Moore, Dig., II, 166. See, also, correspondence with China in 1905, relative to an anti-American boycott in that country, For. Rel. 1905, 204–234, particularly Mr. Root, Secy. of State, to the Chinese Minister, Nov. 14, 1905, *id.*, 232.

virtue of a constitutional provision guaranteeing freedom of speech to the inhabitants. Such an instrument could establish no valid excuse for non-performance of an obligation laid down by international law. As yet there appears, however, no indication that that law charges a State with a duty not to guarantee freedom of speech to those who inhabit its territory.

TITLE C

RIGHTS AND DUTIES OF JURISDICTION

1

RIGHTS OF JURISDICTION

a

§ 218. In General.

The exercise of jurisdiction, that is, of the right of doing justice, requires a decision by a State first, as to the lawfulness or unlawfulness of acts; and secondly, as to the effect to be given to lawful or unlawful acts. These decisions are distinct in kind. The object of the former is to attach a legal quality to an act, and so to establish its character. The object of the latter is to fix the degree of respect to be paid to the legal character already impressed upon an act.

The right to pass upon the lawfulness of an act must necessarily be the exclusive possession of a single sovereign.[1] Otherwise, as has oftentimes been observed, differing legal consequences might be annexed to the same act, rendering it both lawful and unlawful.[2] The right must also, therefore, in every case, belong to that sovereign or political power which exercises control over the place where the particular act is committed.[3] Thus it is that a State may determine the lawfulness of acts committed through-

[1] Declared Mr. Jefferson, Secy. of State, in the course of a communication to Mr. Morris, Minister to France, Aug. 16, 1793: "Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession." Am. State Pap., For. Rel., I, 167, 169. Also *id.*, I, 147–148. See, also, Marshall, C. J., in Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 136; Papayanni *v.* Russian Steam Navigation Co., 2 Moore's Privy Council Cases, N. S., 161; Beale, Cases on Conflict of Laws, I, 87.

[2] Grosscup, J., in Swift *v.* Philadelphia & R. R. Co., 64 Fed. 59, 65; Beale, Cases on Conflict of Laws, III. Summary, § 11.

[3] Holmes, J., in American Banana Co. *v.* United Fruit Co., 213 U.S. 347, 355–357.

out the national domain, whether land or water, or upon its vessels, whenever by reason of their character or position they are regarded as subject to its control. Conversely, a State cannot determine the lawfulness of occurrences in places outside of, or not assigned constructively to, its control.[1]

A State is called upon to determine the effect of the lawfulness or unlawfulness of an act when it has been committed abroad, and a legal or illegal character impressed upon it by a foreign power. In determining the respect to be paid to that character by its own tribunals, the territorial sovereign may not unreasonably exercise wide discretion.[2] A State may, for example, command its national not to commit a particular act in a foreign country. He who in defiance of the prohibition disobeys the command therein, violating no law of that country by so doing, and thereupon returns to his own State, may doubtless be subjected to punishment. In imposing upon him a penalty for disobedience, the aggrieved sovereign does not pass judgment upon the lawfulness of his conduct abroad — which is a foreign fact, but simply declines for reasons of policy to recognize that lawfulness by permitting it to shield the actor from prosecution. On the other hand, the lawful character impressed upon an act by the State within whose territory it occurred, not infrequently receives complete recognition in a foreign country, even though to a similar act there committed a different legal quality would be attached. This is true when, for example, that country has not endeavored to forbid the commission of the particular act in the place where it was committed, and no adverse local policy presents an obstacle.

The law of nations does not always permit a State to disregard the legal or illegal quality of acts committed abroad. This is made obvious when it attempts to question the propriety of conduct committed by an alien in foreign territory, and notably when it endeavors to punish him on account of acts there com-

[1] Rose *v.* Himely, 4 Cranch, 241; The Apollon, 9 Wheat. 362; Le Roy *v.* Crowninshield, 2 Mason, 151; American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 355–357. See, also, Mr. Marcy, Secy. of State, to Mr. Hülsemann, Austrian Chargé d'Affaires, Sept. 26, 1853, H. Ex. Doc. 1, 33 Cong., 1 Sess., 33, Moore, Dig., II, 213.

[2] When the national of a State goes abroad and commits an act in a land where civilization does not prevail, and where there is no territorial sovereign regarded as having the right or power to demand obedience to its will or to impress a legal or illegal quality upon acts, the individual may be said to be subject to the laws of his own State in so far as they are applicable to his conduct. Upon his return to its domain, if it tests the propriety of his conduct by those laws, the question does not arise whether heed should be paid to any foreign local effort to attach a legal quality to his act, because there existed no political power regarded as capable of doing so.

mitted which are not in any way directed against its own safety.[1] The according of recognition to the legal character impressed upon acts by the foreign State within whose territory they were committed tends to check abuses of jurisdiction.

b

§ 219. The Establishment of a Judicial System.

The exercise of jurisdiction requires the establishment of courts of justice as well as of a system of judicial procedure by means of which the general decision of the territorial sovereign concerning both the lawfulness and unlawfulness of acts committed within places subject to its control, and the respect to be paid to lawful or unlawful acts committed abroad, may be enforced. In the establishment and maintenance of its judicial system it will be seen that a State enjoys large freedom. Subject to a few exceptions fixed by the law of nations, it will be found that aliens within the national domain are subject to the jurisdiction of the territorial sovereign and amenable to its laws.[2]

The extent of the jurisdiction of a particular tribunal must always in one sense be a matter of domestic law, and fixed according to the will of the territorial sovereign.[3] The society of nations is unconcerned save when a State attempts to clothe its courts with a power in excess of that which it itself, according to the principles of international law, is permitted to exercise. The tribunal upon which excessive jurisdiction is locally conferred will doubtless not refrain from exercising on occasion the full measure of what is definitely given it, regarding as political any question as to the international wrong attributable to its conduct,

[1] Extra-Territorial Crime, *infra*, § 243.

[2] Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, *citing* Mr. Marcy, Secy. of State, to Mr. Fay, Nov. 16, 1855, 162 MS. Dom. Let. 508, Moore, Dig., II, 92; Opinion of Dr. Wharton, Solicitor to Dept. of State, in case of William A. Davis *v.* Great Britain, 1885, *cited* by Mr. Day, Acting Secy. of State, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699. See, also, State *v.* Neibekier, 184 Mo. 211, 221–222, *citing* McDonald *v.* State, 80 Wis. 407, People *v.* McLeod, 1 Hill, N. Y. 377, S. C. 25 Wend. 483, Campbell *v.* Hall, Cowp. 208, Vattel, bk. 2, ch. 8, secs. 101, 102, Story on Conflict of Laws, 518; Luke *v.* Calhoun County, 52 Ala. 115, 121; Carlisle *v.* United States, 16 Wall. 147.

[3] Declared Cockburn, C. J., in Reg. *v.* Keyn: "No concurrent assent of nations . . . can of itself without the authority of Parliament, . . . give to the courts of this country, independently of legislation, a jurisdiction over the foreigner where they had it not before." 2 Ex. D. 63, 198, Beale, Cases on Conflict of Laws, I, 1, 9. See, also, Holland, Studies in International Law, 199.

and as one for solution solely through the diplomatic channel.[1] Should, however, the extent of the assertion of jurisdiction of a State through the medium of its own judicial agency become with its consent the subject of adjudication before an international tribunal, the decision would necessarily rest upon the requirements of the law of nations.

Save for the general obligation to conform to the practices of civilized powers, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code. No right of supervision or dictation is lodged abroad.[2] Moreover, the action of the courts in interpreting the local law and in applying rules of procedure is not regarded as subject to revision by any external authority.[3] Thus a State may in fact decline to permit the correctness of the decision of its own tribunals, or the reasonableness of the judicial enforcement of a particular rule to become the subject of diplomatic discussion.[4] It must be clear, however, that

[1] Cockburn, C. J., in Regina *v.* Keyn, 2 Ex. D. 63, 160, quoted in Holland, Studies in International Law, 199, note; Mortensen *v.* Peters, *Am. J.*, I, 526; Simeon E. Baldwin: "The Part Taken by Courts of Justice in the Development of International Law", *Yale Law J.*, X, 1; John C. Gray, The Nature and Sources of the Law, 122.

See, also, Marshall, C. J., in Foster and Elam *v.* Neilson, 2 Pet. 253, 307, 309; Jones *v.* United States, 137 U. S. 202; In re Cooper, 143 U. S. 472, 502–505; Pearcy *v.* Stranahan, 205 U. S. 257.

[2] Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, on Thrasher's case, 6 Webster's Works, 521, 528, Moore, Dig., II, 88; Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, Jan. 10, 1854, MS. Inst. Austria, I, 89, Moore, Dig., II, 88; Mr. Marcy, Secy. of State, to Mr. Starkweather, Minister to Chile, Aug. 24, 1855, MS. Inst. Chile, XV, 124, Moore, Dig., II, 90; Mr. Seward, Secy. of State, to Mr. Burton, Minister to Colombia, No. 137, April 27, 1866, Dip. Cor. 1866, III, 522, 523, Moore, Dig., VI, 660; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232–234, Moore, Dig., II, 97.

[3] "It cannot be expected that any government would go so far as to yield to a pretension of a foreign power to revise and review the proceedings of its courts under the claim of an international right to correct errors therein, either in respect to the application of principles of law, or the application of facts as evidence in cases where the citizens of such foreign power have been convicted. It certainly could not be expected that such a claim would be allowed before the party making it had first presented a clear case *prima facie* of willful denial of justice or a deliberate perversion of judicial forms for the purpose of oppression." Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 90. See, also, Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232–234, Moore, Dig., II, 97; Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, 162 MS. Dom. Let. 508, Moore, Dig., II, 92; Mr. Olney, Secy. of State, to Mr. Chilton, M. C., June 5, 1896, 210 MS. Dom. Let. 496, Moore, Dig., II, 94.

[4] See the position of Germany respecting the attitude of Mr. Olney, Secy. of State, in 1895, relative to the prosecution of Louis Stern at Kissingen, For. Rel., 1895, I, 454–488, especially Mr. Olney, Secy. of State, to Baron Thielmann, German Ambassador, Sept. 26, 1895, *id.*, 469, and Baron Thielmann, German Ambassador, to Mr. Olney, Secy. of State, Oct. 1, 1895, *id.*, 479. For an abstract of the correspondence, *cf.* Moore, Dig., II, 93–94.

the courts may prove to be the instrumentality through which a State either denies justice or directly perpetrates injustice upon foreign powers or their nationals. Under such circumstances, the nature of what takes place is not disguised or altered by reason of the judicial agency which commits the wrong. In States where the courts are independent of the political department of the government, there is strongest reason to withhold diplomatic discussion of questions which have become the subject of judicial inquiry, until at least there has been a final adjudication resulting in a decision deemed by a foreign State to be at variance with international law or the terms of a treaty.[1]

Although a resident alien be prosecuted criminally according to a system possessing certain "harsh features" and deficient in many safeguards for the security of the accused,[2] without trial by jury or the privilege of the writ of habeas corpus, and although the judicial proceedings be brief and summary,[3] and instigated upon suspicion rather than upon proper cause alleged under oath, there may still be, in the particular case, no solid ground for complaint on the part of his government.[4] A State must, therefore, be normally reluctant to interpose in an endeavor to interfere with the administration of justice as applied impartially to its nationals in a foreign country.[5] On the other hand, a State will be quick to protest if the judicial system of another works palpable injustice to such individuals, either as a natural incident of procedure, or as a direct effect of adjudications.[6]

Instances are frequent and varied. The application to an alien of local laws sharply at variance with treaty stipulations contracted for his benefit, will arouse complaint;[7] likewise any discrimination

[1] Mr. Adee, Acting Secy. of State, to the Italian Ambassador, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 670; Mr. Lansing, Secy. of State, to the German Ambassador, No. 2217, April 7, 1916, with reference to the case of the Appam, American White Book, European War, III, 342, 343–344.

[2] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, April 6, 1855, MS. Int. Austria, I, 105, Moore, Dig., II, 89.

[3] Report of Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, on Thrasher's case, 6 Webster's Works, 521, 528, Moore, Dig., II, 88.

[4] Mr. Marcy, Secy. of State, to Mr. Richter, Feb. 21, 1854, 42 MS. Dom. Let. 231, Moore, Dig., II, 90.

[5] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 89; Mr. Forsyth, Secy. of State, to Mr. Davee, Feb. 7, 1838, 29 MS. Dom. Let. 330, Moore, Dig., VI, 652.

[6] Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232–234, Moore, Dig., II, 97.

[7] Mr. Marcy, Secy. of State, to Mr. Fay, Nov. 16, 1855, MS. Inst. Switzerland, I, 39, Moore, Dig., VI, 655; Case of Dr. M. A. Cheek against Siam,

against him on account of his nationality, especially if he is subjected to criminal prosecution.[1] A perversion of the judicial system,[2] manifested by the institution of criminal proceedings in order to oppress an alien, is not likely to be tolerated by the State to which he belongs.[3] If his trial is conducted with gross injustice,[4] if the local law be violated,[5] if, while in custody he be accorded treatment harsh beyond measure, or if he is held or imprisoned on account of the commission of an act not forbidden as a crime by the local law, interposition is to be anticipated, unless local remedies afford a complete means of redress and are within the reach of the victim.[6] Whenever the government of his own State has solid reason to believe from evidence before it that a denial of justice has occurred, it is justified in denying the pretension of the foreign prosecuting State that it may set up the judgment of its own tribunals as a bar to the international claim.[7]

Moore, Arbitrations, II, 1899–1908; Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, 162 MS. Dom. Let. 508, Moore, Dig., II, 92; Mr. Blaine, Secy. of State, to Mr. O'Connor, Nov. 25, 1881, 139 MS. Dom. Let. 663, Moore, Dig., II, 96.

[1] Report on Thrasher's Case by Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, 6 Webster's Works, 530, Moore, Dig., VI, 698; Opinion of Dr. Francis Wharton, Solicitor of the Dept. of State, in the case of William A. Davis *v.* Great Britain, 1885, *cited* in note of Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI. 699; Case of C. A. Van Bokkelen, Moore, Arbitrations, II, 1807–1853, Moore, Dig., VI, 699.

[2] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 90.

[3] Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232–234, Moore, Dig., II, 97; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, Jan. 17, 1881, MS. Inst. Spain, XVIII, 591, Moore, Dig., VI, 656.

[4] Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 23, April 12, 1878, MS. Inst. Hayti, II, 136, Moore, Dig., VI, 656; Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, April 19, 1879, MS. Inst. Mexico, XIX, 570, Moore, Dig., VI, 696; Mr. Forsyth, Secy. of State, to Mr. Welsh, March 14, 1835, 27 MS. Dom. Let. 261, Moore, Dig., VI, 696.

[5] Case of Dr. M. A. Cheek *v.* Siam, Moore, Arbitrations, II, 1899–1908, Moore, Dig., VI, 656.

[6] See, for example, Case of C. A. Van Bokkelen, Moore, Arbitrations, II, 1807–1853, Moore, Dig., VI, 699; also Claims, Denial of Justice, *infra*, § 281–282.

[7] Note of Dr. Francis Wharton, Wharton, Dig., II, 672, Moore, Dig., VI, 694; Report of Mr. Bayard, Secy. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., VI, 667; also, Claims, Denial of Justice, *infra*, § 283–285.

C

The Exercise of Jurisdiction within the National Domain

(1)

§ 220. On Land.

On land, the territorial sovereign exercises exclusive jurisdiction throughout its domain.[1] By no process issuing from any other authority may individuals there be lawfully held in restraint,[2] save under exceptional circumstances which will be later observed. By no command emanating from a foreign power may acts which contravene the local law be rendered lawful. Thus the alien who in obedience to instructions from his own State violates that law, is not exempt from prosecution.[3] The deserter from a foreign ship,[4] as well as the fugitive from the justice of a foreign country,[5] find themselves safe from the strong arm of the pursuer unless by treaty or otherwise the State consents to the exercise of foreign authority within its limits. Again, the officer or seaman of a foreign vessel is, when ashore, subject to the local law.[6]

It should be observed that the courts of a State, and notably those of the United States, will not sit in judgment upon the acts of the government of another State committed within its own territory. It is declared that "redress of grievances by

[1] Marshall, C. J., in Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 136.

[2] Mr. Calhoun, Secy. of State, to Mr. Everett, Aug. 7, 1844, and Sept. 25, 1844, MS. Inst. Great Britain, XV, 211 and 23, respectively, Moore, Dig., II, 225.

[3] *Compare dicta* in Horn *v.* Mitchell, 223 Fed. 549, 552; also Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842, in relation to McLeod's Case, Webster's Works, VI, 301, 302–303, Moore, Dig., II, 29. But see statement of Senator Calhoun, in the Senate, June 11, 1841, Calhoun's Works, III, 618, Moore, Dig., II, 26.

S. S. Co., 254 Fed. 126, 130.

[4] Mr. Seward, Secy. of State, to Mr. Stanton, Secy. of War, April 15, 1863, 60 MS. Dom. Let. 231, Moore, Dig., II, 370.

[5] Mr. Rush, Secy. of State, to Mr. Hyde de Neuville, April 9, 1817, MS. Notes to Foreign Legations, II, 218, Moore, Dig., IV, 245; Mr. Webster, Secy. of State, to Mr. d'Argaïz, June 21, 1842, Webster's Works, VI, 399, 405, Moore, Dig., IV, 246; Mr. Buchanan, Secy. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., IV, 246; United States *v.* Rauscher, 119 U. S. 407, 411.

[6] Mr. Randolph, Secy. of State, to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 585. See, also, United States *v.* Thierichens, 243 Fed. 419, where the commander of an interned German war vessel who was charged with having smuggled from the vessel property into the United States (when the United States was a neutral), and with having violated the so-called Mann Act of June 25, 1910, was held to be subject to criminal prosecution.

reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." [1]

(2)

Ports and Bays. Foreign Merchant Vessels

(a)

§ 221. Application of the Local Law.

The exercise by a State of jurisdiction over its ports and bays becomes a matter of international concern in so far as it is applied to foreign merchant vessels. Over such ships and their occupants the territorial sovereign may assert jurisdiction.[2] Local officials may go on board and arrest persons charged with the commission of offenses within the territorial limits of the State, whether on such

[1] Underhill *v.* Hernandez, 168 U. S. 250, 252. In that case it appeared that in 1892 the defendant General Hernandez had been a commander of certain revolutionary forces in Venezuela which achieved success, and became formally recognized by the United States as the legitimate government of Venezuela. The plaintiff, an American citizen, who had been engaged in the construction of a waterworks system for the city of Bolivar, had been denied a passport to leave that city, by General Hernandez, who had assumed command thereof. This action was brought against the latter in New York to recover damages for the detention caused by reason of his refusal to grant the passport, for alleged confinement of Underhill to his own house, and for certain alleged acts by the soldiers of Hernandez' army. The Supreme Court of the United States agreed with the conclusion of the Circuit Court of Appeals that "the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

See, also, the opinion of Mr. Justice Holmes, in the case of American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 357–358; opinion of Mr. Justice Clarke, in Oetjen *v.* Central Leather Co., 246 U. S. 297; Hewitt *v.* Speyer, 248 Fed. 590, s.c. 250 Fed. 367.

[2] Mr. Buchanan, Secy. of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., II, 272; Mr. Everett, Secy. of State, to Mr. Ingersoll, Feb. 17, 1853, MS. Inst. Great Britain, XVI, 192, Moore, Dig., II, 273; Mr. Marcy, Secy. of State, to Mr. Keenan, Consul at Hong Kong, April 14, 1856, 21 Disp. to Consuls, 567, Moore, Dig., II, 288; Mr. Seward, Secy. of State, to Sir F. Bruce, British Minister, March 16, 1866, Dip. Cor. 1866, I, 231, Moore, Dig., II, 292; Opinion of Mr. Taft, Atty.-Gen., 15 Ops. Attys.-Gen., 178; Mr. Frelinghuysen, Secy. of State, to Mr. Randall, M. C., March 14, 1884, 150 MS. Dom. Let. 276, Moore, Dig., II, 278; Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 12, 1885, For. Rel. 1885, 82, 83, Moore, Dig., II, 278. See, also, Wildenhus's Case, 120 U. S. 1; Article VI I of Resolution of the Institute of International Law, 1894, *Annuaire*, XIII, 330; C. N. Gregory, "Jurisdiction over Foreign Ships in Territorial Waters", *Mich. Law Rev.*, II, 333; P. Fedozzi, "*Des délits à bord des navires marchands dans les eaux territoriales étrangères*", *Rev. Gén.* IV, 202; Note, *Harv. Law R.*, XXIV, 489; United States *v.* Bull, *Am. J.*, V, 242 (Phil. Is. Sup. Ct. Jan. 15, 1910); A. H. Charteris, 'The Legal Position of Merchantmen in Foreign Ports and Waters," *British Year Book of Int. Law*, 1920–1921, 45.

vessels,[1] or elsewhere.[2] To make the arrest, however, of an inmate of a ship, at the request of a third State, within whose territory he may have violated the local law,[3] or by reason of the circumstance that he is charged with the commission of an offense when the ship was on the high seas, has been regarded as an abuse of power.[4]

In the process of exercising jurisdiction over foreign ships the territorial sovereign is doubtless obliged to exercise care. Thus the firing of a solid shot at a passenger vessel for the sole purpose of compelling her to show her flag,[5] or the attempt to arrest an occupant by means of a force imperiling the lives of innocent persons on board or the safety of the property of a friendly State, has been regarded by the United States as arbitrary action calling for disavowal by the State whose authorities had recourse to it.[6] Again, the hauling down of the flag of a merchant vessel, detained on account of the violation of local customs regulations, has been deemed to be improper conduct justifying the demand for an expression of regret.[7]

[1] Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., II, 272; Same to Mr. Campbell, Consul at Havana, Nov. 1, 1848, 10 MS. Disp. to Consuls, 493, Moore, Dig., II, 272; Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 517, May 2, 1876, MS. Inst. Italy, I, 527, Moore, Dig., II, 276; Opinion of the Attorney-General quoted by Mr. Evarts, Secy. of State, in note to Mr. Mendez, Dec. 27, 1879, MS. Notes to Spain, X, 60, Moore, Dig., II, 277; Mr. Frelinghuysen, Secy. of State, to Mr. Randall, M. C., March 14, 1884, 150 MS. Dom. Let. 276, Moore, Dig., II, 278.

[2] Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 12, 1885, MS. Inst. Cent. Am., XVIII, 488, Moore, Dig., II, 867; Mr. Gresham, Secy. of State, to Mr. Huntington, Dec. 30, 1893, For. Rel. 1894, 296, Moore, Di ., II, 880.

[3] Mr. Marcy, Secy. of State, to Mr. Bromberg, Consul at Hamburg, Sept. 1, 1853, 17 MS. Desp. to Consuls, 70, Moore, Dig., II, 274; Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 516, May 2, 1876, MS. Inst. Italy, I, 526, Moore, Dig., II, 277.

[4] Mr. Cushing, Atty.-Gen., Sept. 6, 1856, 8 Ops. Attys.-Gen., 73, Moore, Dig., II, 290; Mr. Fish, Secy. of State, to Mr. Schenck, Nov. 8, 1873, MS. Inst. Great Britain, XVIII, 431, For. Rel. 1874, 490, Moore, Dig., II, 293.

The territorial sovereign might justly assert a concurrent right to punish such an offender if he were one of its own nationals, provided it could lawfully apprehend him. If he were surrendered by the master of the ship, no difficulty would arise.

[5] Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, June 21, 1897, For. Rel. 1897, 504, Moore, Dig., II, 280.

[6] Mr. Gresham, Secy. of State, to Mr. Huntington, Dec. 30, 1893, For. Rel. 1894, 296, Moore, Dig., II, 880.

[7] Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to England, Nov. 6, 1886, relative to the case of the *Marion Grimes*, For. Rel. 1886, 362, 370, Moore, Dig., II, 280; Same to Same, Dec. 13, 1886, For. Rel. 1887, 451, Moore, Dig., I, 864.

Concerning complaint made in 1873, of onerous fines imposed on American vessels by Spanish authorities in Cuba for technical violation of customs regulations, see Mr. Fish, Secy. of State, to Gen. Sickles, Minister to Spain, March 21, 1873, For. Rel. 1873, II, 932, Moore, Dig., II, 319, also documents

A foreign merchant vessel and its occupants are, upon entering port, subject to the operation of the civil as well as criminal laws of the State.[1] Thus the ship may be obliged to conform to local regulations, prohibiting, for example, arrival at certain seasons with a deck cargo.[2] The master, in the hiring of seamen,[3] or in contracting for the carriage of freight to foreign countries, may find himself reasonably subjected to strict limitations imposed by local statute.[4]

there cited. See, also, award of Baron Blanc, Arbitrator in the case of the American ship *Masonic*, Moore, Arbitrations, II, 1055–1069. Relative to irregular and arbitrary proceedings directed against American vessels by Mexican customs officers, see Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, Jan. 31, 1883, MS. Inst. Mexico, XX, 568, Moore, Dig., II, 323; Same to Same, Feb. 20, 1883, concerning the arrest and treatment accorded the master of an American vessel who was charged with smuggling, For. Rel. 1883, 625, Moore, Dig., II, 324.

[1] "Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction applied to her actual situation or to the persons of her owners or others interested in her." Westlake, 2 ed., I, 269–270.

Although the matter relates to administrative control rather than to jurisdiction, it may be here observed that the territorial sovereign is not entitled to demand the custody of the ship's papers of a foreign merchant vessel entering port. Mr. Adee, Acting Secy. of State, to Mr. Conger, Minister to Brazil, Dec. 3, 1897, For. Rel. 1897, 42, Moore, Dig., II, 333, also documents, *id.*, II, 326–333.

[2] Correspondence between the United States and Great Britain relative to the English Merchant Shipping Act of 1876, abstracted and cited in Moore, Dig., II, 282–283.

"And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs." Taney, C. J., in Brown *v.* Duchesne, 19 How. 183, 198–199. *Compare* Caldwell *v.* Van Vlissengen, 9 Hare, 415.

[3] Patterson *v.* Bark Eudora, 190 U. S. 169, sustaining the application to foreign vessels of the Act of Dec. 21, 1898, 30 Stat. 755, 763, forbidding the payment of seamen's wages in advance, in the case of a seaman shipped on a foreign vessel from an American port; also, Chambers *v.* Steamship Kestor, 110 Fed. 432, Moore, Dig., II, 338.

See The Ixion, 237 Fed. 142, holding that the Seamen's Act of March 4, 1915, Chap. 153, § 4, 38 Stat. 1165, was applicable to foreign vessels while in harbors of the United States.

Cf. Mr. Bayard, Secy. of State, to Mr. Roustan, French Minister, Aug. 26, 1885, relative to the Shipping Act of the United States of June 26, 1884, For. Rel. 1885, 386, Moore, Dig., II, 307. While a State may, for the protection of seamen generally, limit the freedom of a foreign master as to the terms of a shipping contract with a foreign sailor, concluded within its territory, it has been doubted whether the territorial sovereign may also justly demand that shipping articles be signed before a local shipping-master rather than before the consular officer of the country to which the foreign vessel may belong. Mr. Bayard, Secy. of State, to Mr. White, Chargé at London, Mar. 1, 1889, For. Rel. 1889, 447, Moore, Dig., II, 334; also documents cited *id.*, II, 336–338.

[4] See, for example, the provisions of the so-called Harter Act of Feb. 13,

In subjecting foreign vessels and their occupants to the operation of the local law a State is not deterred by any requirement of international law from disregarding the lawful character of acts committed abroad, as in a foreign port, when they are the proximate cause of others committed within the national domain and contrary to a statutory prohibition. No undertaking lawfully entered into abroad and contemplating performance in that domain, as by the carriage of goods thereto, will be deemed to be entitled to respect if it defies the will of the sovereign thereof. The applicability of this principle to vessels engaged in foreign commerce must be obvious.[1]

(b)

§ 222. Matters of Internal Order and Discipline.

Solid grounds of policy have long rendered it inexpedient for States to assert jurisdiction in matters relating to the internal order and discipline of a foreign merchant vessel, and affecting solely the ship and its occupants. Of such a character are disputes between masters and seamen, involving petty criminal offenses committed by members of a crew. Jurisdiction has in such cases generally been yielded to the authorities of the State to which the vessel belongs, and notably to consular officers.[2] Opinion is divided whether the existing practice indicates the general relinquishment of a right normally possessed by the territorial sovereign, or is to be ascribed in each case to the terms of a particular agreement by which local jurisdiction is specifically surrendered.[3] The United States has protested against the asser-

1893, 27 Stat. 445, U. S. Comp. Stat. 1918, §§ 8029–8031, forbidding clauses in bills of lading relieving from liability for negligence, and from exercise of due diligence in equipping vessels, and from liability for errors of navigation, etc.

[1] See, for example, the application of the Harter Act of Feb. 13, 1893, in Knott *v.* Bottany Mills, 179 U. S. 69; The Germanic, 196 U. S. 589, 598. Also § 73, chap. 349, Act of Aug. 27, 1894, 28 Stat. 570, amended, Feb. 12, 1913, chap. 40, 37 Stat. 667, U. S. Comp. Stat. 1918, § 8831, with respect to trusts in restraint of import trade.

[2] See, for example, Wildenhus' Case, 120 U. S. 1; Ex parte Anderson, 184 Fed. 114.

[3] In Wildenhus' Case, 120 U. S. 1, the Court inclined to the view that Art. XI of the treaty between the United States and Belgium of March 9, 1880, was a mere recognition of the existing practice of nations. See, also, opinion of Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 73; Mr. Fish, Secy. of State, to Mr. Schenck, March 12, 1875, For. Rel. 1875, I, 592, Moore, Dig., II, 295; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, Nov. 13, 1883, For. Rel. 1883, 30, Moore, Dig., II, 302. *Compare* Mr.

tion of jurisdiction over controversies of the class described, by local magistrates in the territory of a foreign State with which no adequate agreements had been concluded.[1]

It is generally understood, and the treaties of the United States frequently provide, that disorders on board of a vessel which are of a character to disturb the tranquillity and public order on shore, or concern a person not a member of the crew, are to be dealt with by the local courts.[2] Those courts may, therefore, be called upon to pass upon the preliminary question whether the particular offense charged is of such a character.[3] In Wildenhus' Case the Supreme Court of the United States declared that a disorder was of a kind to disturb the peace of a port, if the offense were of such gravity that it would awaken public interest on shore when it became known there, and especially if it were of a character such that its commission within the territory of any civilized State would result in the severe punishment of the offender. In that case, the stabbing and killing of a Belgian seaman by another member of the crew, himself also a Belgian, on board of a Belgian steamship moored at a dock in New Jersey was regarded as furnishing just cause for local prosecution.[4]

Marcy, Secy. of State, to Mr. Keenan, Consul at Hong Kong, April 14, 1856, 21 Disp. to Consuls, 567, Moore, Dig., II, 288; Opinion of Mr. Berrien, Atty-Gen., 2 Ops. Attys.-Gen., 381, Moore, Dig., II, 286; Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, July 31, 1885, MS. Inst. Haiti, II, 511, Moore, Dig., II, 300.

See, also, The Gloria de Larrinaga, 196 Fed. Rep. 590, where an American court of admiralty declined to take jurisdiction in the case of a claim under a British Shipping Act for short allowance, made by a British seaman on a foreign ship and arising in foreign waters.

[1] Mr. Fish, Secy. of State, to Mr. Schenck, Nov. 8, 1873, For. Rel. 1874, 490, Moore, Dig., II, 293; Same to Same, March 12, 1875, For. Rel. 1875, I, 592, Moore, Dig., II, 295.

[2] For example, Article XI of the treaty with Belgium, of March 9, 1880, declared that "The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew shall be concerned therein." Malloy's Treaties, I, 97.

[3] Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, July 18, 1855, MS. Inst. Peru, XV. 171, Moore, Dig., II. 313; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, Nov. 13, 1883, For. Rel. 1883, 30, Moore, Dig., II, 302; Mr. Evarts, Secy. of State, to Count Lewenhaupt, Swedish and Norwegian Minister, July 30, 1880, MS. Notes to Sweden and Norway, VII, 204, Moore, Dig., II, 315.

[4] 120 U. S. 1. See, also, Mr. Hay, Secy. of State, to Baron Fava, Italian Ambassador, July 19, 1900, MS. Notes to Italian Legation, IX, 440, Moore, Dig., II, 314; Commonwealth *v.* Luckness, 14 Philadelphia, 363, Moore, Dig., II, 315; Case of the German steamer, *Tom G. Corpi*, at Brest, 1908, *Rev. Gén.* XV, 439.

See Art. XXX of Regulations concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 281, J. B. Scott, Resolutions, 151.

(c)

§ 223. Civil Disputes of Seamen Arising from Their Connection with the Ship.

There has been a tendency on the part of maritime powers, such as the United States, to conclude conventions withholding from domestic courts jurisdiction in civil controversies between seamen and the masters of ships on which the former served, particularly in reference to the adjustment of wages and the execution of contracts.[1] The scope of certain of these agreements to which the United States has become a party has been the subject of frequent adjudications in American courts.[2] Question has arisen whether a particular stipulation excluding local jurisdiction should be applied when it would entail great hardship on account of the absence of a consular officer;[3] and whether also an appropriate treaty should be deemed, for constitutional reasons, to embrace the case of an American citizen.[4] In numerous cases the terms of a convention have been acknowledged to be applicable to the circumstances of the case, and jurisdiction has been withheld.[5]

It may be doubted whether in the absence of an appropriate treaty, the territorial sovereign is deterred by the operation of any rule of international law from exercising through its local courts jurisdiction over civil controversies between masters and members of a crew, when the judicial aid of its tribunals is invoked by the latter, and a libel *in rem* is filed against the ship.[6]

[1] See, for example, Art. XI of consular convention with Sweden, of June 1, 1910, Charles' Treaties, 115; Art. XXIII of treaty with Spain of July 3, 1902, Malloy's Treaties, II, 1708.

[2] See The Ester, 190 Fed. 216, where the decision of Smith, J., embraces a thorough discussion of previous cases; also The Rindjani, 254 Fed. 913, concerning consular jurisdiction over a wage dispute under convention with the Netherlands, of May 23, 1878. The Seamen's Act of 1915, 38 Stat. 1164, 1165, was here deemed not to apply to a contract made in Holland to be performed on a Dutch vessel, both parties being Dutch.

[3] The Salomoni, 29 Fed. 534.

[4] See, for example, The Neck, 138 Fed. 144, where the libelant, a seaman on a foreign vessel, was an American citizen, and was, for that reason, deemed to have a constitutional right to invoke the jurisdiction of a court of admiralty within the United States, under the facts of the case. The Court appeared, moreover, to doubt the applicability of the treaty (that with Germany of Dec. 11, 1871) to the case.

[5] See, for example, The Bound Brook, 146 Fed. 160; Tellefsen *v.* Fee, 168 Mass. 188; The Koenigen Luise, 184 Fed. 170.

[6] The Ester, 190 Fed. 216, 221, 223; also The Belgenland, 114 U. S. 355, where Mr. Justice Bradley declared in the course of the opinion of the Court (363): "Circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the

It is to be observed, however, that American courts exercise discretion in taking or withholding jurisdiction according to the circumstances of the particular case. Their action in so doing is not to be regarded as indicative of any requirement of public international law.[1]

(d)

§ 224. Involuntary Entrance.

A foreign vessel forced into port by stress of weather, or by inevitable necessity, is not regarded as subject to the local jurisdiction. The involuntary entrance furnishes a ground of exemption.[2] Thus the imposition of a fine upon a foreign ship compelled to put into port for such a reason is believed to lack justification.[3] Likewise, goods on board of a vessel so circumstanced are not regarded as subject to the payment of duties.[4] Exemption from payment depends, however, upon proof of the fact of the urgency of the distress. The necessity must be grave[5] and the proof convincing[6] [see following page for footnote 6].

country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul."

[1] It may be observed that the Supreme Court of the United States has construed the Seamen's Act of 1915, chap. 153, 38 Stat. 1164, as indicating no design on the part of the Congress to assert control over aliens' contracts of shipment abroad on foreign vessels, and of advancements in pursuance thereof. Sandberg *v.* McDonald, 248 U. S. 185; also Neilson *v.* Rhine Shipping Company, 248 U. S. 205. *Compare* Strathearn S. S. Co. *v.* Dillon, 252 U. S. 348.

[2] Hallet & Browne *v.* Jenks, 3 Cranch, 210, 219; The Short Staple *v.* United States, 9 Cranch, 55; The Nuestra Señora de Regla, 17 Wall. 29. See, also, Mr. Seward, Secy. of State, to Mr. Stoeckl, Russian Minister, June 4 and June 13, 1864, MS. Notes to Russian Legation, VI, 156, 157, Moore, Dig., II, 343; Mr. Bayard, Secy. of State, to Mr. Phelps, Nov. 6, 1886, For. Rel. 1886, 362, 364–365; Moore, Dig., II, 343.

[3] Mr. Uhl, Acting Secy. of State, to Mr. Smythe, Minister to Haiti, May 3, 1894, MS. Inst. Haiti, III, 398, Moore, Dig., II, 349; Report of Mr. Davis, Committee on Foreign Relations, July 14, 1897, on case of Alfredo Laborde and others, *Competitor* prisoners, Senate Rep. 377, 55 Cong., 1 Sess., 5, Moore, Dig., II, 349; Mr. Bayard, Secy. of State, to Mr. Phelps, Nov. 6, 1886, For. Rel. 1886, 362, 364–365, Moore, Dig., II, 343.

[4] The Brig Concord, 9 Cranch, 387; The New York, 3 Wheat, 59, 68; Opinion of Mr. Wirt, Atty.-Gen., 1 Ops. Attys.-Gen., 509; Mr. Bayard, Secy. of State, in Case of the *Rebecca*, Feb. 26, 1887, Senate Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., II, 345.

[5] Declares Wheaton: "The danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity

Between 1831 and 1841, there arose a series of cases where slaves on board of American merchant vessels, wrecked upon British coasts, or forced, by stress of weather or mutiny, into British ports, were liberated.[1] The involuntary presence of a foreign vessel in a local port might not suffice to dissolve the existing relations between persons on board,[2] or to justify the local authorities in taking affirmative steps to put an end to the existing relationship, unless the continuance thereof became a source of real disturbance to the peace of the country.[3] It might, however, well be doubted whether, as Mr. Dana pointed out in relation to the foregoing cases:

> The local authorities must give active aid to the master against persons on board his vessel who are doing no more than peacefully and quietly dissolving, or refusing to recognize, a relation which exists only by force of the law of the nation to which the vessel belongs, if the law is peculiar to that nation, and one which the law of the other country regards as against common right and public morals.[4]

In all of the cases Great Britain paid an indemnity, in those of the *Comet* and the *Encomium*, as a result of diplomacy;[5] in those of

would justify the act; where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: such a case, though there might be no existing storm, would be viewed with tenderness; but there must be at least a moral necessity. Then, again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage; for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place, the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and is, therefore, liable to be rigidly examined." Note on Case of The New York, 3 Wheat. 59, quoting from opinion of Sir William Scott in the case of The Eleanor, Edwards, 159, 160, Moore, Dig., II, 340–341.

[6] The Æolus, 3 Wheat. 392 [see previous page for this note reference].

[1] These were the cases of the *Comet*, 1831; the *Encomium*, 1835; the *Hermosa*, 1840; and the *Creole*, 1841. For a brief statement of facts of the several cases, see Moore, Dig., II, 350–352.

[2] Mr. Webster, Secy. of State, to Mr. Everett, June 28, 1842, Curtis' Life of Webster, II, 106, quoted in Moore, Dig., II, 352; Mr. Webster, Secy. of State, to Lord Ashburton, British Plenipotentiary, Aug. 1, 1842, Webster's Works, VI, 303, 306, Moore, Dig., II, 353.

[3] See opinion of Mr. Bates, umpire, in the case of the *Enterprise*, and in the case of the *Hermosa*, Moore, Arbitrations, IV. 4372 and 4374 respectively, Moore, Dig., II, 355 and 357, respectively.

[4] Dana's Wheaton, note No. 62. See, also, Hall, 5 ed., 202, note. *Compare* opinion of Mr. Bates, umpire, in the case of the *Creole*, Moore, Arbitrations, IV, 4375, Moore, Dig., II, 358.

[5] Mr. Webster, Secy. of State, to Mr. Fillmore, M. C., May 6, 1842, House Ex. Doc. No. 242, 27 Cong., 2 Sess., p. 1.

the *Enterprise*, *Hermosa* and the *Creole*, in pursuance of the award of Mr. Joshua Bates, umpire of the mixed commission under the Convention of February 8, 1853.[1]

(e)

§ 225. Asylum on Merchant Vessels.

The case of the individual who, after having committed an offense within the territory of a State, escapes therefrom, takes passage abroad on a foreign merchant vessel, and is sought to be arrested thereon when the ship enters a local port, presents on principle no difficulties. The fugitive has no connection with the ship save as a passenger. His violation of the local law within the national domain, and its necessary effect upon the public mind, justify, and in a sense compel, the territorial sovereign to apprehend and prosecute the wrongdoer when he enters its domain. The circumstance that he is a passenger in transit to another country on board of a vessel entering territorial waters merely in order to make a port of call, seems to be immaterial. The ship itself is not exempt from local jurisdiction and cannot grant asylum.[2]

The views of the Department of State with respect to the matter did not, at least before the close of the last century, appear to be harmonious. Mr. Bayard, Secretary of State, referring, in 1885, to the case of one Gámez, declared it to have been the duty of the captain of an American ship to surrender to the local authorities of Nicaragua, upon their request, a political fugitive from that country who had voluntarily taken passage at San José de Guatemala, for Costa Rica, knowing that the vessel would enter *en route* a Nicaraguan port.[3]

In 1890, Mr. Blaine, as Secretary of State, in a communica-

[1] For the texts of the awards of the umpire, see Moore, Arbitrations, IV, 4374–4378, Moore, Dig., II. 355–361.

[2] Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., II, 856; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, May 27, 1876, MS. Inst. Haiti, II, 79, Moore, Dig., II, 857; Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, Nov. 3, 1885, For. Rel. 1885, 542, Moore, Dig., II, 857.

[3] Instruction to Mr. Hall, Minister to Central America, March 12, 1885, MS. Inst. Cent. Am., XVIII, 488, Moore, Dig., II, 867.

It appears that the captain of the ship, having declined to surrender Gámez, set sail without proper clearance papers. Criminal proceedings instituted against the master in his absence resulted in a decision ultimately affirmed by the Supreme Court of Nicaragua, announcing the exemption of foreign merchant vessels from the local jurisdiction with respect to persons on board accused of political offenses. See Mr. Shannon, Minister to Central America, to Mr. Foster, Secy. of State, Oct. 13, 1892, For. Rel. 1892, 45–49, Moore, Dig., II, 868–870.

tion to Mr. Mizner, Minister to Central America, asserted that in Spanish-American countries it was the habit of the territorial sovereign before making an arrest, to apply to the diplomatic or consular officer of the State to which the vessel belonged for his consent, and to furnish such officer with proof of the nature of the crime alleged; that the arrest was never made when the representative of the United States withheld his consent or the demand wore a political aspect; that powerful causes operated in favor of the exception that had arisen, exempting political offenders from local jurisdiction.[1] Mr. Blaine rebuked the Minister for having intervened, by authorizing, in compliance with demands of Guatemala, the seizure on an American vessel, at a Guatemalan port, of General Barrundia, a passenger in transit from Mexico to Panama, who had been charged with the commission of political offenses against Guatemala.[2] General Barrundia had resisted capture, and had been killed. By reason of his intervention, the Minister was recalled.[3]

In 1893, one Bonilla, a native of Honduras, boarded an American steamer in Nicaragua bound for Guatemala. Upon the arrival of the vessel at Amapala, Honduras, his surrender was duly demanded of the captain, on the ground that Bonilla had been "sentenced by the Courts of the Republic." The captain, after consultation with Mr. Baker, the American Minister to Nicaragua, who was himself a passenger on the vessel, refused to comply. The captain was later warned that if he attempted to leave port before delivering Bonilla, the vessel would be fired upon. The vessel, having previously received her clearance papers, and still retaining custody of the fugitive, proceeded to leave port and was fired upon, but without effect. The United States vigorously protested against this action. The Government of Honduras promptly gave assurances of disavowal and regret.[4]

[1] Communication of Nov. 18, 1890, For. Rel. 1890, 123, 133–141, Moore, Dig., II, 859–862, and 872–876. *Cf.*, also, Mr. Rockhill, Third Assist. Secy. of State, to Mr. Williams, Consul-General at Havana, Sept. 5, 1895, 149 MS. Inst. Consuls, 433, Moore, Dig., II, 862.

[2] Relative to the impropriety of consular intervention, see Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, Nov. 7, 1885, MS. Inst. Haiti, II, 523, Moore, Dig., II, 858.

[3] President Harrison, Annual Message, Dec. 1, 1890, For. Rel. 1890, iii, Moore, Dig., II, 871. In that document it is stated that General Barrundia had failed in a revolutionary attempt to invade Guatemala from Mexican territory, and that his seizure was attempted in order that he might be tried "under what is described as martial law."

See Mr. Mizner's defense in For. Rel. 1890, 144, contained in part in Moore, Dig., II, 876.

[4] For. Rel. 1893, 154 *et seq.*, Moore, Dig., II, 880–881.

Mr. Gresham, Secretary of State, on Dec. 30, 1893, enunciated the general principles which he believed to be applicable in such cases. He declared that a merchant vessel in a foreign port was within the local jurisdiction with respect to offenses and offenders against the local laws; that as the doctrine of asylum had "no recognized application" to such a vessel, the master was without discretion as to the character of the offense charged; that permitting the arrest of a passenger was not analogous to proceedings in extradition; that the master was not competent to determine whether the evidence was sufficient to warrant arrest and commitment for trial, or to impose conditions upon arrest; that his function was merely passive, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest; that American diplomatic and consular officers were incompetent to order surrender by way of quasi-extradition. While the Secretary declared that arbitrary attempts to capture a passenger by force, without regular judicial process, might call for disavowal when the resort to violence endangered the lives of innocent men and the property of a friendly nation, he was far from asserting that there was a limitation of the right of jurisdiction over political refugees peculiar to Spanish American States.[1] It is believed that Mr. Gresham correctly stated the requirements of the law. It must be clear that the attempt to prevent an enlightened State, whether of Spanish America or Europe, from exercising as complete jurisdiction over foreign vessels and their occupants within local ports as is commonly and properly enjoyed by maritime powers generally, betokens disrespect for the territorial sovereign, imputing to it inability to administer justice, and breeding contempt for its legitimate authority.

Over the fugitive from the justice of a foreign State who is arrested within the territory of a third State and brought into a local port, in the custody of foreign agents on a foreign merchant vessel, in transit to the place of trial, the territorial sovereign

[1] Communication to Mr. Huntington, For. Rel. 1894, 296, Moore, Dig., II, 880. "The letter to Mr. Huntington was communicated by Mr. Gresham, Secretary of State, to Mr. Baker, United States Minister to Nicaragua, Jan. 31, 1894. March 22, 1898, Mr. Sherman, Secy. of State, instructed Mr. Merry, Mr. Baker's successor, that he was to be guided by it." Moore, Dig., II, 882, *citing* MS. Inst. Cent. Am., XXI, 290.

Relative to the unwillingness of the United States "to acquiesce in the arbitrary and forcible violation of its flag by a merely military power, without due and regular warrant of law and not in conformity with the ordinary course of justice", see Mr. Foster, Secy. of State, to Mr. Scruggs, Minister to Venezuela, Sept. 8, 1892, For. Rel. 1892, 623, Moore, Dig., II, 864.

may doubtless assert control and justly demand that the individual be set at liberty.[1]

(3)

§ 226. The Marginal Sea. Foreign Merchant Vessels.

The extent of the jurisdiction of a State over foreign merchant vessels within territorial waters constituting the maritime belt or marginal sea, appears to be proportional to the degree of interest with which the territorial sovereign regards the conduct of such ships or of their occupants.[2]

It is believed that over the vessel at anchor within such waters a State may, on principle, exercise as broad a jurisdiction as if the ship were docked in a local port.[3] In the assertion of the right, similar occurrences would not, however, be likely to arouse equal concern. In the case of the vessel anchored within the marginal sea, its position with respect to the adjacent land and its contemplated movements might impel the territorial sovereign to ignore an act the commission of which on board of a vessel in port would at once awaken interest and lead to the instigation of criminal proceedings.

With respect to what occurs on the passing ship, not bound for a local port, the concern of the territorial sovereign is less vital, and its right of jurisdiction less broad. According to Article VI of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894, crimes and offenses committed on board of foreign ships passing through the territorial sea by persons on board of them, against persons or things on board of the same ships, are, as such, outside of the jurisdiction of the littoral State, unless they involve the violation of the rights or interests of that State or of its inhabitants (*ressortissants*) not forming part of the crew or passengers.[4]

The territorial sovereign must itself be the judge of what violates its own rights or interests. It is not, however, likely to find occasion or be disposed to charge a violation thereof, unless apprised of the commission of a grave offense arousing in fact the in-

[1] See Extradition, *infra*, § 341.

[2] See, in this connection, Westlake, 2 ed., I., 266–267.

[3] According to Art VIII of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894: "Ships of all nationalities are subject to the jurisdiction of the littoral State by reason of the simple fact that they are in the territorial waters, unless they are only passing through them." *Annuaire*, XIII, 330, J. B. Scott, Resolutions, 114.

[4] *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114.

terest of persons on shore or elsewhere outside of the vessel and within its territory. If a passing ship or an occupant thereof violates the local law and with respect to a stranger to the vessel, the territorial sovereign may fairly assert jurisdiction.

Whether the statutes of the littoral State are applicable to occurrences taking place within the marginal sea, and especially to acts committed on foreign passing ships, and whether also the local tribunals are clothed with requisite jurisdiction for purposes of adjudication, present questions of municipal rather than international law. They involve the inquiry as to the extent to which the territorial sovereign has seen fit to exercise its legislative power.[1] Inasmuch as the marginal sea is a part of the territory of the adjacent State, the application of local laws to acts committed within such waters would not seem to be dependent upon a specific declaration of legislative intention. The rule of construction actually observed would, however, be one attributable to the municipal law.

d

The High Seas

(1)

§ 227. In General.

The term "high seas" may be said to refer, in international law, to those waters which are outside of the exclusive control of any State or any group of States, and hence not regarded as belonging to the territory of any of them.[2] The ocean until it envelops the shores of a littoral State and constitutes its maritime belt, is not a part of the domain of any territorial sovereign. No State possesses, therefore, the right to determine the lawfulness of acts there committed unless taking place on board of one

[1] In the case of Reg. *v.* Keyn, L. R. 2 Ex. Div. 63, the precise question was whether a particular tribunal (the Central Criminal Court) had jurisdiction in a case of homicide committed by a foreign master on a foreign ship passing within three miles of the British coast. It was held that the Central Criminal Court lacked jurisdiction. While it was declared in certain *dicta* that in the absence of Parliamentary action the open seas adjacent to the coast were not to be regarded as a part of Her Majesty's dominions, it was not suggested that if the sovereign had seen fit to treat such waters as a part of the national domain, persons on foreign merchant vessels therein would not be amenable to the local laws. As a result of the decision the British Territorial Waters Jurisdiction Act was passed in 1878.

[2] See Second Court of Commissioners of Alabama Claims, Stetson *v.* United States, No. 3993, class 1, Moore, Arbitrations, IV, 4335, Moore, Dig., II, 885. *Compare* the special signification attached to the term "high seas" within § 5346 of the Revised Statutes, in the case of United States *v.* Rodgers, 150 U. S. 249. See, also, Dana's Wheaton, 169–170; Woolsey, 6 ed., 72–76; J. B. Moore, Principles of American Diplomacy, 1918, Chap. III.

of its own ships, or unless the society of maritime States unites to confer upon it authority to do so.[1] The relation between a vessel and the country to which it belongs is sufficiently close to justify the latter to assert a right of jurisdiction with respect to the ship and its occupants.[2] Doubtless the society of nations may agree to impose upon a vessel and its crew a duty not to commit certain acts on the high seas, such as those of piracy; and it may empower the individual State to punish, in behalf of the society, those who defy the prohibition. It is significant, however, that maritime States appear to be reluctant to impose generally such burdens or to create such sanctions. Conversely, there happily remains widespread acceptance of the principle that the free and unmolested enjoyment of the high seas in times of peace is the privilege of every ship sailing under the flag of a civilized State.[3]

If a State may, under any circumstances, excuse its assertion of jurisdiction with respect to the conduct of a foreign vessel and its foreign occupants on the high seas, it must be due to the fact that the ship or those individuals were participating in some activity itself internationally illegal, and, therefore, forbidden by the family of nations, or to the presence of extraordinary circumstances which, for the moment or for the time being, justified disregard of the normal obligation of restraint.

(2)

§ 228. Jurisdiction Resulting from Acts of Self-Defense.

It has been observed that on grounds of self-defense a State may under certain circumstances not unreasonably exercise its

[1] Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, For. Rel. 1889, 614, Moore, Dig., I, 931; Award of Dr. F. de Martens, Arbitrator, in the case of the Costa Rica Packet, Moore, Arbitrations, V, 4952.

A State not infrequently punishes its own nationals on account of acts committed on foreign vessels on the high seas. In so doing, the sovereign merely imposes a penalty for disobedience to its own command, declining to respect the legal quality, whether lawful or unlawful, which the State of the vessel attaches to the act, and, at the same time, without denying the right of that State to exercise jurisdiction should the actor enter its domain. See Mr. Bayard, Secy. of State, to Mr. Connery, Chargé at Mexico, Nov. 1, 1887, For. Rel. 1887, 751, 754, Moore, Dig., I, 933, note; Earl Granville, Secy. of Foreign Affairs, to Mr. Lowell, American Minister to Great Britain, June 8, 1880. For. Rel. 1880, 481, Moore, Dig., I, 934.

[2] Mr. Marcy, Secy. of State, to Chevalier Bertinatti, Sardinian Minister, Dec. 1, 1858, MS. notes to Italian States, VI, 178, Moore, Dig., I, 930; Mr. Fish, Secy. of State, to Mr. Schenck, Minister to England, Nov. 8, 1873, MS. Inst. Great Britain, XXIII, 431, Moore, Dig., I, 931; Opinion of Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 73; Crapo *v.* Kelly, 16 Wall, 610; Wilson *v.* McNamee, 102 U. S. 572, 574.

[3] President Grant, Annual Message, Dec. 1, 1873; Richardson's Messages, VII, 241, Moore, Dig., II, 897.

strong arm outside of its own domain, both on sea and land, and in derogation of the normal rights of another power.[1] Such action may give rise to adjudications in a local court, and these may involve inquiry as to the nature of the acts which the territorial sovereign sought to prevent, and may contemplate the imposition of penalties upon the actors.

Inasmuch as the exercise of jurisdiction, involving a judicial proceeding, differs sharply in character from the taking of preventive measures, as by a military or naval force, in order to avert instant danger to the territory or inhabitants of a State, there may be cases where an adjudication in a local forum cannot well be regarded, from an international point of view, as necessarily incidental to the defense of the territorial sovereign. Thus it may be contended with force, that the grounds justifying interference with a foreign ship on the high seas failed wholly in the particular case to warrant the instigation of local criminal proceedings against the persons controlling the vessel after it had been seized. If such proceedings are not internationally illegal, it must be for the reason that the persons controlling the ship were not only guilty of conduct which the prosecuting State had the right to thwart, but also committed acts of such a kind and so affecting that State that in proceeding criminally against the offenders it might count on the definite acquiescence of maritime powers generally.

(3)

Visit and Search

(a)

§ 229. In General.

The right to visit and search a foreign vessel on the high seas is regarded as pertaining to a belligerent as such,[2] and hence a privilege which, in time of peace, no State may justly exercise.[3] That

[1] Acts on the High Seas, Case of The Virginius, *supra*, § 68. See oral argument of Mr. Carter, in behalf of the United States, Fur Seal Arbitration, *Proceedings*, XII, 101–102, 246–249.

[2] Lord Stowell in the case of Le Louis, 2 Dodson, 210, 245; The Antelope, 10 Wheat. 66; The Marianna Flora, 11 Wheat. 1; Mr. Fish, Secy. of State, to Mr. Borie, Secy. of Navy, May 18, 1869, 81 Dom. Let., 124, Moore, Dig., I, 193. *Cf.* Visit and Search, *infra*, § 724.

[3] President Fillmore, Annual Message, Dec. 2, 1851, Richardson's Messages, V, 117, Moore Dig., II, 888; Mr. Marcy, Secy. of State, to Mr. Cueto, Spanish Minister, March 28, 1855, contained in Senate Ex. Doc. I, 35 Cong., Special Sess., 4, Moore, Dig., II, 889; Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Brit. and For. State. Pap., L, 1145, Moore, Dig., II, 891; Mr. Fish, Secy. of State, to Mr. Adee, Chargé at Madrid, Dec. 31,

the existence of the right depends upon that also of a state of war does not seem to be due to the belief that a State is deterred by any rule of law from defending itself in seasons of peace by the same means which it may employ when it is a belligerent.[1] The true reason would appear to be that what may be and usually is a frequent need of a belligerent, rarely, if ever, becomes a necessary mode of safeguarding the vessels of a State which is at peace.

It is conceivable that on grounds of self-defense a State although not engaged in war might, under extraordinary circumstances, offer satisfactory excuse for the visit and search by a public vessel of a foreign ship. The contingency furnishing conditions necessary to justify such action would, however, appear to be unlikely to arise with any degree of frequency.[2] Therefore it may be neither unscientific nor unuseful to maritime commerce for enlightened powers to assert that the right is the possession solely of a belligerent.

(b)

§ 230. As a Means of Suppressing the Slave Trade.

It is said that the law of nations does not permit the visitation and search of foreign vessels in time of peace as a means of suppressing the slave trade.[3] The United States long adhered

1873, For. Rel. 1874, 976, Moore, Dig., II, 899; Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, Aug. 11, 1880, For. Rel. 1880, 922, Moore, Dig., II, 903; Mr. Gresham, Secy. of State, to Mr. Taylor, Minister to Spain, March 14, 1895, For. Rel. 1895, II, 1177, Moore, Dig., II, 908.

[1] See oral argument of Mr. Carter, *Proceedings*, Fur Seal Arbitration, XII, 246; oral argument of Mr. Phelps, *id.*, XV, 206–207.

[2] "If a piratical vessel were known to be cruising in certain latitudes, and a national armed ship should fall in with a vessel sailing in those regions, and answering the description given of the pirate, the visitation of a peaceable merchantman in such a case, with a view to ascertain her true character, would give no reasonable cause of offense to the nation to which she might belong, and whose flag she carried." Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Brit. and For. State Pap., L, 1145, Moore, Dig. II, 891, 892.

[3] *Le Louis*, 2 Dodson, 210; The Antelope, 10 Wheat. 66, 116–123.

"It was at first sought to found a right of visit and search in such cases on the theory that the trade constituted a violation of the law of nations, for which, as in the case of piracy, the offender might be seized on the high seas by the cruiser of any power. This theory was not accepted; but, while rejecting it, the British courts, in the early part of the nineteenth century, took the ground that, where a foreign vessel was captured on the high seas and was afterwards proceeded against in the British courts as a prize, the fact that she was engaged in the slave trade, if the act was forbidden by the laws of her own country as well as by those of Great Britain, would defeat a claim to restitution." Moore, Dig., II, 914, *citing* The Amédie, 1 Acton, 240; The Fortuna, 1 Dodson, 81; The Diana, 1 Dodson, 95.

to that position.[1] Great Britain renounced, in 1858, claims which it had previously asserted in support of a contrary doctrine.[2] The United States, after having long declined to conclude an agreement yielding to foreign vessels a right to visit and search American ships suspected of being engaged in such traffic,[3] became, in 1862, a party to a convention with Great Britain providing that the vessels of war of the contracting parties, clothed with special instructions, might visit such merchant vessels as should, upon reasonable grounds, be suspected of participation in the African slave trade, or of having been fitted out for that purpose, and, upon well-founded suspicions, send them in for trial before mixed courts.[4] By an additional convention of June 3, 1870, the mixed courts were abolished, and arrangement made that the jurisdiction formerly lodged in them should be exercised by courts of one or the other of the contracting parties. It was agreed also that upon the detention by a cruiser belonging to one party of a merchant vessel of the other, the ship should be sent in to a port of its own country for adjudication, or handed over to a cruiser of its nationality, if one should be available in the neighborhood.[5] The United States became a party of the General Act of Brussels of July 2, 1890, "permitting, for the

[1] Mr. Adams, Secy. of State, to Messrs. Gallatin and Rush, Nov. 2, 1818, Am. State Pap. For. Rel. V, 72, 73, Moore, Dig., II, 918; Mr. Adams, Secy. of State, to Mr. Canning, British Minister, Aug. 15, 1821, MS. Notes to For. Leg., III, 22, Moore, Dig., II, 919; Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Feb. 22, 1822, MS. Notes to For. Leg., III, 50, Moore, Dig., II, 920; Mr. Adams, Secy. of State, to Mr. Canning, British Minister, June 24, 1823, MS. Notes to For. Leg., III, 141, Moore, Dig., II, 921; Mr. Webster, Secy. of State, to Mr. Cass, Minister to France, April 5, 1842, MS. Inst. France, XIV, 272, Moore, Dig. II, 929; Mr. Webster, Secy. of State, to Mr. Everett, Minister to England, March 28, 1843, Webster's Works, VI, 331–342, Moore, Dig., II, 935; U. S. Senate Resolution, June 16, 1858; For. Rel. 1874, 963, Moore, Dig., II, 946.

[2] Mr. Cass, Secy. of State, to Mr. Dallas, Minister to England, Feb. 23, 1859, MS. Inst. Great Britain, XVII, 150, Moore, Dig., II, 941; Same to Same, June 30, 1859, MS. Inst. Great Britain, XVII, 115, Moore, Dig., II, 944; Lord Malmesbury, British For. Secy. to Lord Napier, British Minister, June 11, 1858, Brit. and For. State Pap., L, 737, 738–739, Moore, Dig., II, 943.

[3] See documents contained in Moore, Dig., II, 918 to 941, relating to the Treaty of Ghent of Dec. 24, 1814, and to subsequent discussion and negotiations between the United States and Great Britain.

According to Article VIII of the Webster-Ashburton treaty of Aug. 9, 1842, it was provided that the United States and Great Britain should each maintain on the African coast a sufficient squadron to enforce "separately and respectively" their own laws for the suppression of the slave trade. Malloy's Treaties, I, 655.

[4] Malloy's Treaties, I, 674, 676. See, also, additional Articles concluded Feb. 17, 1863, *id.*, I, 687. Concerning the treaty of 1862, see Moore, Dig., II, 946–948, and documents there cited.

[5] Arts. II and III, Malloy's Treaties, I, 694.

purpose of repressing the slave-trade, a mutual search within a defined zone on the eastern coast of Africa of vessels of less than five hundred tons burden." [1]

It may be noted that the convention concluded by the United States, Great Britain, Russia and Japan, July 7, 1911, for the preservation and protection of the fur seals frequenting the North Pacific Ocean contemplates the visit and search of ships under the flags of the contracting parties when suspected of being engaged in pelagic sealing within specified waters thereof, embracing Bering Sea.[2]

(4)

Piracy

(a)

§ 231. In General.

Piracy is an offense of the high seas. It derives its internationally illegal character from the will of the society of nations which, by common understanding, confers upon each of its members a right of jurisdiction over any persons who, regardless of their nationality, commit the offense.[3] The nature of what is forbidden is to be ascertained by reference to the practice of maritime States generally.[4]

Local legislation, like that of the United States, may provide for the punishment of persons committing acts described therein as piratical.[5] The object may be twofold: first, to punish nationals

[1] For the text of the convention, see Malloy's Treaties, II, 1964.

[2] Art. I, Charles' Treaties, 61.

[3] It is "the rejection of all public rule" by the pirate which Westlake regards as the reason for "the universality of the authority and jurisdiction" over him. Int. Law, 2 ed., I, 181–183. Hall emphasizes the fact that as piratical acts are "done under conditions which render it impossible or unfair to hold any State responsible for their commission", and that as no recourse can, therefore, be had to any government for redress, the right of seizure and punishment is the possession of every State. Higgins' 7 ed., § 81.

See, also, Dana's Wheaton, 193–196; Dana's notes, *id.*, Nos. 83 and 84; Bonfils-Fauchille. 7 ed., § 594; Calvo, 5 ed., 576–605; Rivier, I, 248–251; Woolsey, 6 ed., 233–239; Oppenheim, 2 ed., I, §§ 272–279. Paul Stiel, *Der Tatbestand der Piraterie nach geltendem Völkerrecht*, Leipzig, 1905; G. Tambaro, *Pirateria*, Turin, 1910; D. A. Azuni, *Recherches pour Servir à l'Histoire de la Piraterie*, Genoa, 1816.

See Charles M. Endicott, Narrative of the Piracy and Plunder of the Ship Friendship, of Salem, on the West Coast of Sumatra, 1831, Salem, 1859.

[4] In the course of the opinion of the Court in the case of United States *v.* Smith, Mr. Justice Story said: "And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment." 5 Wheat. 153, 162.

[5] Moore, Dig., II, 951.

who commit acts that are forbidden, as well as aliens who commit them on vessels under the flag of the State; and secondly, to punish any persons of whatsoever nationality who, on whatsoever ships, commit what is deemed to be internationally illegal conduct. In interpreting the legislation of the United States, the Supreme Court has been careful not to impute to Congress an intention to assert a right of jurisdiction with respect to the acts of foreigners on board of foreign vessels on the high seas, save when those acts might be fairly regarded as amounting to piracy within the requirements of international law.[1] Acts of such a character committed by foreigners on vessels not under the flag of any civilized State have been regarded as within the scope of the statutory law.[2]

The zone of piratical operations is the high seas.[3] When pirates commit depredations within the domain of a particular State, the actors, so long as they remain there, are subject to the sole jurisdiction of the territorial sovereign.[4]

Pirates, by reason of their occupation, possess no authority which any civilized State is bound to respect. National authorization of the commission of piratical acts could not free them from their internationally illegal aspect.[5] Before Germany became a

[1] Concerning Section 8 of the Act of April 30, 1790, 1 Stat. 113, 114, see United States *v.* Palmer, 3 Wheat. 610; United States *v.* Klintock, 5 Wheat. 144; United States *v.* Holmes, 5 Wheat. 412; United States *v.* The Pirates, 5 Wheat. 184. *Cf.* commentary on these decisions in Moore, Dig., II, 954–959.

See Chap. 12 of the Federal Criminal Code, with respect to piracy and other offenses upon the seas, U. S. Comp. Stat. 1918, §§ 10463–10483 *a*. According to § 10463, 35 Stat. 1145, "Whoever on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."

It may be observed that piracy is frequently made an extraditable offense in extradition treaties of the United States. Concerning the interpretation of the term "piracy" in Art. X of the treaty with Great Britain of Aug. 9, 1842, see In re Tivnan, 5 Best & S. 645, Dip. Cor. 1864, II, 30; Case of *The Chesapeake*, Moore, Extradition, I, 316.

[2] United States *v.* Klintock, 5 Wheat. 144, 152; United States *v.* The Pirates, 5 Wheat. 184; United States *v.* Holmes, 5 Wheat. 412.

[3] Oppenheim, 2 ed., I, § 272.

[4] § 302 of the Federal Criminal Code; 35 Stat. 1147, U. S. Comp. Stat. 1918, § 10475.

[5] Sir William Scott, in the case of The Helena, 4 Ch. Rob. 3, 5–6. At the close of the eighteenth century, the Barbary powers had by no means abandoned their regular depredations under official authority on merchant vessels generally. Moore, Am. Diplomacy, 64–70. As late as 1853, Dr. Lushington, in the case of The Magellan Pirates, 1 Spinks' Eccl. & Adm. Rep. 81, 83, declared: "Even an independent State may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not

belligerent in 1914, it was not supposed that any member of the family of nations would authorize the commission in its behalf of acts on the high seas which by reason of their unmoral character sank to the level of those of the pirate, even though they differed technically in kind from those committed by the latter.[1]

(b)

§ 232. Piratical Acts.

Piratical acts may assume a variety of forms.[2] They may include, for example, homicide or robbery or burning.[3] They may be directed against the ship on which the actors are lodged, or against its officers, or against another vessel and its occupants.[4] They may represent the united effort of persons controlling a vessel so that the ship itself is transformed into a piratical craft. Coincident in time with the birth of the United States, certain seas were infested with brigands whose regular occupation was the robbery and seizure of merchant vessels as a means of enriching the captors.[5] The purpose of their undertakings and their in-

pirates because, perhaps, their sole livelihood may not depend on piratical acts? I am aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such *dictum* as a universal proposition."

[1] See § 304 of the Federal Criminal Code, with respect to acts committed by an American citizen under color of a foreign commission, and deemed to constitute the actor "a pirate", 35 Stat. 1147, U. S. Comp. Stat. 1918, § 10477.

[2] Dana's Wheaton, 192 to 196; Dana's Note No. 83, *id.*

[3] Declared Chief Justice Marshall in United States *v.* Klintock, 5 Wheat. 144, 152: "The Court is satisfied, that general piracy, or murder or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations." See, also, Mr. Justice Story, in United States *v.* Smith, 5 Wheat. 153, 160–162.

[4] United States *v.* Holmes, 5 Wheat. 412; Mr. Marcy, Secy. of State, to Mr. Starkweather, Sept. 18, 1854, MS. Inst. Chile, XV, 107, Moore, Dig., II, 965.

The capture of a vessel by native Africans unlawfully kidnapped, and to whom a status of slavery had not been validly attached, for the sole purpose of enabling the captors to regain their native country, and not for that of robbery or plunder, was held not to be piratical in the case of the *Amistad*, 15 Pet. 518, 593–594. See, also, Mr. Seward, Secy of State, to Mr. Van Valkenburg, Minister to Japan, Feb. 19, 1869, MS. Inst., Japan, I, 316, Moore, Dig., II, 966.

The attempt of a mutinous crew to gain control of a vessel, or acts of violence of other persons on board, having the same end in view, do not constitute piracy. If, however, the actual control of the ship be displaced, and the mutineers or other persons thereon employ the ship for their own purposes, in total disregard of the authority of the country to which the vessel belongs, their action becomes clearly piratical. The piracy in such case is the consequence of the successful mutiny or overthrow of authority. See Dana's Wheaton, Dana's Note No. 83. *Compare* Opinion of Mr. Hill, Asst. Atty.-Gen., 14 Ops. Attys.-Gen., 589.

[5] "At the close of the eighteenth century, a merchantman built for long

difference as to the nationality of the victims may have been responsible for the belief that he was not a pirate whose acts were directed against the vessels of a single State.[1] It is now understood, however, that the sea-brigand cannot, by so limiting the scope of his operations, free himself from a piratical character.[2]

As piracy does not necessarily involve the taking of property, the absence of an intent to steal is not necessarily decisive of the character of what takes place. According to Dana, "the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons or classes of persons, or by a particular national authority." [3]

It seems to be distinctive of acts of piracy that they are committed in furtherance of private ends rather than for a public purpose in behalf of a political community.[4] When an insurrection has been suppressed, persons who were associated with it cannot save the character of their acts, otherwise to be regarded as piratical, on the ground that the commission thereof was in aid of a public cause.[5]

voyages still differed little in armament from a man-of-war. Whether it rounded the Horn or the Cape of Good Hope, it was exposed to the depredations of ferocious and well-armed marauders, and if it passed through the Straits of Gibraltar it was forced to encounter maritime blackmail in its most systematic and most authoritative form." J. B. Moore, Principles of American Diplomacy, 1918, p. 104.

[1] See, for example, the language of Mr. Justice Nelson in United States *v.* Baker, 5 Blatchford, 6, 12, cited with approval by Mr. Bayard, Secy. of State, in a communication to the Secy. of the Navy, July 14, 1885, 156 Dom. Let., 691, Moore, Dig., II, 1097; also suggestion of Chief Justice Marshall in United States *v.* Klintock, 5 Wheat. 144, 152.

[2] Dana's Wheaton, Dana's Note No. 83.

[3] *Id.* Mr. Dana criticized the statement oftentimes made that an act of piracy must be committed by one possessed of an *animus furandi*. Inasmuch as the Latin verb *furari* refers to the taking of property, and the absence of an intention to steal is not necessarily proof that the actor is not possessed of a state of mind which may serve to give to his acts a piratical character, this objection seems well taken. If it be necessary to resort to a Latin phrase in order to describe the requisite or common mental state of a pirate, it might be well to consider the potentialities of the verb *furere*, signifying to rage, to be furious, to act like a madman, or, as Cicero employed it, to act against the welfare of one's own country. In view of the nature of his occupation and the contempt with which he is regarded by civilization, a pirate might be said to possess invariably an *animus furendi*.

[4] Declares Hall: "Though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends." Higgins' 7 ed., p. 269, § 81. See, also, In re Tivnan, 5 Best & S. 645, Dip. Cor. 1864, II, 30; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085. *Compare* Smith's Case and statement of counsel for the prosecution published in Moore, Dig., II, 1079; also case of the *Chesapeake*, Moore, Extradition, I, 316; Burley's Case, *id.*, I, 319, Dip. Cor. 1864, II, 813.

[5] "The Confederate cruiser Shenandoah continued her depredations on United States vessels in the seas around Cape Horn for several months after

It is always possible that persons participating in a public expedition involving the use of force on the high seas may, for their own purposes, commit depredations not in fact related to or necessitated by the political cause which they serve. Doubtless such acts are not necessarily stripped of a piratical quality (if they would otherwise attain it) by reason of the general purposes of the expedition. Difficulty may, however, arise in such a case to distinguish the particular act which could be fairly regarded as piratical from others necessarily attributable to and connected with the public cause.[1]

(c)

§ 233. Acts of Unrecognized Insurgents.

At the present time there remains the inquiry as to the extent to which the particular operations of unrecognized insurgents are to be fairly regarded as both internationally illegal and possessed of a piratical character. The body of maritime States is not necessarily affected by the operations of insurgents directed solely against vessels of the State whose government it is sought to overthrow. For that reason, there has been at times a disposition on the part of such States to pay a certain degree of respect to the authority conferred upon insurgent vessels and their occupants, before formally according recognition to the insurgent movement.[2]

As the success of an insurgent movement produces a legal condition of affairs demanding recognition by foreign powers, the commission of acts of force on the high seas by means of which that result is accomplished, should not, as Hall declares, be treated as piratical merely on account of the lack of external recognition of the political power by whose authority they were committed.[3]

the fall of the Confederate government, but as it was in ignorance the British authorities, on her arrival at Liverpool, allowed the captain and crew to go free and delivered the ship to the United States." Westlake, 2 ed., I, 186. See, also, Moore, Arbitrations, IV, 4176.

[1] *Compare* the situation where, under an extradition treaty, the surrender is demanded of a person accused of robbery, and where it is contended by the accused that the act charged was incidental to a political movement rendering the offense itself political in character and hence one outside of the scope of the treaty. See Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, relative to the case of Jesus Guerra, For. Rel. 1897, 408–414; also Case of Christian Rudovitz, whose extradition from the United States was sought by Russia in 1909. Extradition, Political Offenses, *infra*, §§ 315–316.

[2] Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, June 15, 1885, For. Rel. 1885, 272, 273, Moore, Dig., II, 1094; Article by Dr. Francis Wharton, in *Albany Law J.*, Feb. 13, 1886, 125, Moore, Dig., II, 1100.

[3] Hall, Higgins' 7 ed., § 81, pp. 268–269.

It is not believed that the acts of insurgents when duly authorized by those in control of the insurgent movement, if committed in furtherance thereof, and directed solely against the vessels of the government sought to be overthrown, should be regarded as piratical. A Federal court, in 1885, appeared to reach a somewhat different conclusion in the case of the *Ambrose Light*.[1] In that case the brig *Ambrose Light*, commissioned by insurgent authorities opposing the government of Colombia, was seized in 1885, by the U. S. S. *Alliance*, in the Caribbean Sea about twenty miles to the westward of Cartagena. None of the officers or crew of the captured ship were American citizens. The vessel was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established government of Colombia. It did not appear that depredations or hostilities were contemplated by the persons controlling the vessel other than such as might be incidental to the struggle against that government and to the so-called blockade and siege. The ship was brought to New York and there condemned on the ground that she had been lawfully seized because "bound upon an expedition technically piratical." In reaching this conclusion, the court stated that as the seizure had been made by the Navy Department "under the regulations", and as the case was prosecuted by the Government itself claiming "its extreme rights", the court was bound to apply "the strict technical rules of international law."[2] It may be doubted, however, whether the practice of maritime States has established a rule of international law which would denounce as piratical an expedition such as that upon which the *Ambrose Light* was bound, under circumstances such as those of that case.[3] The United States has at various times expressed reluctance to treat as piratical the operations of insurgent vessels engaged in furthering a public end, and when directed solely against persons and property associated with governments sought to be overthrown. It

[1] 25 Fed. 408.

[2] *Id.*, 443. Concerning the *Ambrose Light*, see Mr. Bayard, Secy. of State, to Secy. of Navy, July 14, 1885, 156 MS. Dom. Let. 691, Moore, Dig., II, 1097; Mr. Bayard, Secy. of State, to Mr. Garland, Atty.-Gen., July 15, 1885, 156 MS. Dom. Let., 263, Moore, Dig., II, 1099, note; Editorial comment, Scott, Cases, 350, note.

[3] *Compare* the attitude of Baron Cotejipe, Brazilian Minister of Foreign Affairs, in communication of Jan. 12, 1877, to the Spanish Chargé d'Affaires, regarding the steamer *Montezuma*, quoted by Calvo, 5 ed., I. 591; also position of the British, French and German governments, respecting certain Spanish ships taken by insurgents, near Cartagena in 1873, described in Calvo, 5 ed., I. 583–588.

has, moreover, properly declined to be guided in its decisions by declarations or requests emanating from such governments.[1]

Whether the acts of unrecognized insurgents, directed against the ships of foreign States, are to be deemed piratical should, on principle, depend upon the magnitude of the movement and also upon the relation of the acts to the struggle for the reins of government. If the acts are incidental to the contest, and consist merely in the attempt to prevent an outside State or its nationals from rendering aid to the *de jure* government opposed, and in a struggle of such magnitude as would justify the recognition of the insurgents as such by a foreign power, it is not believed that they should be treated as piratical.[2]

It must be clear that vessels belonging to the nationals of a foreign State, and which have been seized by unrecognized insurgents, may be lawfully retaken upon the high seas by the public ships of that State.[3] This right is not, however, based upon the theory that the original taking was essentially piratical,

[1] Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085; Mr. Frelinghuysen, Secy. of State, to Mr. Langston, Minister to Haiti, Dec. 15, 1883, For. Rel. 1884, 297. Moore, Dig., II, 1087; Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, April 24, 1885, For. Rel. 1885, 254, Moore, Dig., II, 1089; Same to Same, June 15, 1885, For. Rel. 1885, 272, 273, Moore, Dig., II, 1094; Mr. Bayard, Secy. of State, to Mr. Whitney, Secy. of Navy, April 15, 1885, 155 MS. Dom. Let. 101, Moore, Dig., II, 1096, note.

On October 31, 1873, *The Virginius*, a vessel belonging to the Cuban insurgents and employed in aiding the insurrection, was captured by the Spanish cruiser *Tornado*, and taken to Santiago de Cuba, where fifty-three of the persons on board, American, British and Cuban, were charged with piracy, tried by court-martial, and shot. The vessel had been fraudulently registered in the United States, and when captured was displaying the American flag. Both the United States and Great Britain emphatically denied the right of Spain to treat the persons found on board *The Virginius* as pirates. To both States Spain paid substantial indemnities in satisfaction of personal claims, for distribution among the families of persons interested. See Mr. Fish, Secy. of State, to Admiral Polo de Bernabé, April 18, 1874. For. Rel. 1875, II. 1178, 1182; also *id.*, 1250, Moore, Dig., II, 967–968, and documents there cited; also Hall, Higgins' 7 ed., p. 277, *citing* Parl. Papers, LXXVI, 1874.

[2] *Compare* the case of the monitor *Huascar*, which in 1877, after revolting from the public service of Peru, and having adhered to the insurgent movement, was denounced by the *de jure* government as a piratical vessel. The *Huascar*, while on the high seas, took coal from a British ship without agreeing to pay therefor, and also stopped another British ship, taking therefrom two persons bound for the public service of the Peruvian government. As these acts were considered piratical by the Commander-in-Chief of the British Naval force in the Pacific, the *Huascar* was attacked and partially disabled by a British cruiser. Upon the subsequent surrender of the *Huascar* to the Peruvian authorities, that Government demanded an indemnity of Great Britain, which the latter refused to pay. Hall, Higgins' 7 ed., pp. 275–276, *citing* Parl. Papers, Peru, No. 1, 1877.

[3] Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085; Mr. Bayard, Secy. of State, to Mr. Scruggs, Minister to Colombia, May 19, 1885, For. Rel. 1885, 211. Moore, Dig., II, 1087–1088.

but rather on the ground that as the seizure was wrongful the rescue from the seizor is at least justifiable.[1] From this right of recapture there does not appear to be derived a right to regard the original seizure as piratical.[2] Whether that act is of such a character should be ascertained by reference to the general principles applicable to any case.[3]

(d)

§ 234. Acts of Privateers.

At the time when privateering flourished, the courts of the United States declared that, according to the law of nations, the duly commissioned privateer, like the public armed vessel, was not to be regarded as piratical.[4] Furthermore, the political department of the Government asserted that privateering was not to be deemed to partake of the offense of piracy because of the circumstance that the commander and a majority of the crew of a privateer might not be nationals of the State issuing the commission.[5] The action, however, of Mexico in 1847, in issuing blank commissions for the use of privateers, and for indiscriminate sale by minor agents in Europe, who were empowered to insert the names of persons commissioned, was regarded by the United States as action conferring no authority entitled to respect.[6]

(5)

§ 235. Revenue or Hovering Laws.

Great Britain in 1736, and the United States in 1799, by means of revenue or so-called hovering laws, appeared to assert a right

[1] Mr. Bayard, Secy. of State, to Mr. Whitney, Secy. of Navy, April 15, 1885, 155 MS. Dom. Let. 101, Moore, Dig., II, 1089, note.

[2] Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, April 24, 1885, For. Rel. 1885, 254, Moore, Dig., II, 1089–1090.

[3] It must be obvious that insurgents may commit acts of piracy. Declared Dr. Lushington in the case of the Magellan pirates, "It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion." 1 Spinks, Eccl. & Adm. Rep. 81, 83.

[4] The Neustra Señora de la Caridad, 4 Wheat. 497; The Santissima Trinidad, 7 Wheat. 283; Ford *v.* Surget, 97 U. S. 594, 618–620; Dale *v.* Merchants' Mutual Marine Ins. Co., 6 Allen, 373; Dale *v.* New England Mutual Marine Ins. Co., 2 Cliff. 394; Fifield *v.* Ins. Co. of Penn., 47 Pa. St. 166.

See, also, memorandum of Mr. Buchanan, Minister at London, March 16, 1854, Geo. Ticknor Curtis, Life of James Buchanan, New York, 1883, II, 128, quoted in Moore, Dig., II, 976.

[5] Mr. Adams, Secy. of State, to The Chev. Onis, Spanish Minister, April 7, 1819, MS. Notes to For. Leg. II, 355, Moore, Dig., II, 974.

[6] Mr. Buchanan, Secy. of State, to Mr. Saunders, June 13, 1847, MS. Inst. Spain, XIV, 224, Moore, Dig., II, 972.

of jurisdiction with respect to certain acts committed on the high seas adjacent to their territorial waters and within four leagues of their coasts.[1] The Act of Congress imposed a penalty upon the master of any vessel bound to a port within the United States who should, within that distance of the coasts thereof, not produce the requisite manifests of the cargo to be discharged within the United States, or fail to certify the same, and also in case of the unlading of the cargo before the ship should come to the proper place for the discharge of the same without authority, except in case of necessity.[2] The same act directed revenue officers to board all vessels which should arrive within the United States or within four leagues of the coasts thereof, if bound for the United States, and search and examine the same, demand, receive and certify the requisite manifests, affix proper seals, and remain on board until the vessels should arrive at their destination.[3] It is thus apparent that while the design of the statute was to prevent the commission of acts within the limits of the United States in violation of its revenue laws, the scheme of prevention contemplated the punishment of individuals on account of acts committed on the high seas, at least in case the ship concerned came into American waters.[4]

Notwithstanding conflicting opinions within a small group of cases, it is not to be concluded that the Supreme Court of the United States denounced such conduct as at variance with the requirements of international law.[5]

[1] The British Act of 1736, was that of 9 Geo. II, Chap. 35. See, especially, Sections XVIII and XXIII.

The Act of Congress is Chap 22, March 2, 1799, to regulate the collection of duties on imports and tonnage, 1 Stat. 627, 647–648, 700. The date of this Act is sometimes inadvertently stated to be March 2, 1797.

Cf. Marginal Seas, *supra*, § 144.

[2] Act of March 2, 1799, Section 26, Rev. Stat. § 2814, U. S. Comp. Stat. 1918, § 5511; also Section 27, Rev. Stat. § 2867, U. S. Comp. Stat. 1918, § 5555.

[3] Act of March 2, 1799, Section 99, Rev. Stat. § 2760, U. S. Comp. Stat. 1918, § 8459½ *b* (52)

See, also, Dana's Wheaton, Dana's Note No. 108.

[4] "All these offences, and all offences of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offence against the municipal law within the area to which the municipal law properly extends." Sir Charles Russell, oral argument, Fur Seal Arbitration, *Proceedings*, XIII, 1076.

[5] Chief Justice Marshall, in the case of Church *v.* Hubbart, 2 Cranch, 187, 234, in 1804 declared it to be the right of a State to seize vessels hovering upon its coasts and about to enter therein for the purpose of violating its revenue laws. "The result of the decision is," according to Mr. Dana, "that the Court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power, was void and a mere trespass." Dana's Wheaton, Dana's Note No.

In his oral argument before the Paris Tribunal, in the Fur Seal Arbitration, in 1893, Mr. Edward J. Phelps, in behalf of the United States, summarized the practice of his own country and Great Britain. He justified the position of both on the ground of self-defense, or, more broadly, of self-preservation.[1] Sir Charles Russell (then Attorney-General, subsequently Lord Chief Justice of England) asserted, on the other hand, that hovering laws rested upon the principle that

> no civilized State will encourage offences against the laws of another State, the justice of which laws it recognizes. It will-

108. In 1808, in the case of Rose *v.* Himely, 4 Cranch, 241, 279, the learned Chief Justice expressed the view that the seizure of a foreign vessel on the high seas for the breach of a municipal regulation was an act "which the sovereign cannot authorize." Justices Livingston, Cushing and Chase, without expressing an opinion on the validity of a seizure on the high seas under a municipal regulation, if the property captured should be immediately taken into a port of the captor's country, concurred in denying the validity of the condemnation of the vessel because she was condemned while lying in a foreign port. *Id.*, 281. Johnson, J., was of opinion that the capture was legal. *Id.*, 281; and Todd, J., subsequently stated that he had concurred in that view. See Hudson *v.* Guestier, 6 Cranch, 285, note. In the case of Hudson *v.* Guestier, 4 Cranch, 293, in an agreed statement of facts, it appeared that the capture was effected within territorial waters, hence the right to capture on the high seas was not considered. The judgment for the plaintiffs having been set aside, however, the case was remanded for a new trial, and, as a result, the defendant secured a verdict and judgment. The plaintiffs, thereupon, by writ of error, appealed to the Supreme Court, alleging as error an instruction to the effect that the capture was legal, "although such capture was made at a distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island." Hudson *v.* Guestier, 6 Cranch, 281, 282. The Supreme Court, in affirming the judgment below, held that the allegation as to jurisdiction, "if it had been essential", might, for all that appeared, have been urged before the French court of condemnation, and decided by it in the negative; and that as that court had a right to dispose of every question raised in behalf of the owners of the property, relating to jurisdiction as well as to any other problem, the judgment thereon was not subject to review. Mr. Justice Livingston said, however, in the course of the opinion, "If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent." *Id.*, 284. Chief Justice Marshall, who alone dissented, observed that "he had supposed that the former opinion delivered in this case upon the point had been concurred in by four judges. But in this he was mistaken"; and that the principle of Rose *v.* Himely "is now overruled." *Id.*, 285. The chief ground of disagreement in the foregoing cases concerned the right of a court to condemn a vessel when lying within a foreign port and hence outside of the control of the tribunal, rather than the right of a State to seize a vessel for any purpose outside of its own territorial waters.

See, also, Story, J., in The Apollon, 9 Wheat. 362, 371; Blatchford, J., in Manchester *v.* Massachusetts, 139 U. S., 240, 258; Memorandum by Mr. L. H. Woolsey of the Solicitor's office, Dept. of State, Dec. 28, 1910, on municipal seizures beyond the three-mile limit, For. Rel. 1912, 1289.

[1] Fur Seal Arbitration, *Proceedings*, XV, 128–135.

ingly allows a foreign State to take reasonable measures of prevention within a moderate distance even outside territorial waters.[1]

He denied, however, that such acts would in all cases meet with assent, particularly if the attempt were made to enforce them at a considerable distance from land or that in such case they could be asserted as of right as against an objecting State. In admitting the acquiescence of States in the exercise of such jurisdiction, however limited in scope, the learned advocate established the best possible foundation for the existence of the right under international law.[2] These statements are believed together to furnish significant evidence of the fact that the exercise of jurisdiction for revenue purposes, within a close proximity to territorial waters, is not to be regarded as internationally wrongful.[3]

(6)

§ 236. Hot Pursuit.

When a foreign vessel, after having violated the municipal laws of a State, within its territorial waters, puts to sea to avoid detention, conditions justifying immediate pursuit and capture on the high seas on grounds of self-defense, are, as has been already observed, rarely if ever present.[4] Nevertheless, it may be necessary, as Westlake has pointed out, "for the effective administration of justice", that a State should be permitted to pursue and capture such a vessel on the high seas, and bring it

[1] Fur Seal Arbitration, *Proceedings*, XIII, 1076 and 1079.

[2] Declares Westlake in commenting upon a similar admission by Sir Charles Russell in the course of the same argument: "In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted." Int. Law, 2 ed., I, 177.

[3] Blatchford, J., in Manchester *v.* Mass., 139 U. S. 240, 258; Oral argument of Mr. Edward J. Phelps, Fur Seal Arbitration, *Proceedings*, XV, 128–135.

Said Mr. Fish, Secy. of State, in a communication to Sir E. Thornton, British Minister, Jan. 22, 1875: "It is believed, however, that in carrying into effect the authority conferred by the Act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the Act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations." For. Rel. 1875, I, 649–650, Moore, Dig., I, 731.

See, also, Sir W. Scott in *Le Louis*, 2 Dodson, 210, 245–246; Cockburn, C. J., in Reg. *v.* Keyn, 2 Exch. Div. 63, 216. *Compare* Mr. Evarts, Secy. of State, to Mr. Foster, April 19, 1879, MS. Inst. Mexico, XIX, 570, Moore, Dig., I, 731. See editorial comment on the case of the *Tatsu Maru*, *Am. J.*, II, 391.

[4] *Supra*, § 68.

back to the national domain for judicial prosecution.[1] This is obviously true if the pursuit be commenced before the ship has actually escaped from the territorial waters, and is continued without interruption until the vessel is overtaken and seized.[2]

Enlightened powers are reluctant to attempt to shield their own vessels from the just and natural consequences of illegal acts committed within the territorial waters of friendly States. Hence the practice to which Sir Charles Russell, in his argument in the Fur Seal Arbitration, bore striking testimony, reveals acquiescence on the part of maritime States in the hot pursuit and arrest on the high seas of a delinquent and fugitive vessel by the public ship of the territorial sovereign whose municipal laws have been violated. This acquiescence affords solid proof, therefore, that such action is not internationally illegal.[3]

(7)

§ 237. Impressment.

A State lacks the right to impress into its public service a person, whether a national or a former national, found on board of a foreign vessel on the high seas.[4] Although his presence there

[1] Int. L., 2 ed., I, 177. See, also, Woolsey, 6 ed., 71.

[2] "One condition is it must be a *hot* pursuit — that is to say, a nation cannot lie by for days or weeks and then say: 'You, weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you.' As to that, it must be a *hot* pursuit, it must be *immediate* and it must be *within limits of moderation.*" Sir Charles Russell, oral argument, Fur Seal Arbitration, *Proceedings*, XIII, 1079.

According to Art. VIII of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894: "The littoral State has the right to continue on the high seas a pursuit commenced in the territorial sea, and to seize and pass judgment on the ship which has committed a breach of law within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State whose flag the ship flies. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue ceases as soon as the ship has entered a port of its own country or of a third Power." *Annuaire*, XIII, 330, J. B. Scott, Resolutions, 115.

[3] Fur Seal Arbitration, *Proceedings*, XIII, 1079.

Denying such a right, see Award of Mr. Asser, Arbitrator in the cases of the *James Hamilton Lewis*, and the *C. H. White* under Convention between the United States and Russia, Aug. 26–Sept. 8, 1900, For. Rel. 1902, Appendix, I, 454, 456, and 459, 462.

Concerning the case of the *Itata*, a vessel in the service of the Chilean Congressional Party, and which in 1891, after having escaped from the United States, and having eluded pursuit on the high seas, was surrendered, together with her cargo, to an American naval commander within Chilean waters, see Moore, Arbitrations, III, 3067–3071; Moore, Dig., II, 985–986, and documents there cited.

[4] "Great Britain at one time claimed the right to impress into her navy British seamen found on board the vessels of other nations on the high seas. This claim was asserted, not as a peace-right, nor yet as an independent war-right, but as an incident of the admitted belligerent right of visit and search.

may indicate disobedience to a command forbidding a change of nationality, or prohibiting foreign service not specially authorized, neither circumstance appears, according to American opinion, to justify the assertion of control or jurisdiction over the individual or the ship. That right is necessarily the exclusive possession of the State to which the vessel belongs. For the ship's protection rather than that of a particular occupant, the law of nations denies the privilege to any other power.[1]

e

Extraterritorial Crime

(1)

§ 238. Offenses Committed Outside of the State and Taking Effect Therein.

The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain.[2] Instances of the recognition of this principle in American cases are numerous and varied.[3] It has been observed, however, that in both England and America, the courts have not assumed jurisdiction

> even under Statutes couched in the most general language, to try and sentence a foreigner for acts done by him abroad, unless they were brought, either by an immediate effect or by

. . . The claim of impressment seems at the present day to possess, however, even if it has never been formally renounced, only an historic interest as a phase of the struggle for the establishment of the principle of the freedom of the seas. This great principle, Great Britain now fully recognizes and maintains; she also permits the expatriation of her subjects, and acknowledges the qualified nationality derived by seamen from their services; and, in the case of Mason and Slidell, she impliedly affirmed that the taking of persons from a neutral vessel, under cover of the belligerent right of visit and search, could not be justified by a claim to their allegiance." Moore, Dig., II, 987.

See, also, Mr. Marshall, Secy. of State, to Mr. King, Minister to England, Sept. 20, 1800, Am. State Pap., For. Rel. II, 486, 489, Moore, Dig., II, 989; Moore, Dig., II, 987–1001 and documents there cited; Woolsey, 6 ed., 384–386.

[1] Indirect Unneutral Service, Persons Subject to Interception, The Trent Case, *infra*, §§ 818.

[2] The analysis and treatment of this problem are based upon Mr. Moore's masterly Report on Extraterritorial Crime, contained in For. Rel. 1887, 757.

[3] See, for example, United States *v.* Davis, 2 Sumner, 482; Commonwealth *v.* White, 123 Mass. 430; State *v.* Hall, 114 N. Car. 909; Simpson *v.* State, 92 Ga. 41.

direct and continuous causal relationship, within the territorial jurisdiction of the court.[1]

In 1910, the Department of State declared that "inasmuch as, under Anglo-Saxon legal theory, crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside of its jurisdiction, whether by American citizens or aliens", it was not possible to meet the suggestion of a German note verbale that there be any American guarantee of the criminal prosecution in the United States of an American citizen charged with the commission of a crime in Germany.[2]

(2)

§ 239. Offenses Committed on Vessels of the State.

A State has the right to make reasonable application of its criminal code to its own vessels (private or public) when they are on the high seas, and, therefore, to punish the occupants who violate it.[3] The relation of the State to the vessel when so circumstanced justifies the assertion of jurisdiction.[4] It has been observed, however, that when a merchant vessel (as distinct from a public ship) enters a foreign port, it is not exempt from the local jurisdiction, and that one who, while on board, commits a criminal act is ordinarily amenable to local process.[5] Nevertheless, the State to which the vessel belongs may also punish the offender, especially if he be an officer or member of the crew, in case the territorial sovereign of the port may not have exercised

[1] Report on Extraterritorial Crime, For. Rel. 1887, 778, Moore, Dig., II, 255.

[2] Mr. Wilson (for Mr. Knox, Secy. of State) to Mr. Hill, Ambassador to Germany, Jan. 11, 1910, For. Rel. 1910, 518. See, also, United States *v.* Nord Deutscher Lloyd, 223 U. S. 512, 517–518, where Mr. Justice Lamar declared: "The statute, of course, has no extra-territorial operation, and the defendant cannot be indicted here for what he did in a foreign country. American Banana Co. *v.* United Fruit Co., 213 U. S. 347."

[3] President Adams to Mr. Pickering, Secy. of State, May 21, 1799, John Adams' Works, VIII, 651, Moore, Dig., I, 930; Mr. Fish, Secy. of State, to Gen. Schenck Minister to England, Nov. 8, 1873, MS. Inst. Gr. Br., XXIII, 431, Moore, Dig., I, 931; Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, For. Rel. 1889, 614, Moore, Dig., I, 931; Opinion of Mr. Cushing, Atty.-Gen., Sept. 6, 1856, 8 Ops. Attys.-Gen., 73; Mr. Evarts, Secy. of State, to Mr. Welsh, Minister to England, No. 328, July 11, 1879, For. Rel. 1879, 435, Moore, Dig., I, 932.

[4] Crapo *v.* Kelly, 16 Wall. 610, 624; Wilson *v.* McNamee, 102 U. S. 572.

[5] Rights of Jurisdiction, Ports and Bays; Foreign Merchant Vessels, Application of the Local Law, *supra*, § 221.

jurisdiction, and the offender enter the domain of the former.[1] This concurrent right of that State is based on the theory that its connection with the ship suffices to justify the punishment of persons officially attached to it who disobey the commands of the sovereign wherever the vessel may be, and regardless of the legal quality which acts of disobedience may attain in the place where they are committed.[2]

It will be found that the exemption of a foreign public ship and its occupants from the local jurisdiction of the territorial sovereign is due to its consent.[3]

(3)

§ 240. Offenses Committed by Nationals of the State.

It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience. The unwillingness of the former to respect and yield to the law of the latter is a matter with which no foreign power has the right to interfere.[4] It is to be observed, however, that in practice the nationals of a State are rarely called upon to observe the general provisions of its criminal code when they are within the territory of a foreign country.[5] If a State sees fit, for reasons of public policy, to pro-

[1] Mr. Webster, Secy. of State, to Lord Ashburton, British Minister, Aug. 1, 1842, Webster's Works, VI, 306, 307, cited in United States *v.* Rodgers, 150 U. S. 249, 264, Moore, Dig., I, 936; Reg. *v.* Anderson (1868), 11 Cox C. C. 198.

[2] Nor would there seem to be any reason why the State to which the vessel belongs should be deterred from punishing a passenger, as distinct from a member of the crew, under the circumstances stated in the text, if he were guilty of conduct normally rendered criminal by the laws of enlightened States and by those of the country within whose territory he committed an offense, as well as by those of the prosecuting State.

[3] Exemptions from Jurisdiction, Foreign Vessels of War, *infra*, §§ 251–253.

[4] Mr. Bayard, Secy. of State, to Mr. Connery, Chargé at Mexico, Nov. 1, 1887, For. Rel. 1887, 751, 754, Moore, Dig., I, 933.

[5] "The subject has presented to publicists and legislators so many grave doubts on the score of expediency and justice, that few countries have attempted to require of their citizens a general observance of their criminal law outside of the national territory, except in particular places. These exceptions are barbarous lands, in which local law does not exist, and to which the doctrine of the sovereignty of each nation over all persons within its territory does not completely apply; and Mohammedan and other non-Christian countries, in which the citizens of many states enjoy a conventional immunity from the local law." Report on Extraterritorial Crime, For. Rel. 1887, 779, Moore, Dig., II, 256.

Declared Mr. Justice Holmes in the case of American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 355–356: "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens

hibit the commission by its nationals of particular acts (such as, for example, the remarriage by a divorced citizen within a specified period after the granting of a decree of divorce) anywhere in the world, the scope of the prohibition should be definitely expressed. In the United States the courts are reluctant to impute to the legislature an intention to give extraterritorial application to a penal law containing no express provision respecting the territorial scope of its application.[1]

(4)

Offenses Committed by Foreigners Outside of the State

(a)

§ 241. In General.

Justification for the criminal prosecution of a foreigner by reason of the commission and consummation of an act outside of the prosecuting State, must, on principle, be due to the consent of his own country, or to the fact that the law of nations renders the act, by reason of its peculiar nature, internationally illegal, or because it is directed against the safety of the State.[2] A State may, by treaty, consent that its nationals found engaged in the slave trade shall be prosecuted by another contracting party.[3] Such

as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See The Hamilton, 207 U. S. 398, 403; Hart *v.* Gumpach, L. R. 4 P. C. 439, 463, 464; British South Africa Co. *v.* Companhia de Moçambique [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction."

[1] Van Voorhis *v.* Brintnall, 86 N. Y. 18; State *v.* Shattuck, 69 Vt. 403, 407; Commonwealth *v.* Lane, 113 Mass. 458. *Compare* Lanham *v.* Lanham, 136 Wis. 360, 365–366. See, also, Roth *v.* Roth, 104 Ills. 35, 44.

See State *v.* Fenn, 47 Washington, 561, and Commonwealth *v.* Lane, 113 Mass. 458, relative to statutes expressly forbidding divorced citizens from contracting marriages, under certain circumstances, outside of, as well as within the State.

Declared Mr. Justice Day in Sandberg *v.* McDonald, 248 U. S. 185, 195: "Legislation is presumptively territorial, and confined to limits over which the lawmaking power has jurisdiction."

[2] Declared Mr. Justice Story, in The Apollon, 9 Wheat., 362, 370: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction."

[3] See, for example, treaty between the United States and Great Britain of April 7, 1862, for the Suppression of the African Slave Trade, Malloy's Treaties, I, 674.

an agreement affords, however, no proof of general acquiescence in the application of a local criminal code to the acts of foreigners committed abroad. Nor does the circumstance that the commission of the offense of piracy renders the actor, regardless of his nationality, amenable to prosecution by any maritime power,[1] justify the inference that a territorial sovereign enjoys general authority to prosecute aliens entering its domain on account of the commission of other acts abroad.

(b)

§ 242. Offenses against the Safety of the State.

The statutory law of many States, and notably of continental Europe, has contemplated the prosecution of foreigners charged with the commission, while abroad, of acts directed against the safety of the State; and the legislation of several of that number assimilate to acts of such character those embracing the counterfeiting of seals of the State, as well as various forms of the national moneys.[2] Such legislation may be regarded as exceptional in character. Occasions for its application are infrequent and attributable to circumstances indicative of a great public need.[3] Statutes enacted for the preservation of the safety of a State afford slight support for the contention that it may normally apply its criminal code to aliens who outside of places subject to its control commit acts of which it disapproves.

(c)

§ 243. Offenses against Nationals of the State. Cutting's Case.

The attitude of the United States in Cutting's case is enlightening. On June 18, 1886, one A. T. Cutting, an American citizen, and a resident of Mexico, published in Texas a card commenting on certain proceedings of one Emigdio Medina, a Mexican citizen with whom Cutting had had a controversy. For that publica-

[1] Piracy, In General, *supra*, § 231.

[2] See Report on Extraterritorial Crime, For. Rel. 1887, 790–791.

[3] According to Art. VIII of the Resolutions adopted by the Institute of International Law, Sept. 7, 1883, with respect to the Conflict of Penal Laws: "Every State has the right to render punishable, acts committed even outside of its territory and by foreigners in violation of its local laws, when they constitute an attack upon the social existence of the State and compromise its safety, and when they are not forbidden by the criminal law of the State on whose territory they have been committed."

tion Cutting was, a few days later, arrested and imprisoned in Mexico. Proceedings were taken under Article 186 of the Mexican Penal Code providing for the prosecution of a foreigner committing in a foreign country an offense against a Mexican citizen, in case the breach of law should have the character of a penal offense in the country where it was committed as well as in Mexico.[1] The jurisdiction was sustained by the courts of that country and approved by its Executive. An appellate tribunal released Cutting by reason of the abandonment of the complaint by the aggrieved Mexican citizen, declaring also that justice had been satisfied by the enforcement of a small part of the original sentence.[2] The United States denied that, according to the principles of international law, an American citizen could be justly held to answer in Mexico for an offense committed in the United States, simply because the object of that offense happened to be a Mexican citizen.[3] Mexico, on the other hand, sought to sustain its action on two grounds: first, because such jurisdiction was believed to be justified by international law and the positive legislation of various states; and secondly, on the theory that as such a claim was made in the legislation of Mexico, the question became one solely for the decision of the Mexican courts. In response to the latter, Mr. Bayard, Secretary of State, had merely to advert to the principle maintained and admitted by the United States, that a country cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. In response to the former, he declared that according to the principles of international law the penal laws of a State, save with respect to nationals thereof, had no extraterritorial force; and that the existing legislation of States indicated no general acquiescence in the assertion expressed in the Mexican code.[4] The Secretary protested also against the claim of a right on the part of a Mexican tribunal to pass upon the question whether an American citizen had in fact committed in Texas the

[1] Concerning Cutting's case see For. Rel. 1886, 691–708; *id.* 1887, 751–849 (which contains the Report on Extraterritorial Crime, by Mr. Moore, Third Assist. Secy. of State, 757–840); documents in Moore, Dig., II, 228–242; also A. Rolin, "*L'Affaire Cutting*", *Rev. Droit Int.*, 1 ser., XX, 559; J. M. Gamboa, "*L'Affaire Cutting*", *id.*, 1 ser., XXII, 234, both cited in Moore, Dig., II. 269. See, also, Woolsey, 6 ed., 109–111; Westlake, 2 ed., I, 262–263.

[2] President Cleveland, Annual Message, Dec. 6, 1886, For. Rel. 1886, viii, Moore, Dig. 231.

[3] Mr. Bayard, Secy. of State, to Mr. Connery, Chargé d'Affaires to Mexico, Nov. 1, 1887, For. Rel. 1887, 751, Moore, Dig., II, 232.

[4] *Id.* Proof of this fact was furnished by the data contained in Mr. Moore's Report on Extraterritorial Crime, enclosed in Mr. Bayard's note.

offense of libel against its laws, when, according to the code of that State, no person could be convicted of such an offense except as a result of indictment and trial by jury.[1] The urgent representations of the United States to secure a modification by Mexico of its unusual claim apparently failed to receive favorable consideration.[2] It is believed that the position taken by the United States was sound.

f

Exemptions from Territorial Jurisdiction

(1)

§ 244. In General.

A foreigner is exempt from the jurisdiction of the State which he has entered when the lawfulness of his acts and the consequences resulting from their commission, as well as the process to which he is amenable, are left to the determination of an outside power, such as his own country. It is always by virtue of the consent of the territorial sovereign that the exemption arises.[3] Such consent may be derived from a treaty willingly concluded by friendly powers. It may result from the long-continued and insistent demand of several States, and may not be fully expressed in any series of agreements. Again, the whole family of nations may unite in requiring each of its members to consent to a particular exemption, and so create a general duty of acquiescence. Regardless of the process by which the consent is obtained, the exemption, when once established, becomes necessarily a part of the local law. It is local because it is applied within the territory of a State; and it is a law because it is sanctioned by the supreme power within a State.[4] Thus, it is the law of China, pursuant to treaty, that the American citizen who commits murder within the territory of that country shall

[1] Report on Extraterritorial Crime, For. Rel. 1887, 765.

[2] Mr. Bayard, Secy. of State, to Mr. Bragg, Minister to Mexico, May 4, 1888, For. Rel. 1888, II, 1189, Moore, Dig., II, 240.

[3] Marshall, C. J., in Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 137. See, also, in general, Hall, 5 ed., 167–200.

[4] Mather *v.* Cunningham, 105 Maine, 326, 338.

Declared Finlay, L. C., in the case of Casdagli *v.* Casdagli, [1919] A. C. 145 "The jurisdiction exercised by His Majesty in Egypt is indeed extra-territorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore, for this purpose, really part of the law of Egypt affecting foreigners there resident. . . . In Egypt it is part of the law of the governing community or supreme Power; in other words, it is part of the law of Egypt that English residents are governed by English law." (156

be punished according to the laws of the United States, and by an American tribunal exercising judicial functions on Chinese soil.[1] It may be regarded as the local law of every State that the heads of foreign powers shall be exempt from its jurisdiction whenever they enter its domain.[2]

Because the exercise of exclusive jurisdiction throughout the national domain is essential to the maintenance of the supremacy of the territorial sovereign, the most solid grounds of international necessity must be shown in order to justify a demand that a State consent to an exemption; convincing evidence of usage must be furnished in order to prove that, in the absence of treaty, the sovereign has in fact agreed to yield it. It becomes important, therefore, to examine the reasons urged in behalf of exemptions habitually demanded, as well as the processes by which they are conceded, and the extent to which they are admitted to exist. It is important also to observe the nature and purpose of particular exemptions; whether, for example, they are due to the official character of an individual, or to the function which he is supposed to fulfill; or to the relation between himself and some person or thing that is exempt; or to his method of entering the territory of a State, or to the inapplicability of certain laws to him.

§ 245. The Same.

Exemption from local jurisdiction does not imply exemption also from all local control. It will be found that persons or things regarded as exempt from the former are frequently, under normal conditions, subjected to varying degrees of the latter. Although a particular individual may not be amenable to local process, he may, nevertheless, be prevented from committing acts regarded as detrimental to the public welfare, and rendered illegal by local enactment.[3]

and 161.) It is said in this connection by Prof. Beale that "The acceptance by the House of Lords of the doctrine that the law administered in the consular courts is so administered because it is part of the territorial law of the sovereign, means its universal acceptance." *Harvard Law Rev.*, XXXIII, 3.

See, also, Lord Hobhouse, in Secretary of State *v.* Charlesworth, Pilling & Co., [1901] A. C. 373, 385, quoted by Sir Francis Piggott, Exterritoriality, new ed., Hong Kong, 1907, 5–6.

[1] Art. XI of treaty of June 18, 1858, Malloy's Treaties, I, 215; also Art. XVII of treaty of Oct. 8, 1903, *id.*, 269.

[2] Mighell *v.* Sultan of Johore, Court of Appeal, L. R. 1894, Q. B. Div., I, 149, Moore, Dig., II, 558.

[3] See excellent statement in Moore, Dig., IV. 678; also Mr. Hay, Secy. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom. Let. 104, Moore, Dig., IV, 679.

The term extraterritoriality, or exterritoriality, has frequently been employed not only to describe the character, but also to indicate the reason for the existence of various exemptions;[1] and in the latter connection, to signify that persons or things are immune from local process because they are to be regarded as "detached portions of the State to which they belong, moving about on the surface of foreign territory and remaining separate from it."[2] Even when confined to its descriptive function, the term is employed to refer to immunities accorded to entities or things which are essentially different. The foreign vessel of war which, for example, enjoys exemption from local jurisdiction, bears no resemblance to the parcel of land occupied by a foreign legation which, although the habitat of a diplomatic officer himself exempt from the local jurisdiction, is, nevertheless, subject to certain applications of the local criminal code with respect to offenses there committed by non-diplomatic persons.[3]

To assert the principle of exterritoriality as the reason for the existence of an exemption, is to contend that a foreign political power may penetrate the territory of a State, and there lawfully assert a will in derogation of that of its territorial sovereign.[4] Such an occurrence would mark the defiance of the supremacy of that sovereign within its own domain, and thereby ignore a principle which enlightened powers have acted upon, and have utilized as the basis of their system of international justice.

(2)

§ 246. Heads of Foreign States.

According to Chief Justice Marshall, the equality and independence of "sovereigns", and the common interest impelling

[1] See, for example, language of Mr. Cushing, Atty.-Gen., in the course of an opinion addressed to Mr. Marcy, Secy. of State, April 28, 1855, 7 Ops. Attys.-Gen., 122, 130, 131, Moore, Dig., II, 578.

[2] Hall, Higgins' 7 ed., § 48.

[3] See, for example, case of Nitchencoff, a Russian subject, who committed an assault in the house of the Russian Ambassador at Paris, described in Moore, Dig., II, 778, *citing Solic. Journal*, X. 56, Nov. 18, 1865; also Mr. Jackson, Chargé, to Mr Hay, Secy. of State, July 5, 1899, For. Rel. 1899, 318, Moore, Dig. II, 778–779.

[4] "Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the State in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If exterritoriality is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, dis-

them to mutual intercourse, have given rise to a waiver of jurisdiction over the persons of the heads of foreign States, as well as over certain other agencies thereof.[1] It must be clear that whatever is closely identified with or symbolic of the political power of members of the society of nations should not be treated with the disrespect necessarily implied by the assertion of jurisdiction by a territorial sovereign. What Hall refers to as the "ground of practical necessity" affords at the present time an equally cogent reason for exemption.[2] That necessity demands that the interests of a foreign State should not be injured or embarrassed by subjecting to local process such a national representative as a president or a king.

As a matter of practice, the head of a foreign State, who, as such, enters the territory of any other, enjoys, together with his personal suite, complete exemption from local jurisdiction. If he enters *incognito*, he does not forfeit the privilege of claiming exemption in case he makes known his official character.[3]

It is not believed that the form of the government of a State is decisive of the existence or extent of the exemption of the individual who is its official head. The attempt to assert jurisdiction over the president of a republic within the domain of a foreign power would be justly regarded as a grave violation of international law.[4]

The head of a foreign State is not permitted to exercise judicial functions within the national domain, with respect to persons even of his own suite. Nor can he properly afford asylum within his residence to fugitives from local justice. By attempting thus to thwart the authorities of the State, or by otherwise abusing the privileges necessarily accorded him, he would incur the danger of compelling the territorial sovereign to expel him from its domain.

One who by any process ceases to be the head of a State, at once loses all right of exemption from jurisdiction.

placing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it." Hall, Higgins' 7 ed., § 48, p. 177. Also Scharrenberg *v.* Dollar S. S. Co., 245 U. S. 122.

[1] Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 137.

[2] Higgins' 7 ed., § 48.

[3] Mighell *v.* Sultan of Johore, Court of Appeal, L. R. 1894, Q. B. Div., I, 149, Moore, Dig., II, 558.

[4] Bonfils-Fauchille, 7 ed., § 632.

(3)

Foreign Military Forces

(a)

§ 247. Entering the Territory of a State With Its Consent.

Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.[1] If a member, seeking to break his connection with the force, succeeds in fact in escaping from its control, it is not believed that the military authority possesses the right to pursue, arrest and punish him. The jurisdiction of a commanding officer would seem to depend upon his retention of actual control over the individual. The territorial sovereign may, of course, on grounds of expediency or courtesy, consent to pursuit and arrest, and even the infliction of punishment.[2]

(b)

§ 248. Entering the Territory of a State Without Its Consent.

When a foreign military force enters the territory of a State without its consent, it is believed that the exemption of any member from local jurisdiction should, on principle, depend solely upon whether there is solid justification for the expedition itself. If, for example, there are present those extraordinary circumstances which, on grounds of self-defense, excuse the violation of the national domain, the participants would seem to be entitled to such exemptions as they might claim had the territorial sovereign

[1] Declared Marshall, C. J., in the case of Schooner Exchange *v.* McFaddon: "The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require." 7 Cranch, 116, 139. See, also, Tucker *v.* Alexandroff, 183 U. S. 424.

Also, in this connection, see Mr. Fish, Secy. of State, to Mr. Cameron, Secy. of War, Dec. 7, 1876, 116 MS. Dom. Let. 166, Moore, Dig., II, 400.

[2] In the case of Tucker *v.* Alexandroff, 183 U. S. 424, 435, the Supreme Court of the United States expressed doubt whether, in the absence of positive legislation by Congress, the President possessed the power to authorize a foreign officer to apprehend deserters within the United States. *Compare* situation in Casablanca Case, J. B. Scott, Hague Court Reports, 110.

permitted the force to enter the country.[1] If, however, those circumstances are not present, and the movement or expedition constitutes an essentially illegal invasion of the territory of a friendly State, in time of peace, it is difficult to see how any member of the force derives exemption from the local jurisdiction by reason of the fact that his acts as a participant are in obedience to the commands of a foreign sovereign. Inasmuch as no duty is imposed upon the State to permit the entrance of the force, there would seem to be no duty to consent to the surrender of jurisdiction with respect to a member of it.[2] For that reason it is to be regretted that Mr. Webster, as Secretary of State, in the case of McLeod, whose acts of participation in the *Caroline* expedition in 1837 within the State of New York were ratified by the British Government, declared that while he deemed the expedition to be without justification, the action of the Crown sufficed to exempt the individual from local prosecution in New York.[3]

[1] This is because the violation of territory is, as has been seen, for the purpose of fulfilling a necessary function of government which the State lacks, for the time being, the power or disposition to perform, and when non-performance would be productive of grave and irreparable injury to the rights of the foreign State whose military force is engaged in the expedition. In such case the territorial sovereign is not in a position to claim that the absence of its own consent is proof of the illegality of the penetration of its domain.

Certain Non-political Acts of Self-Defense, *supra*, §§ 66–67; The Landing of Foreign Forces, *supra*, § 202.

[2] It must be acknowledged that a practical difficulty may stand in the way of the application of the principle enunciated in the text. A State whose force enters foreign territory will always be reluctant, if not wholly unwilling, to admit that the expedition lacked justification. On the other hand the State whose territory is invaded may be equally unwilling to admit that there was reasonable excuse for what took place.

[3] See communication to Mr. Crittenden, Atty.-Gen., March 15, 1841, Webster's Works, VI, 262, 264, Moore, Dig., II, 25. *Contra*, statement of Mr. Calhoun, in the Senate, June 11, 1841, Calhoun's Works, III, 618, Moore, Dig., II, 26.

Concerning the case of the *Caroline*, see *supra*, § 66.

"In November, 1840, Alexander McLeod was arrested by the authorities of the State of New York and held for trial on a charge of murder committed at the time of the destruction of the steamer *Caroline*, December 29, 1837, within the territorial jurisdiction of that State. On the 13th December, 1840, Mr. Fox, the British Minister at Washington, on his own responsibility asked for his immediate release, on the ground that the destruction of the *Caroline* was 'a public act of persons in Her Majesty's service, obeying the order of their superior authorities'; that it could, therefore, 'only be the subject of discussion between the two national Governments', and could 'not justly be made the ground of legal proceedings in the United States against the persons concerned.' Mr. Forsyth, Secretary of State, replied on the 28th of December, with the declaration that no warrant for the interposition called for could be found in the powers with which the Federal Executive was invested, but at the same time denying that the demand was well founded. On the 12th of March, 1841, Mr. Fox, in behalf of his Government, presented a formal demand for McLeod's immediate release, on the ground which he had previously stated. Mr. Webster, who had then become Secretary of State, made answer on the 24th of April, and, while admitting the grounds

If McLeod was, according to the law of nations, exempt from the jurisdiction of that State, it was because the violation of its territory by a British force had been justified on grounds of self-defense, and the attending circumstances had satisfied the demands of the legal principle which Mr. Webster had himself tersely enunciated.[1]

(c)

§ 249. Individual Members of Foreign Military Forces.

The reasons of necessity and convenience which give rise to exemptions accorded foreign organized military forces permitted to enter the national domain are not applicable in the case of detached individuals belonging to foreign services. Notwithstanding the right of the territorial sovereign to prosecute them for the commission of offenses against its laws, it may be requested to surrender such offenders, on grounds of courtesy, to the authorities of their own State. The United States has made such a request.[2]

It is believed to be important to observe that in time of peace no individual gains immunity from local prosecution by reason of

of the demand, declared that the Federal Government was unable then to comply with it. In May McLeod was taken down to the city of New York, and was there brought before a justice of the supreme court of the State on a writ of *habeas corpus*. After a full argument, that tribunal, in July, refused to discharge him; and in the ensuing October, ten months after the first demand and seven months after the second, he was tried at Utica, and acquitted on proof of an *alibi*. This case led to the adoption by Congress in August, 1842, of an act to provide for the removal of cases involving international relations from the State to the Federal Courts." Moore, Dig., II, 24–25, *citing* message of Dec. 28, 1840, H. Ex. Doc. 33, 26 Cong., 2 Sess.; report of Feb. 13, 1841, H. Report 162, 26 Cong., 2 Sess.; message of June 1, 1841, S. Doc. 1, 27 Cong., 1 Sess.; message of March 8, 1842, H. Ex. Doc. 128, 27 Cong., 2 Sess.; message of Aug. 11, 1842, H. Ex. Doc. 2, 27 Cong., 3 Sess.; message of Jan. 23, 1843, S. Ex. Doc. 99, 27 Cong., 3 Sess.; Brit. and For. State Pap., XXIX, 1126, and XXX, *id.*, 193; People *v.* McLeod, 25 Wend. 483; 26 Wend. 663, Appendix; Mr. Fox, British Minister, to Mr. Webster, Secy. of State, March 12, 1841; Webster's Works, VI, 247; Mr. Webster, Secy. of State, to Mr. Fox, British Minister, April 24, 1841, *id.*, 250; correspondence between Mr. Forsyth and Mr. Fox, H. Ex. Doc. 33, 26 Cong., 2 Sess.

[1] Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842. Webster's Works, VI, 301–302, Moore, Dig., II, 412. See, also, Arce *v.* State, 202 S. W. (Texas Court of Crim. Appeal) 951. In this case it was held that the courts of Texas were without jurisdiction to punish Mexican soldiers who, while attached to forces of Gen. Carranza, killed American soldiers in the course of a battle in Texas. The decision was based on the theory that while at the time of the killing there was no "public or complete war" existing between the United States and Mexico, the battle was an act of war and technically within the limited meaning of the word "war."

[2] Mr. Seward, Secy. of State, to Gen. Salgar, Colombian Minister, March 30, 1865, MS. Notes to Colombia, VI, 182, Moore, Dig., II, 561.

the fact that he is a member of an absent foreign military force, and that the act charged against him was committed in obedience to a military or other command emanating from a foreign State.[1]

(4)

Foreign Vessels of War

(a)

§ 250. Their Public Character and Its Proof.

A naval vessel built and launched within the territory of a State other than that of the owner, does not acquire the status of a foreign vessel of war until the flag of the sovereign is hoisted upon her. Prior to that time certain immunities from local jurisdiction may doubtless be claimed in behalf of the ship, on the ground that she is the property of a foreign power. She does not, however, possess a quality such that acts committed on

[1] See, in this connection, Horn *v.* Mitchell, 223 Fed. 549. In this case one Horn was held in custody by the United States Marshal for the District of Massachusetts to answer to an indictment charging the prisoner with illegal transportation of explosives interstate, from New York to Boston, and from Boston to Vanceboro, Maine, and alleging that such transportation was necessarily connected with and a part of the destruction of a bridge which was (near Vanceboro and in British territory) in the possession of the British Government. The prisoner sought release by *habeas corpus*, contending in part, that he was not subject to prosecution on the indictment found against him in the District of Massachusetts, because he was an officer of the German army and had committed the acts alleged to be a violation of American law in connection with an attack upon British territory. The petitioner relied upon Section 753 of the Revised Statutes, by virtue of which he contended that he was entitled to have the question of his immunity from prosecution on account of his alleged connection with the German army determined upon *habeas corpus* proceedings. On the assumption that the statute should be given such construction, the United States District Court was not of opinion that the petitioner brought himself within its provisions, for the reason that while he was a subject of a foreign State, it did not appear that he was domiciled within its territory, or that the acts in question were authorized or commanded by the foreign State whose commission he held. In the absence of such authorization it was declared that the prisoner could not invoke the law of nations or his foreign commission in his defense. The court was unwilling to yield to the contention that the petitioner had presumptive authority to act for his government in a foreign country and to bind it by what he did there.

It is believed that even if the petitioner's contention was sound respecting his right to have the question of his immunity from prosecution determined on *habeas corpus* proceedings, the Act of Congress on which he relied would not have sufficed to justify his release even had he proved conclusively his domicile to be in Germany and express authorization from the German Government. It cannot be admitted that the law of nations, to which the statute adverts, bases a right of exemption upon the foreign governmental authorization of the actor save when the foreign sovereign is itself excused from disregarding the supremacy of a friendly State within the limits of its territory.

board of her, are, for any reason, to be regarded as not cognizable in the local courts.[1]

The commission of the commander of a vessel is conclusive of her public character.[2] Evidence of that fact is also furnished by her flag, or by the statement of the commander upon his word of honor. Local authorities are not, however, in case of doubt, obliged to accept the latter as final.[3]

(b)

§ 251. Exemption from Local Process.

Opinion in the United States respecting the existence and scope of immunities to be accorded foreign vessels of war has undergone a marked development since the close of the eighteenth century.[4] In June, 1794, Mr. Bradford, Attorney-General, was of opinion that a writ of *habeas corpus* might be awarded to bring before a local court an American citizen unlawfully detained on board a foreign vessel of war.[5] The same year, however, Mr. Randolph, Secretary of State, informed the British Minister that such a vessel within a friendly port was ordinarily exempt from the local jurisdiction.[6] In 1799, Mr. Lee, Attorney-General, was of opinion that civil or criminal process might be served on board of a British man-of-war within the waters of the United States.[7] It should be observed that an Act of Congress of June 5, 1794, had authorized the President to employ the military and naval forces of the United States or its militia, to enforce the

[1] Tucker *v.* Alexandroff, 183 U. S. 424, 440, *citing* The Constitution (1879), L. R. 4 P. D. 39, and The Parlement Belge, 4 P. D. 129, Moore, Dig., II, 562.

[2] Declared Story, J., in The Santissima Trinidad, 7 Wheat. 283, 335–336: "In general the commission of a public ship, signed by the proper authorities to which she belongs, is complete proof of her national character."

[3] Hall, 5 ed., 161, quoted in Naval War College, Int. Law Topics, 1906, 122.

[4] Opinion in England seems to have undergone an equally great change, since Lord Stowell, in 1820, advised His Majesty's Government relative to the case of an Englishman who, as a political fugitive, took refuge on board a British man-of-war at Callao. Report of Royal Commission on Fugitive Slaves, LXXVI, 226, cited in Westlake, 2 ed., I, 268. Concerning the history of opinion and usage respecting the immunities of vessels of war, see Hall, Higgins' 7 ed., § 54.

[5] 1 Ops. Attys.-Gen., 47. In concluding his opinion the Attorney-General declared that while a writ of *habeas corpus* might be legally awarded in a case such as that confronting him, "the respect due to the foreign sovereign" might require that a "clear case be made out before the writ be directed to issue."

[6] Communication to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 574. See, also, Mr. Randolph, Secy. of State, to Mr. Fauchet, French Minister, Nov. 17, 1794, 7 MS. Dom. Let. 403, Moore, Dig., II, 574.

[7] 1 Ops. Attys.-Gen., 87.

obedience of foreign public armed vessels to the process of courts of the United States.[1] In 1805, Congress reasserted the right, and made provision for the exercise of jurisdiction over persons committing offenses, even as slight as misdemeanors, on foreign vessels of war within the waters of the United States.[2] The President, in pursuance of the requirement that he issue instructions for carrying the act into effect, did issue instructions, which carefully avoided the possibility of a resort to force in order to effect an arrest, unless under the express direction of the Executive.[3]

§ 252. The Same.

In 1812, in the case of The Schooner Exchange *v.* McFaddon, the Supreme Court of the United States rendered a decision which has since guided the legislative and judicial departments of the Government.[4] The case raised the question whether a vessel commissioned as a man-of-war by the French Government was, upon entering a port of the United States, subject to the jurisdiction of a local court, whose aid was invoked by former owners of the vessel to determine whether their title had been lawfully divested by French authority. Chief Justice Marshall, in the opinion of the Court, adverted to the exclusive and absolute jurisdiction of a State within its own territory. He declared that any restriction thereof was to be derived from the nation's consent; that such consent might be express or implied, and might in some instances be tested by common usage, and by common opinion growing out of that usage. He said that a public armed vessel

> constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which a vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality. . . . Without doubt the sovereign of the place is capable of destroying this implication. He may

[1] Sections 7 and 8, Chap. 50, 1 Stat. 384.
[2] Sections 1 and 7, Chap. 41, Act of March 3, 1805, 2 Stat. 339 and 342. See, also, statement in Moore, Dig., II, 575.
[3] Instructions of May 29, 1805, contained in Moore, Dig., II, 575, *citing* Circulars, Dept. of State, I, 3, 4.
[4] 7 Cranch, 116, Moore, Dig., II, 576–577.

> claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.[1]

It is not surprising that the learned Chief Justice understood clearly that all exemptions from jurisdiction were necessarily derived from the consent of the territorial sovereign, or that he appreciated the force of the reasons why that consent, in the case of foreign vessels of war, ought to be given. It is of greater significance that, in view of the previous attitude of his own country, he concluded that such consent was in fact to be ascribed to the United States or to nations generally. The decision was due to the assumption that an enlightened State intended to act in good faith, and to the belief that there should be imputed to it actual consent to whatever yielding of jurisdiction the observance of good faith might demand. The declaration, on the other hand, that a State might, if it so desired, and sufficiently made known its intention, withhold consent and retain jurisdiction, is also of importance. It was not intimated (nor was there need of intimation) that such action would constitute an abuse of power. The Court was confronted with a simple problem: to decide whether the statutes of a State, descriptive of the ordinary jurisdiction of its tribunals, ought to be so construed as to give them jurisdiction in a case in which the territorial sovereign had impliedly consented to waive its jurisdiction. On that precise question the decision was in the negative.

This case settled the law with respect to the United States. Since the decision there has been no disposition on the part of Congress to assert jurisdiction over foreign vessels of war.[2]

§ 253. The Same.

At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process.[3] The

[1] 7 Cranch, 144 and 146.

[2] The Act of May 15, 1820, forbidding foreign armed vessels for a period of two years to enter any harbors of the United States, other than those specified in the Act, 3 Stat. 597, was primarily an assertion of the right to exclude such vessels from territorial waters, rather than an exercise of jurisdiction over those permitted to enter therein. See statement in Moore, Dig., II, 564. See, also, Mr. Evarts, Secy. of State, to Mr. Comacho, Venezuelan Minister, Dec. 9, 1880, MS. Notes to Venezuela, I, 210, Moore, Dig., II, 565.

[3] In addition to The Schooner Exchange *v.* McFaddon, 7 Cranch, 116, see

ship cannot be lawfully subjected to a civil action arising, for example, from a claim for salvage,[1] or to a criminal action arising from the violation of a local regulation. No occupant while remaining on board the vessel is subject to the local jurisdiction, notwithstanding his infraction of the local criminal code by an act committed on shore or taking effect there.[2]

The vessel of war and its occupants owe, nevertheless, well-defined duties to the territorial sovereign. The former is obliged to respect, for example, local regulations pertaining to navigation and quarantine,[3] and special obligations, when, in time of war, the vessel attached to a belligerent service enters a neutral port. Disregard of them may compel the territorial sovereign to resort to measures of prevention, and if need be, to cause the ship to depart from its waters.[4] Moreover, it may not unreasonably request of the commander or of his government the surrender of an inmate whose conduct has wrought grave harm ashore in violation of the local criminal law.[5]

Mr. Marcy, Secy. of State, to Mr. Dobbin, Secy. of Navy, April 21, 1856, 45 Dom. Let. 212, Moore, Dig., II, 578; Opinions of Mr. Cushing, Atty.-Gen., April 28, 1855, and Sept. 6, 1856, 7 Ops. Attys.-Gen., 122, 131, and 8 Ops. Attys.-Gen., 73, Moore, Dig., II, 578; Dana's Wheaton, Dana's Note No. 63. Also The Pampa, 245 Fed. 137.

[1] See The Constitution, L. R. 4 P. D. 39, 45, Moore, Dig., II. 579. Concerning circumstances when a foreign vessel of war as plaintiff in a suit brought against another vessel may be compelled to give security for damages, see The Newbattle, L. R. 10 P. D. 33, Moore, Dig., II, 579.

Cf., also, Naval War College, Int. Law Situations, 1907, 22–45, containing the decision of Sir Francis Piggott in the case of *The Alexander*, a United States naval auxiliary vessel which had been subjected to a civil suit arising from a collision in the harbor of Hong Kong, in 1906.

[2] See opinions of Mr. Cushing, Atty.-Gen., April 28, 1855, and Sept. 6, 1856, 7 Ops. Attys.-Gen., 122, and 8 Ops. Attys.-Gen., 73, Moore, Dig., II. 578; Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, 92 Dom. Let. 322, Moore, Dig., II, 579 and 588.

See, also, Arts. XV and XVI of Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 273, 277, J. B. Scott, Resolutions, 143, 147.

[3] Mr. Hill, Acting Secy. of State, to Secy. of the Navy, Oct. 6, 1899, 240 MS. Let. 399, Moore, Dig., II, 583; also memorandum of Mr. Lemly, Judge-Advocate-General, U. S. N., communicated to Mr. Moore, Third Assist. Secy. of State, July 6, 1891, Moore, Dig., II, 584; also Woolsey, 6 ed., 92–93. *Cf.* Access to Ports, *supra*, § 187.

[4] See, for example, Chap. 30, title V, § 10, Act of June 15, 1917, 40 Stat. 223, U. S. Comp. Stat. 1918, § 10179, authorizing the compelling of any foreign vessel to depart from the United States or its possessions in all cases in which, "by the law of nations or the treaties of the United States, it ought not to remain."

[5] This is the more obvious when the act complained of is committed outside of the vessel. See Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, relative to the surrender of a person charged with the commission of an offense rendered extraditable by a treaty with the demanding government, 92 MS. Dom. Let. 322, Moore, Dig., II, 579.

(c)

§ 254. Duty Not to Grant Asylum.

The territorial sovereign may fairly and normally object to the conduct of the commander of a foreign public vessel who utilizes the exemption from local jurisdiction enjoyed by the ship, to grant asylum thereon to fugitives from justice, and thus to shield them from the operation of local laws.[1] In Regulations of the United States Navy of 1913, it was declared that "the right of asylum for political or other refugees has no foundation in international law." It was stated, however, that where frequent insurrections occur and constant instability of government exists, "usage sanctions the granting of asylum." It was said that even in the waters of such countries officers should refuse all applications for asylum, except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob; and it was added that officers must not directly or indirectly invite refugees to accept asylum.[2]

[1] See discussion of the subject in Moore, Dig., II, 845–855, and documents there cited; also, Naval War College, Int. Law Situations, 1902, 21–27, *id.* 1904, 26–34.

[2] See Article R–1649, U. S. Navy Regulations and Naval Instructions, 1913; also Wilson, Int. Law, 1910, p. 118, note 46, *quoting* Regulations of 1905, No. 308.

Concerning the asylum granted certain Chilean refugees on American vessels of war in 1891, see Moore, Dig., II, 851–852, *citing* H. Ex. Doc. 91, 52 Cong., 1 Sess., 71 and 289.

Concerning the asylum granted certain Brazilian refugees on Portuguese vessels of war in 1894, and the consequences thereof, *cf.* For. Rel. 1894, 64–73, and 513, Moore, Dig., II, 853–855. See, also, Mr. Olney, Secy. of State, to Mr. Sill, Minister to Korea, telegram, Dec. 2, 1895, For. Rel. 1895, II, 974, in which strong opposition was expressed to the suggestion of the Minister to permit certain political refugees in his hands to take passage on the U. S. S. *Yorktown* for Shanghai. See correspondence between the United States and Mexico, 1909–1910, For. Rel. 1910, 739–742, respecting the conveyance of Gen. Zelaya out of Nicaraguan territory as a refugee on a Mexican gunboat.

On Oct. 28, 1913, the Department of State declared: "While the rule governing such cases is that it is the duty of American men of war to protect American citizens, it is, as a general rule, against the policy of this Government to grant asylum in its ships to the citizens of foreign countries engaged in political activity, especially when such asylum is for the purpose of furthering their political plans. Temporary shelter to such persons, when they are seeking to leave their country, has sometimes been conceded on grounds of humanity, but even this is done with great circumspection lest advantage be taken of it to further the political fortunes of individuals with the result of involving us in the domestic politics of foreign countries." For. Rel. 1913, 854, 855.

Art. XIX of the Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, appeared to recognize the propriety of offering an asylum to political refugees, as distinct from common offenders against the local criminal law, or deserters from a military or naval service. It was declared, however, that if the commander of the foreign vessel of war should receive political refugees

When a fugitive from justice is once received on board of a foreign vessel of war within the territorial waters of a State he is believed to be withdrawn from the local jurisdiction.[1] Although his reception may have amounted to an abuse of the privileges accorded the vessel, the territorial sovereign does not from that circumstance derive a right of jurisdiction over the ship or its occupants.[2] If the individual has been wrongfully taken on board, and so improperly withdrawn from the control of the territorial sovereign, a demand for his surrender should be made upon the commander of the vessel,[3] or upon the State to which the vessel belongs, through the diplomatic channel, and following the procedure applicable in extradition cases.[4]

(d)

§ 255. Officers and Crews.

The exemption enjoyed by persons officially connected with and on board of a foreign public vessel does not accompany them after they have left the ship or its tenders and are on shore. If a body of sailors under the command of an officer is permitted to land as an organized force, as for the purpose of taking part in a local parade, the members are doubtless exempt from the local jurisdiction, not, however, on account of their connection with a public vessel, but because they constitute an organized force of a foreign State permitted to enter the national domain.[5]

Officers and crews of foreign vessels of war, who commit offenses while ashore, are generally subject to local prosecution.[6] In deal-

on board, it should be clearly established that they were such, and that their admission should be under conditions such as not to constitute assistance by him to one of the parties in dispute to the prejudice of the other. *Annuaire*, XVII, 278, J. B. Scott, Resolutions, 148.

[1] See Oppenheim, 2 ed., I, § 450.

[2] When, in time of war, a neutral vessel of war attempts to remove from a port under belligerent occupation persons expressly forbidden to depart therefrom, without permission of the military authorities, the belligerent may, as such, justly employ reasonable means to block the attempt by searching the vessel and taking off the individuals. See Moore, Dig., II, 849–850, *citing* Dip. Cor. 1863, II, 915, also Dip. Cor. 1866, II, 611–612, *id.* 1867, II, 705.

[3] Mr. Fish, Secy. of State, to Mr. Case, Jan. 27, 1872, MS. Dom. Let. 322, Moore, Dig., II. 851.

[4] See case of the Salvadorean refugees, and relating thereto, President Cleveland. Annual Message, Dec. 3, 1894, For. Rel. 1894, xiv, Moore, Dig., II, 851; also article by J. B. Moore, in *Am. Law Rev.* XXIX, 1.

See Art. XXI of Regulations Concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 278, J. B. Scott, Resolutions, 149.

[5] Tucker *v.* Alexandroff, 183 U. S. 424, 433, Moore, Dig., II, 590; Exercise of Jurisdiction within the National Domain, On Land, *supra*, § 220.

[6] Mr. Randolph, Secy. of State, to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 585; Mr. Buchanan, Secy. of State, to Mr.

ing with the former, however, it is said to be the duty of police authorities to have regard for the rank of the offenders, and to accord them, while under arrest, treatment that shall not betray disrespect towards the naval service of their country.[1]

Possibly the commander of a vessel of war who goes ashore in order to accomplish an end directly connected with or incidental to the public business which brought his vessel into the port, ought not, while so engaged, to be amenable to local process, provided he does not, in the course of his errand, violate the local law. It is believed that he should not, for example, be arrested for an offense committed during a previous visit, or be served with process in a civil suit charging him with tortious conduct at any prior time.[2] It is not known, however, that such an exemption within the limits stated has been claimed or granted by the United States.

For reasons of courtesy and expediency, a usage has arisen permitting foreign officers to seize and take on board their ships, without obstruction, members of crews who have become intoxicated and whose offenses have not been directed against persons or property ashore;[3] likewise, to exercise the customary authority for the maintenance of discipline over seamen, remaining ostensibly within the foreign naval service, and subject to its *de facto* control.[4] Such officers obviously possess no right, however, to arrest seamen who have deserted and escaped from actual control.[5]

(5)

§ 256. Other Vessels in Foreign Public Service.

The reasons which justify and demand the exemption from local jurisdiction of foreign vessels of war are applicable also to other ships devoted to foreign public service. This is fully acknowledged

Leal, Brazilian Chargé, Aug. 30, 1847, S. Ex. Doc. 35, 30 Cong., 1 Sess., 29, Moore, Dig., II, 586; Mr. Seward, Secy. of State, to Mr. Webb, Jan. 23, 1867, MS. Inst. Brazil, XVI, 162, Moore, Dig., II, 590; Mr. Fish, Secy. of State, to Commodore Case, Jan. 27, 1872, 92 Dom. Let. 322, Moore, Dig., II, 588; Mr. Sherman, Secy. of State, to Mr. McKenzie, Minister to Peru, telegram, April 2, 1897, MS. Inst. Peru, XVIII, 24, Moore, Dig., II, 588.

[1] See Case of the *Forte*, Moore, Arbitrations, V, 4925–4928, *citing* Brit. and For. State Pap., LIII, 150, *id.*, LIV, 579, Moore, Dig., II, 587.

[2] Declares Hall: "Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his State." Higgins' 7 ed., 208.

[3] Mr. Buchanan, Secy. of State, to Mr. Leal, Brazilian Chargé, Aug. 30, 1847, Senate Ex. Doc. 35, 30 Cong., 1 Sess., 28, 32, Moore, Dig., II, 589.

[4] Tucker *v.* Alexandroff, 183 U. S. 424, 433, Moore, Dig., II, 590.

[5] *Id.*

with respect to vessels owned and possessed by a State, and notably when they belong to some department of the government.[1]

American courts appear, however, to have encountered difficulty in agreeing as to the circumstances when a foreign merchant vessel requisitioned by the government of its own State is likewise to be accorded exemption.[2] There seems to be no doubt that the essentially public character of a ship is not lost by reason of her incidental use as a vehicle of commerce, provided the vessel be employed substantially for national purposes.[3] Again, as to whether a ship is so employed and concerning the fact of requisition, the courts of the United States are disposed to accept the declaration of the foreign sovereign making the claim. Doubtless an appropriate method of suggesting to a tribunal the interest of such a sovereign is through the medium of the executive branch of the government.[4] The Supreme Court has recently deemed inadequate the suggestion in behalf of a foreign embassy presented by private counsel appearing as *amici curiæ*.[5]

According to the trend of a group of American decisions, requisition does not suffice to exempt a foreign ship from local jurisdiction unless the vessel is within the actual possession of the authorities of the sovereign thus attempting to assert control.[6] This

[1] Thus revenue cutters, or ships belonging to any department of a foreign State, would be doubtless accorded exemption without question.

[2] During The World War, both before and after the United States became a belligerent, numerous ships were requisitioned by European powers, and impressed into the public service for use in transporting supplies across the Atlantic. Certain of these vessels were libeled in American ports.

[3] See The Parlement Belge, L. R. 5 P. D. 197, in contrast to The Charkieh, L. R. 8 Q. B. 197.

See, also, The Maipo, 252 Fed. 627; The Maipo, 259 Fed. 367; also, The Jassy, 1906, 10 Aspinwall, 278.

[4] See procedure followed in the case of The Schooner Exchange *v.* McFaddon, 7 Cranch, 116, 118; The Pizarro, 19 Fed. Cases, No. 11,199; The Luigi, 230 Fed. 493, 495; The Maipo, 252 Fed. 627; The Carlo Poma, 259 Fed. 369.

[5] In re Muir, 41 Sup. Ct. Rep. 185; The Pesaro, U. S. Sup. Ct., Feb. 28, 1921. See The Roseric, 254 Fed. 154, 162–163, where the Court received and acted upon the suggestion in behalf of a foreign State, and made known by counsel for its embassy, acting as *amici curiæ*. *Compare* The Florence H., 248 Fed. 1012, 1017.

In the case of The Adriatic, 258 Fed. 902, the Circuit Court of Appeals, Third Circuit, declared that where the suggestion was made by the British Ambassador, appearing as *amicus curiæ*, it felt bound, on principles of international comity, to accept the suggestion and avowal "as conclusively establishing both the fact of the requisition and its governmental character." Haight, J., 904. See, also, The Athanasios, 228 Fed. 558.

[6] See, for example, The Attualita, 238 Fed. 909; The Tampa, 245 Fed, 137; The Maipo, 252 Fed. 627. See also The Johnson Lighterage Co. No. 24, 231 Fed. 365, 366–367.

In the case of The Carlo Poma, 259 Fed. 369, 370, it was stated by way of *dictum* by Ward, J., in behalf of the Circuit Court of Appeals (Second Circuit): "The law of the United States is the same [as the English], except that

requirement may be attributable to a decision of the Supreme Court of the United States in 1869, in a case not involving any question of international law.[1] On principle, however, it would seem that not the ownership or exclusive possession of a ship by a foreign sovereign gives rise to the claim of immunity, but rather the appropriation and devotion of the vessel to the public service under governmental authority. This idea has found some judicial approval in the United States.[2] When a ship which has been

the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time the process is served. The Davis. 10 Wall. 15, 19 L. Ed. 875; Long *v.* The Tampico (D. C.), 16 Fed. 491; The Attualita, 238 Fed. 909, 152 C. C. A. 43." It may be noted that in this case the vessel was owned and operated by the Italian Government, and clearly entitled to the exemption demanded in its behalf. See, in this connection, Fred K. Nielsen, "Lack of Uniformity in the Law and Practice of States with Regard to Merchant Vessels", *Am. J.*, XIII, 1, 12–21.

[1] The case was that of The Davis, 10 Wall. 15, where the question was whether personal property of the United States on board a vessel for transportation, was subject to a lien for salvage services rendered in saving the property; and whether, also, such a lien should be enforced when the property was not in the possession of an officer of the Government, and the process of the Court could be enforced in a proceeding *in rem* without disturbing the possession of the Government. No question of international law was involved. The reason for permitting the enforcement of the lien under the circumstances stated, was because such action did not conflict with the theory on which the Government was exempt from local process without its own consent. That theory was not identical with that on which, under the law of nations, a foreign sovereign claims and enjoys exemption for vessel property. The distinction between the nature of the two claims was thus tersely emphasized by Charles H. Weston in "Actions Against the Property of Sovereigns", *Harv. Law Rev.*, XXXII, 266, 270: "It is said that the principle governing both cases is the same since immunity is granted out of respect for the 'independence of sovereign authority.' In so far as this phrase expresses the policy underlying the decisions, it merely cloaks the difference between them. In cases involving the local sovereign it represents the State's need for executive freedom from harassing litigation. In cases involving the foreign sovereign it indicates the desire to avoid international friction by substituting diplomatic negotiations for the decrees of local tribunals."

See, also, The Roseric, 254 Fed. 154, 161, where Rellstab, J., declared "The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be 'safely accorded', but on account of its dignity and independence, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

"In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position."

[2] Rellstab, J., in The Roseric, 254 Fed. 154, 160. See, also, the reasoning in The Parlement Belge (1900), L. R. 5 P. D. 197, 217; The Crimdon, 35 Times L. R. 81; The *Messicano*, 32 Times L. R. 519.

requisitioned for a definite public service, such as an admiralty transport, is engaged in the carriage of governmental supplies, and the officers acknowledge the duty to obey the governmental assertion of control and act accordingly, the circumstance that the vessel is neither owned nor actually possessed by the requisitioning State would appear to be immaterial. In such case the dedication of the ship to the public service would seem to render the constructive possession by the sovereign as efficacious for purposes of exemption as actual possession manifested by the assertion of control through the medium of its own officers.[1]

§ 257. The Same.

Should the nationalization of merchant vessels, by requisition or any other process, serve to create a large volume of tonnage engaged under governmental control in commercial enterprise, and notably in foreign trade, there would be reason to withhold exemptions not accorded private ships, unless there was definite understanding that the State of the flag should assure full responsibility for the conduct of its vessels, and also place within the reach of the individual claimant a simple and direct means of obtaining justice.[2] Obviously the matter is one demanding general international agreement to establish a reasonable substitute for the broad yielding of jurisdiction by the territorial sovereign.[3] It should be observed, however, that, in the meantime, any restriction of the existing right of exemption is hardly a matter within the discretion of the courts.[4] While the individual State may

[1] See Brief by Messrs. Coudert Brothers, in support of suggestion of British Embassy in the case of Muir *v.* Chatfield, in the Supreme Court of the United States, October Term, 1918, No. 28, Original.

[2] It is believed that the success with which the principles laid down in the case of The Schooner Exchange *v.* McFaddon, and in that of The *Parlement Belge* have generally been invoked in behalf of foreign public vessels has been due in part to the infrequency of the demand for exemption from local process, and also to the resulting circumstance that the mutual public benefits attributable to respect for the exemption claimed have far outweighed any opposing equities of the libelants. It is not without significance that the number of litigated cases in the United States between 1915 and 1919 far exceeded that of those confronting American tribunals throughout the entire previous life of the nation.

[3] As to the nature of an efficacious substitute there may be a wide diversity of opinion. It may be suggested that the establishment of an international maritime tribunal or commission available as a court of first instance within the port of the territorial sovereign, and supposedly representative of the State of the ship as well as of that sovereign might fulfill the necessary function. The numerous treaty provisions conferring upon a consular officer jurisdiction of certain classes of disputes arising between officers and crew of merchant vessels of his nation afford a significant precedent.

[4] Hough, J., in The Maipo, 259 Fed. 367.

not lawfully by legislative enactment modify the requirements of international law, it may without impropriety express its own view as to what they demand, and in so doing announce a rule for the guidance of its courts.

(6)

§ 258. Other Foreign Public Property.

The matter of the exemption from local jurisdiction of public property belonging to a foreign State and other than its vessels, is affected by the principle that a foreign sovereign cannot be sued without its consent. The attempt, therefore, to make it a party defendant and incidentally attach its property, must fail.[1] If such a sovereign invokes the aid of a local court of equity in order to acquire possession of property to the title of which it has succeeded, it may, doubtless, be fairly deterred from taking possession without satisfying a lien accruing prior to its ownership.[2] While a foreign State, on becoming a plaintiff, subjects itself to the obligation to satisfy a set-off arising out of the same action, it does not expose itself to the defense of a proceeding setting up another claim in respect of another and entirely distinct matter.[3] Such a State by bringing suit does not subject itself to a counterclaim on which an affirmative judgment is asked.[4]

With respect to property owned by a foreign sovereign, exemption is yielded, according to American judicial opinion, when the owner or its agent has possession.[5] When it lacks possession, the

[1] Hassard *v.* United States of Mexico, 61 N. Y. Supp. 939, *affirmed* in 173 N. Y. 645 (commented on by John W. Foster, in *Yale Law J.*, IX, 283–286); Mason *v.* Intercolonial Ry., 197 Mass. 349 (commented on in *Mich. Law Rev.*, VI, 575); Kingdom of Roumania *v.* Guaranty Trust Co., 250 Fed. 341; also De Haber *v.* Queen of Portugal, 17 Q. B. 196; The Parlement Belge, L. R. 5 P. D. 197.

See, also, Nathan Wolfman, "Sovereigns as Defendants", *Am. J.*, IV, 373; Charles H. Weston, "Actions against the Property of Sovereigns", *Harvard Law Rev.*, XXXII, 266.

[2] United States of America *v.* Prioleau, 35 L. J. Chancery, N. S. 7, Moore, Dig., I. 64.

[3] Kingdom of Roumania *v.* Guaranty Trust Co., 250 Fed. 341, *reversing* 244 Fed. 195; People *v.* Dennison, 84 N. Y. 272.

See, also, South African Republic *v.* Compagnie Franco-Belge, 1898, 1 Ch. Div. 190, 195, *citing* Duke of Brunswick *v.* King of Hanover, 6 Beav. 38; situation in case of Von Hellfeld *v.* Russian Government, Prussian Court for Determination of Jurisdictional Conflicts, 1910, *Am. J.*, V, 490.

In the case of Mighell *v.* Sultan of Jahore, 1 Q. B. 1894, 149, the exceptional situation was noted in the case in which a foreign sovereign might be named as defendant for the purpose of giving him notice of the claim which the plaintiff made to funds in the hands of a third person or trustee over which the court had jurisdiction. See, also, Strousberg *v.* Republic of Costa Rica, 44 Law Times R., 199.

[4] French Republic *v.* Inland Nav. Company, 263 Fed. 410.

[5] In the case of Mason *v.* Intercolonial Ry. Co., 197 Mass. 349, the property

property may be attached;[1] but there is a constant requirement that no foreign sovereign be made a party defendant.

It may be urged that the scope of the exemption should be as broad as that demanded for and applicable to vessel property, and that dedication to a public service of a foreign sovereign rather than ownership or possession by it should afford the test of immunity.[2] Certain American cases declaring possession to be essential to exemption of foreign public property, do not appear to assert a different rule from what is assumed or declared to be applicable to vessels. It should be noted, however, that Chief Justice Marshall in the case of The Schooner Exchange *v.* McFaddon, observed that there was under certain circumstances a distinction between the two classes of property.[3] While it must be constantly borne in mind that the reason for the immunity of a sovereign from the process of its own courts is not that which gives rise to the exemption of a foreign State from local jurisdiction, and that grounds for the restriction of the immunity in the former case are not necessarily decisive in the latter, it is not believed to be arbitrary to require in the case of property other than vessels a somewhat narrower basis of exemption. It is hardly unreasonable to disregard the mere fact of dedication to the public service of a foreign sovereign, if it is neither the owner nor possessor of the property. If, however, a foreign public

was in the possession of trustees in behalf of the defendant company which was the property of a foreign sovereign. The court deemed itself to be without the right to take jurisdiction in an action of trustee process against the trustees. See, also, *dictum* in Tucker *v.* Alexandroff, 183 U. S. 424, 440.

[1] See The Johnson Lighterage Co. No. 24, 231 Fed. 365; Long *v.* The Tampico, 16 Fed. 491; also *dictum* in The Carlo Poma, 259 Fed. 369, 370.

In the case of Vavasseur *v.* Krupp, L. R. 9 Ch. Div. 351, Moore, Dig., II, 591, the Mikado of Japan was permitted to remove from British territory shells brought from Germany to England for the use of Japanese vessels of war there building, notwithstanding the attempt of local patentees claiming infringement of their rights as such, to prevent persons in possession of the shells from delivering them to those vessels.

[2] C. H. Weston, in *Harv. Law Rev.*, XXXII, 266, 270–271.

[3] Thus he declared: "Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern." 7 Cranch, 116, 145.

Obviously this distinction cannot be taken to stand for more than the reason behind it; but it seems to be important partly as suggesting that others might be made which also should be entitled to respect.

sovereign establishes the ownership, and demands possession and control, it is greatly to be doubted whether absence of possession should destroy the claim of exemption, at least in a case where no adverse lien has attached to the property prior to the sovereign's acquisition of title.[1]

It may be observed that the increasing tendency of States to acquire property abroad, and thus to participate in foreign commerce, oftentimes in a mode similar to that of a private trader, calls for general agreement establishing the effect of public ownership and of the particular uses of what is acquired, upon the duty of the territorial sovereign to yield exemption from jurisdiction. The problem is closely associated with that arising from the nationalization of vessel property engaged in commercial enterprise. If the law of nations is to remain flexibly responsive to the requirements of international intercourse, definite principles should be enunciated and agreed upon, and these must serve to safeguard and promote, rather than jeopardize and retard the commercial transactions of private concerns with foreign States.

(7)

Extraterritorial Jurisdiction

(a)

§ 259. In General.

For centuries before the establishment of international law the commercial cities of Europe exercised certain privileges of jurisdiction over their own merchants living in foreign places where trade was enjoyed.[2] The merchants of a particular city or na-

[1] See, for example, Vavasseur *v.* Krupp, L. R. 9 Ch. Div. 351.

[2] See, in general, with respect to the relation of the United States to the exercise of extraterritorial jurisdiction, Consular Regulations (1896), Sections 612–653; documents in Moore, Dig., II, 693–727; Instructions to American diplomatic officers (1897), Sections 82–93, 200–240; Philip M. Brown, Foreigners in Turkey: Their Juridical Status, Princeton, 1914; The Nature of the Jurisdiction of the United States Courts Established in Foreign Countries, *Harv. Law Rev.*, XXI, 437; E. M. Borchard, Diplomatic Protection, §§ 180 and 202; Frank E. Hinckley, American Consular Jurisdiction in the Orient, Washington, 1906; Report on Citizenship of the United States, Expatriation, and Protection Abroad, by Messrs. J. B. Scott, David J. Hill, and Gaillard Hunt, 59 Cong., 2 Sess., H. Doc. No. 326; James B. Angell, "The Turkish Capitulations", Am. Hist. Ass'n., *Annual Report*, I, 513; Edward A. Van Dyck, Reports on the Capitulations of the Ottoman Empire, Senate Ex. Doc. No. 3, 46 Cong., Special Session, and Senate Ex. Doc. No. 87, 47 Cong., 1 Sess.

Cf., also, generally, Pierre Arminjon, *Étrangers et protégés dans L'Empire Ottoman*, Paris, 1903; Marcel Baudez, *La Condition Juridique des Étrangers en Chine*, Paris, 1913; E. L. Déligeorges, *Die Kapitulationen der Türkei*,

tionality frequently resided in a certain street or area where their consul acted as a judge in controversies between them. This practice was habitual in the Middle Ages. It extended from Byzantium to London, and from Flanders to Northern Africa, and even to Asia Minor.[1] It grew out of the needs of commerce which demanded the administration of justice in behalf of foreign residents; and justice could not be obtained by any other process.

Upon the capture of Constantinople by Mohammed II in 1453, permanent lodgment was secured in Europe by a power or political entity whose law was based upon the Koran, the requirements of which were not and did not purport to be applicable to non-Mussulmans. Thus from the Ottoman point of view as well as from that of European States, it was unreasonable that such individuals should be subjected to the operation of that law.[2] Immediately, therefore, the Turkish conqueror granted to the Jewish Rabbi and to the Armenian Patriarch in that city the right, and imposed upon them likewise the duty, to maintain justice among their respective co-religionists.[3] For the same reason, Moslem authority is said to have yielded new and broader privileges with

Heidelberg, 1907; J. Hadjilouka, *De la juridiction consulaire en Turquie*, Athens, 1907; W. E. Hall, The Foreign Powers and Jurisdiction of the British Crown, Oxford, 1895; Sir H. Jenkyns, British Rule and Jurisdiction Beyond the Seas, Oxford, 1902; Karl Lippmann, *Die Konsularjurisdiktion im Orient*, Leipzig, 1898; V. K. Wellington Koo, The Status of Aliens in China, New York, 1912; André Mandelstam, *La justice ottomane dans ses rapports avec les puissances étrangères*, Paris, 1911; *Le sort de l'empire ottoman*, Paris, 1917; *La Turquie*, Paris, 1918; Ernest Nys, "*La juridiction consulaire*", *Rev. Droit Int.* 2 ser., VII, 237; G. Pélissié du Rausas, *Le Régime des Capitulations dans L'Empire Ottoman*, 2 ed., Paris, 1910; Sir Francis Piggott, Exterritoriality, London, 1907; J Pillaut, *Les consulats du Levant*, Nancy, 1902; Francis Rey, *De la protection diplomatique et consulaire dans les Échelles du Levant et de Barbarie*, Paris, 1899; James Harry Scott, The Law Affecting Foreigners in Egypt, Edinburgh, 1907; Georges Soulié, *Les droits conventionnels des étrangers en Chine*, Paris, 1916; V. Sténio, *La capitulation de 1535*, Paris, 1915; J. Vergé, *Des consuls dans les pays d'Occident*, Paris, 1903.

[1] E. Nys, *La Juridiction consulaire*, *Rev. Droit Int.*, 2 ser., VII, 237, 239–243.

[2] "The mussulman law was not made for the foreigner, because he is a non-mussulman; it was, therefore, necessary that he should be subjected to his own law. The mussulman law could not protect him or judge him or punish him, inasmuch as it only protected or judged or punished mussulmans; it was necessary, therefore, that he should be protected, judged and punished by his own law. The mussulman law, that is, the *Jus quiritium*, is the exclusive right and privilege of mussulmans and it is the *Jus gentium* which governs the foreigner. In other words, and to resume, let us say: the foreigner, traveling or residing in the Ottoman Empire, remains subject to his personal law, because the law of the Ottoman Empire, being a religious law, cannot be applied to him." G. Pélissié du Rausas, *Le régime des capitulations dans L'Empire Ottoman*, 2 ed., I, 21.

See, also, Philip M. Brown, Foreigners in Turkey, Chap. I; F. Rey, *op. cit.*, 5; Field, J., in the case of In re Ross, 140 U. S. 453, 462–463; James B. Angell, "The Turkish Capitulations", Am. Hist. Assn., *Annual Report*, I, (1900), 513, 514–515.

[3] See Pierre Arminjon, *Étrangers et protégés dans L'Empire Ottoman*, I, 13–16.

respect to foreigners than the Greek Christian authorities had conceded. To the French kings were granted the right, not only to exercise jurisdiction over French subjects, but also to accord protection to those of other non-Mussulman nationalities who were without representation. Such persons were regarded as assimilated to French nationality and were subjected to French jurisdiction.[1] Under the same jurisdiction were even placed Ottoman Christian subjects engaged solely in the foreign trade.[2] Conversely, it was later agreed that the conversion of a Frank to the Mohammedan religion should result in the loss of his French nationality, and obviously, by implication, subject him to Turkish jurisdiction.[3]

A series of unilateral agreements, known as Capitulations, from early in the sixteenth to late in the eighteenth century, embodied the concessions of the Ottoman rulers in favor of France and several European countries.[4] These agreements did not specify with precision the scope of what was granted, but referred to, and oftentimes purported to confirm, customary privileges already long enjoyed.[5] Upon the Capitulations were based the treaties of the nineteenth century. They likewise referred to the customary law. Thus, the treaty with the United States of May 7, 1830, declared that the exercise of the privileges therein described should follow "the usage observed towards other Franks."[6]

[1] F. Rey, *Protection diplomatique et consulaire dans les Échelles du Levant et de Barbarie*, 15–17; E. Nys, in *Rev. Droit Int.*, 2 ser., VII, 237, 243–246.

It may be observed that the right of aliens to enjoy the protection of France became also a duty on their part. Declares Rey, "The western powers themselves, Portugal, Spain, England and Holland, could not trade in Turkey, save under the protection of the [French] King. The banner of France covered their ships, the Consul of France protected their nationals. . . . Other flags appeared in Turkey, but France remained the protector of all Europeans that lacked representation, as it had long been that of innumerable missionaries sent by Rome to the Orient for the purpose of restoring to the obedience of the Pope the schismatic Christians." *Op. cit.*, 15.

[2] See Capitulations of 1604, de Testa, *Rec.*, I, 141, commented on in F. E. Hinckley, American Consular Jurisdiction in the Orient, 10.

[3] F. E. Hinckley, American Consular Jurisdiction in the Orient, 11.

[4] For texts of the Capitulations in favor of France of 1535, 1604 and 1740, see de Testa, *Rec.*, I, 15, 141 and 186, respectively. For texts of those of 1569 and 1673, *see* Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, Paris, 1897, I, 88 and 136, respectively. For texts of Capitulations of 1675 in favor of Great Britain, renewing those of 1580, *id.*, I, 146. For texts of those of 1809, see Brit. and For. State Pap., I, 768. For texts of Capitulations in favor of the Netherlands, 1680, Austria, 1718, and Russia, 1783, *see* Noradounghian, *op. cit.*, I, 169, 220 and 351, respectively.

[5] F. Rey, *op. cit.*, 16; also statement in Moore, Dig., II. 596. Declares Hinckley: "Whether the ancient usages, so frequently mentioned and confirmed in the Turkish capitulations, included essential rights, not described in the texts of earlier documents, cannot be shown. In fact there is much difference in the provisions of the capitulations and even some divergence upon important points." *Op. cit.*, 16.

[6] Malloy's Treaties, II, 1319.

Gradual recognition of the principle that a State should enjoy actual supremacy throughout the territory over which it asserted control, together with the establishment of national local tribunals capable of administering justice for aliens as well as natives, necessarily led to the complete abandonment of extraterritorial jurisdiction throughout Europe generally.[1] In Turkey, however, the old system remained and even developed. While in Western Europe the exercise of jurisdiction became in fact the sole possession of the territorial sovereign, in the Ottoman Empire the Sultan, by reason of the inapplicability of the Mohammedan law to non-Mussulmans, was unable to regain possession of what had earlier been relinquished.[2]

The extraterritorial privileges of western States in oriental countries, such as China and Japan, were not secured until well into the nineteenth century, when the supremacy of the territorial sovereign had long been recognized as a fundamental principle of international law. There was no opportunity for the development of a customary law respecting the exemptions of resident aliens. The treaties, therefore, specified clearly what was granted. The western States gained no privileges of protection, whether jurisdictional in character or otherwise, over persons other than their own subjects or citizens.[3]

Exemptions from the local jurisdiction, whether enjoyed in Turkey or in Asiatic States, are, as has been noted, regarded as necessarily based upon the consent of the territorial sovereign.[4]

§ 260. The Same.

"In countries not inhabited by any civilized people, or recognized by any treaty with the United States", the United States is not reluctant to exercise jurisdiction through its consular officers

[1] E. Nys, in *Rev. Droit Int.*, 2 ser., VII, 237, 243.

[2] But see the attempt that was made in September, 1914, and described in *Rev. Gén.*, XXI, 487–493.

[3] See statement in Moore, Dig., II, 596. The same writer declares also, "It may be pointed out, as an historical fact, that the practice of extraterritoriality in China and Japan began with and rested upon the treaties, and did not originate in custom, as it did in the Ottoman dominions. This distinction has important consequences, and should not be lost sight of." *Id.*, II. 602. See, also, F. E. Hinckley, American Consular Jurisdiction in the Orient, 15–16; V. K. Wellington Koo, The Status of Aliens in China, New York, 1912, Chap. IX.

[4] Papayanni *v.* Russian Steam Navigation Co., 2 Moore's Priv. C. C. N. S. 161, Beale, Cases on Conflict of Laws, I, 87; also Piggott, Extraterritoriality, 1907 ed., 7.

Cf. Exemptions from Territorial Jurisdiction, In General, *supra*, § 244.

with respect to the conduct of American citizens in such places.[1] Such action is not in defiance of the claim of any political power deemed to be entitled to respect as a territorial sovereign. The problems incidental to the exercise of extraterritorial jurisdiction commonly arise, however, in relation to countries where some government exists which the outside world regards as capable of exercising rights of property and control and of possessing titles demanding respect, and with which, therefore, there has been a disposition to conclude agreements.

When a State exercises a certain degree of protection over a region or country within which rights of extraterritorial jurisdiction have been yielded, the protecting State cannot justly demand the suspension or termination of extraterritorial privileges until it itself, by some appropriate process, assumes responsibility for the administration of justice. Such assumption takes place when, for example, the State by annexation asserts its own exclusive control over the protected country.[2]

[1] Rev. Stat., § 4088, U. S. Comp. Stat. 1918, § 7638.

See Mr. Justice Holmes, in the course of the opinion of the Court in the case of American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 355–356.

[2] A State, upon the acquisition of the territory of a country where extraterritorial privileges are enjoyed, obviously acquires the right to forbid the further exercise of jurisdiction by other powers. The actual termination of such privileges is sometimes accomplished by treaty. See, for example, treaty between the United States and Great Britain, Feb. 25, 1905, relative to the relinquishment of extraterritorial rights in Zanzibar, For. Rel. 1905, 485; *id.*, 1907, I, 569–577; also treaty between the United States and France March 15, 1904, relative to Tunis, For. Rel. 1904, 304. By reason of the scope of certain leases by China in 1897 and 1898, to Germany, Russia, and Great Britain, respectively, the United States, as well as other powers, except Japan, believed that the several consular officers within the leased areas lacked authority to exercise jurisdiction under their existing exequaturs. For. Rel. 1900, 382 to 390.

It is not believed that a proclamation of martial law emanating from a country which has conceded extraterritorial privileges to a foreign State, operates to suspend the right of the latter to exercise jurisdiction over its own nationals. See Mr. F. W. Seward, Acting Secy. of State, to Mr. Maynard, June 26, 1877, MS. Inst. Turkey, III, 251, Moore, Dig., II, 641. Concerning the effect, however, of such a proclamation from a State acknowledged to be for all purposes a full member of the family of nations, and in actual control of the country, see Mr. Frelinghuysen, Secy. of State, to Mr. Whitney, Consular Officer at Tamatave, Aug. 28, 1883, 108 MS. Inst. Consuls, 185, Moore, Dig., II. 642; also statement, *id.*, 644. *Compare* attitude of Mr. Bayard, Secy. of State, in 1889, relative to a proclamation of martial law by German authorities at Apia, House Ex. Doc. 119, 50 Cong., 2 Sess., 2, 3, Moore, Dig., II, 643.

See Brit. and For. State Pap., CVIII, 868, containing exchange of notes between Great Britain and Greece in August and September, 1914, relative to the renunciation by Great Britain of extraterritorial rights in territories acquired by Greece, and in which such rights under the Turkish Capitulations had been enjoyed.

(b)

§ 261. Persons in Whose Behalf Extraterritorial Jurisdiction May Be Claimed.

Notwithstanding their lack of uniformity, the several treaties yielding privileges of extraterritorial jurisdiction to the United States have, with the exception of those with Morocco of 1787 and 1836, and Tripoli of 1805, been alike in that their provisions have specifically purported to be applicable to cases concerning citizens of the United States.[1] In the exercise of rights thereunder, the United States has taken the position that:

> American nationality includes all persons, whatever their civil status, who owe allegiance to the United States either as citizens by birth or by naturalization or as native inhabitants of the insular possessions, or as seamen on American ships, or as assistants or guards in legations and consulates, or, to a limited extent, as employees of American citizens in oriental countries.[2]

In former years such claims were productive of controversy with Turkey when, for example, American jurisdiction was demanded in behalf of a naturalized American citizen of Turkish origin who, after having expatriated himself without the consent of the Sultan, returned to Turkish territory, and was there subjected to local criminal prosecution. Although the United States was in such case unwilling to yield its claim, it consented, nevertheless, to the expulsion of the individual when he was charged with participation in a conspiracy to overthrow the Turkish Government.[3] The fact that expatriation and the acquisition of American

[1] The treaties with Morocco of 1787 and 1836, and with Tripoli of 1805, referred to "citizens of the United States, or any persons under their protection"; the treaty with Tripoli of 1796, to "the protection to be given to merchants, masters of vessels and seamen"; the treaty with Siam of 1833, to "merchants of the United States trading in the Kingdom of Siam."

Doubtless the inhabitants of American insular possessions who are nationals of the United States are to be regarded as citizens in an international sense, although such persons may fail to be so regarded in a constitutional one. See Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt, 207.

Concerning the nature and extent of the interposition of the American Minister to Turkey, in 1894, in the case of the arrest and imprisonment of Turkish subjects employed in American Schools, see For. Rel. 1894, 740–749; also Hinckley, 86 and 115.

[2] F. E. Hinckley, American Consular Jurisdiction in the Orient, 78, quoted with approval by Mr. Wilson, Acting Secy. of State, to Mr. Fletcher, American Chargé at Peking, July 30, 1909, For. Rel. 1909, 69.

[3] Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, For. Rel. 1895, II, 1256, 1259–1262, Moore, Dig., II, 706–709; also Mr. Root, Secy. of State, to Mr. Leishman, American Minister, Oct. 19, 1905, relative to cases of Vartanian and Afarian, For. Rel. 1905, 892–894.

citizenship had lacked Turkish authorization was not, however, admitted by the United States to afford a just ground for expulsion.[1]

A foreign seaman upon enrollment as a member of the crew of a vessel is said to owe temporary allegiance to the State to which the ship belongs, and in return therefor to be entitled to invoke the power of that State for his own protection. Thus for purposes of extraterritorial jurisdiction, a seaman enrolled on an American vessel is regarded both by the political and judicial departments of the Government of the United States as of American nationality.[2]

Notwithstanding the occasional extension of good offices of American consular officials in countries where extraterritorial privileges have been accorded, in behalf and for the protection of nationals of so-called non-treaty States, the United States has declined to exercise jurisdiction with respect to such individuals save with the express consent of the territorial sovereign.[3] Turkey appears at times to have yielded assent;[4] but China has been disposed to withhold it.[5]

[1] Mr. Gresham, Secy. of State, to Mr. Terrell, Minister to Turkey, March 29, 1894, For. Rel. 1894, 754.

[2] Mr. Blaine, Secy. of State, to Sir E. Thornton, June 3, 1881, MS. Notes, Great Britain, XVIII, 543, Moore, Dig., II, 606; United States Consular Regulations, § 629, p. 268, Moore, Dig., II, 610; In re Ross, 140 U. S. 453. "British courts can only exercise criminal jurisdiction over British subjects, and persons to whom the privileges of subjects have been regularly extended; they consequently have no power to try a foreign seaman belonging to a British ship for any offence committed within or without the territorial jurisdiction." Hall, Foreign Jurisdiction, 142.

[3] Instructions of Mr. Gresham, Secy. of State, to Mr. Denby, Jr., American Chargé, 1894, For. Rel. 1894, 106, 117, 119 and 124, in the course of which Mr. Gresham said: "The consuls of the United States in China . . . have never been invested with power to exercise jurisdiction over the citizens or subjects of another nation," *id.*, 119, 121. See also Mr. Adee, Second Asst. Secy. of State, to Mr. Grant, Consular Officer at Cairo, Oct. 22, 1890, 134, MS. Inst. Consuls, 598, Moore, Dig., II, 754.

The exercise of protection by a State over its own nationals, citizens or persons of foreign nationality resident in a foreign country, does not necessarily call for the exercise of jurisdiction. In so far as it does not, the problems incidental to protection arising in Oriental countries, where certain extraterritorial privileges are enjoyed, do not differ in kind from those arising in western States of European civilization. Hall, Jurisdiction, 134, quoted in Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt, 203. It has long been the policy of the United States not to endeavor to become the protector, for purposes of jurisdiction or otherwise, of aliens resident in countries where extraterritorial privileges are secured, save under circumstances observed in the text. See documents contained in Moore, Dig., II. 727–755.

[4] Notwithstanding any willingness on the part of Turkey to permit the protection of an alien by a country of his choice, the Department of State has adverted to the fact that such concession "cannot constrain us to treat an alien on the footing of our treaties as a citizen, nor constrain the Government of the individual to respect his voluntary choice of another protection than that flowing from his natural allegiance." Mr. Adee, Second-Asst. Secy. of State, to Mr. Grant, American Consular Officer, No. 56, Oct. 22, 1890, MS. Inst. Consuls, 595, Moore, Dig., II, 753.

[5] See Report on Citizenship, by Messrs. Scott, Hill and Hunt, 208; Hinck-

The claim of jurisdiction with respect to guards or assistants in legations and consulates, has been based upon the theory that the official duties of such persons in the public service of the United States should not be subject to interference by vexatious suits, save by some process enabling the agency of government to safeguard its own interests.[1]

There seems to be less reason to assert jurisdiction with respect to the native servant employed by a merchant or citizen of a State enjoying extraterritorial privileges. The former lacks that peculiar relationship to the State of his employer which exists in the case of a seaman on one of its merchant vessels, or of an assistant attached to a consulate. Nevertheless, the practice has arisen, especially in China, of yielding certain exemptions with respect to native servants.[2]

(c)

§ 262. Classes of Actions.

The several treaties of the United States with countries yielding extraterritorial jurisdiction have manifested a resemblance in the concession of jurisdiction over American citizens charged with the commission of offenses commonly regarded as criminal.[3] Or-

ley, American Consular Jurisdiction of the Orient, 89, *citing* For. Rel. 1873, II, 139.

In 1909, the Department of State made the following significant statement in the course of an instruction to Mr. Fletcher, American Chargé at Peking: "The contention of the Chinese Government that treaty powers have no jurisdiction over citizens of non-treaty nations, judged by the well-established rules of international law, would seem to be valid, and the contention put forth by some of the treaty powers that 'extraterritoriality is a natural right' would seem to be groundless and supported by no recognized authority on international law, at least in so far as can be ascertained." For. Rel. 1909, 69.

See, also, Aide-mémoire to the Russian Embassy at Washington, Oct. 11, 1910, in which the Department of State declared that the Government had uniformly taken the position that "by consenting to lend its good offices in behalf of subjects of other nations, it could not assume to assimilate such subjects to citizens of the United States and to invest them with extraterritorial rights which they did not enjoy as subjects of the country of their allegiance." For. Rel. 1910, 838.

[1] Mr. Angell, American Minister, to the Turkish Minister of Foreign Affairs, April 23, 1898, For. Rel. 1898, 1110, 1111; also case of arrest in 1899, of Cavass of the American Consulate at Smyrna, For. Rel. 1900, 920–934, especially Mr. Griscom, American Minister, to Mr. Hay, Secy. of State, Jan. 13, 1900, *id.*, 928, Moore, Dig., II, 744.

"It is the policy of the United States to limit to as few as may be absolutely necessary the persons exempt from the local jurisdiction through their being attached to legations and consulates as assistants, guards or servants and to maintain with firmness the protection of those who are thus engaged." Hinckley, 85.

[2] Mr. Hay, Secy. of State, to Mr. Conger, Minister to China, Jan. 8, Feb. 10, and Feb. 26, 1900, For. Rel. 1900, 396, 399 and 401, Moore, Dig., II, 599. *Compare* Mr. Rives, Asst. Secy. of State, to Mr. Ropes, April 28, 1888, 168 MS. Dom. Let. 239, Moore, Dig., II, 600.

[3] Arts. XX and XXI of treaty with Morocco of January, 1787, Malloy's

dinarily no distinction has been raised with respect to the nationality of the individual who is the victim of criminal violence. The treaties have been silent with reference to offenses committed by foreigners against Americans. Agreements concluded by the territorial sovereign with other powers have commonly served, however, to lodge jurisdiction in the authorities of the State to which the offender owes allegiance. With respect to crimes committed by nationals of the territorial sovereign and directed against American citizens, the treaties have indicated no disposition to grant jurisdiction.[1] Early agreements with Morocco and with Tripoli provided, however, for the assistance of the American consular officer at the trial of such an offender.[2]

In civil matters, the treaties appear generally to have yielded jurisdiction when the controversy is between American citizens. In cases involving disputes between such individuals and the nationals of other powers (enjoying extraterritorial privileges) there has usually been no disposition on the part of the territorial sovereign to withhold jurisdiction.[3] China has, for example, agreed

Treaties, I, 1210; Arts. XX and XXI of treaty with Morocco of Sept. 16, 1836, *id.*, 1215–1216; Art. CXXIII of Algeciras Convention of April 7, 1906, *id.*, II, 2180; Art. IX of treaty with Tripoli of 1796, *id.*, 1786; Arts. XVIII and XIX of treaty with Tripoli of June 4, 1805, *id.*, 1792; Art. IV of treaty with the Ottoman Empire of May 7, 1830, *id.*, 1319; protocol with the Ottoman Empire of Aug. 11, 1874, with respect to the right to hold real estate in Turkey, *id.*, 1344; Art. IX of convention with Siam of March 20, 1833, *id.*, 1628; Art. II of treaty with Siam of May 29, 1856, *id.*, 1630; Art. IX of treaty with Muscat of Sept. 21, 1833, *id.*, I, 1230; Arts. XXI, XXIV, XXV and XXIX of treaty with China of July 3, 1844, *id.*, 202–204; Arts. XI, XXVII and XXVIII of treaty with China of June 18, 1858, *id.*, 215 and 220; Art. IV of treaty with China of Nov. 17, 1880, *id.*, 240; Art. XVII of treaty with China of Oct. 8, 1903, *id.*, 269; Art. IX of convention with Borneo of June 23 1850, *id.*, 132; Arts. V and VI of treaty with Persia of Dec. 13, 1856, *id.*, II, 1372–1373; Art. IV of treaty with Corea of May 22, 1882, *id.*, I, 336; Art. VI of treaty with Japan of July 29, 1858, *id.*, 1003; Art. IV of convention with Japan of July 25, 1878, *id.*, 1022; Art. XVIII of treaty with Japan of Nov. 22, 1894 (providing for the cessation of extraterritorial jurisdiction), *id.*, 1035; Art. II of treaty with Zanzibar of July 3, 1886, *id.*, II, 1900; treaty with Great Britain of Feb. 25, 1905, providing for relinquishment of extraterritorial rights in Zanzibar, *id.*, I, 795.

EXTRADITION. The United States does not at the present time assert the right to recover by its own authorities American citizens, fugitive from its territory, where they have been charged with crimes and have sought refuge in countries where the United States enjoys extraterritorial jurisdiction. The surrender of such offenders is either demanded of the territorial sovereign in pursuance of extradition treaties, or, in the absence thereof, is requested as a matter of courtesy. See statement in Moore, Dig., II, 633, *citing* Moore on Extradition, I, 100; also case of Paul Stensland in Morocco, 1906, For. Rel. 1906, II, 1161–1164. *Compare* Case of Surratt, Dip. Cor. 1866, II, 275, 277; *id.*, 1867, II, 82; also relative to Case of Myers and Tunstall, *id.*, 1862, 873.

[1] See, for example, treaties with China of 1844 and 1858. That of 1858 permitted arrests to be made by American as well as native authorities.

[2] See treaties with Morocco of 1787 and 1836; with Tripoli of 1805.

[3] Mr. Strobel, Third Asst. Secy. of State, to Messrs. Butler, Stillman and

that the exercise of such a right in such cases is to be regulated by a treaty between the United States and the outside power.[1] Persia has permitted adjudication before the "respective consuls or agents" of the United States and the foreign power.[2] In the absence of express provision, the territorial sovereign has commonly acquiesced in the exercise of jurisdiction by the proper officials of the State to which the defendant belongs.[3] In controversies between American citizens and nationals of the country where extraterritorial privileges are enjoyed, the treaties have indicated unwillingness on the part of the territorial sovereign to give up jurisdiction, although provision has frequently been made for a limited participation by the foreign State at trials conducted by local judicial officers. Ordinarily no distinction has been made in the treaties of the United States, between cases in which an American citizen is plaintiff, and those in which he is defendant. Turkey, for example, according to the treaty of 1830, agreed to permit the American dragoman to be present at the trial; and causes in which the amount in controversy exceeded five hundred piasters were to be submitted to the Sublime Porte.[4] Siam has consented that disputes arising between American citizens and Siamese subjects should be heard by the consul in conjunction

Hubbard, Jan. 16, 1894, 195 MS. Dom. Let. 166, Moore, Dig., II, 602; also statement in Moore, Dig., II, 600.

[1] Treaties of 1844, and 1858. See, generally, V. K. Wellington Koo, The Status of Aliens in China, 1912, 166–228; Marcel Baudez, *La condition juridique des étrangers en Chine*, 1913, 60–201; Georges Soulié, *Les droits conventionnels des étrangers en Chine*, 1916, Chap. III.

[2] Treaty of 1856.

[3] Papayanni *v.* Russian Steam Navigation Co., 2 Moore's Privy P. C. C., N. S. 161, Moore, Dig. II, 667.

[4] With respect to the practice which prevailed generally in Turkey, see Philip M. Brown, Foreigners in Turkey, Their Juridical Status, Chaps. III and IV, and documents there cited.

Mr. Cushing, Attorney-General, in an opinion, October 23, 1855, announced the following outline of the system of extraterritorial jurisdiction then prevailing in Turkey:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians at length substituted by common consent in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution also, at length, of mixed tribunals in place of the separate consular courts, this arrangement introduced at first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christians." 7 Ops. Attys.-Gen., 565, 569.

The foregoing statement was incorporated in Instructions to the Diplomatic Officers of the United States (1897), 84–85, and is given in Moore, Dig., II,

with the proper Siamese officials.[1] China has permitted the case to be tried by the proper official of the nationality of the defendant, agreeing, however, that the properly authorized official of the plaintiff's nationality be permitted to attend the trial, enjoy facilities for watching the proceedings in the interest of justice, have the right to examine and cross-examine witnesses, and if dissatisfied with the proceedings, to protest against them in detail.[2] Persia has permitted the presence at the trial of an agent of the United States, but seems to have lodged jurisdiction of all disputes between Persian subjects and citizens of the United States, in Persian tribunals.[3]

(d)

§ 263. Difficulties with Turkey. Article IV of Treaty of 1830.

There long existed a controversy between the United States and Turkey respecting the precise contents of the text of Article IV of the treaty of 1830, providing for extraterritorial privileges, and concerning the interpretation of that portion thereof declaring that the exercise of jurisdiction by American authority should follow "the usage observed towards other Franks."[4] The Turkish

662. See, also, Dainese *v.* Hale, 91 U. S. 13; Dainese *v.* United States, 15 Ct. Cl. 64; Hinckley, 151–153.

Concerning the establishment and jurisdiction of mixed courts in Egypt, see documents in Moore, Dig., II, 722–727; also Hinckley, 153–158.

In December, 1906, the law officer of the Department of State expressed the opinion that jurisdiction over criminal libel committed by an American citizen in Egypt, was still vested in the American consular courts, and had not been transferred to the mixed tribunals. For. Rel. 1907, II, 1080; also *id.*, 1076–1081.

Great Britain having in 1914 established a protectorate over Egypt, which was not thereafter regarded by the former as in any sense a dependency of Turkey, undertook to make careful provision for a revision of the judicial system of the country, and contemplated the ultimate withdrawal of extraterritorial privileges previously enjoyed by virtue of the Turkish Capitulations. As Prof. Philip M. Brown has well observed: "The suppression of the régime of the Capitulations in Egypt, with all its attendant evils of special immunities for foreigners, of a consequent failure to insure an even justice for all, and also of special political pretensions by the Powers enjoying these privileges, is a logical necessity once the domination of Great Britain is recognized." Editorial comment, "The Egyptian Capitulations", *Am. J.*, XII, 820, 822–823.

[1] Treaty of 1856.

[2] Treaty of 1880. Concerning the mixed court at Shanghai, see documents in Moore, Dig., II, 652–653, F. E. Hinckley, 163–173; For. Rel. 1906, I, 369–407.

[3] Treaty of 1856.

[4] The English text of the last sentence of the Article as contained in Malloy's Treaties, II, 1319, is as follows: "Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any

Government denied that the English text was a correct translation of the original Turkish version, contending that the latter did not in fact contain provision for the trial or punishment of an American citizen by his minister or consul.[1] That Government did, however, in 1888, submit what it stated to be a correct French translation of the Turkish text.[2] In 1890, Mr. Blaine, Secretary of State, offered to yield the right of trial, and to accept the treatment accorded to certain European Powers, providing for trial by local authorities, in the presence of the dragoman of the American Legation, retaining, however, the right to punish the offender.[3] The Turkish Government declined to yield that right, renewing in substance the contention that the reference to the usage to be observed towards other Franks was a limitation of the right granted, the scope of which was to be determined by the practice of the several Powers in 1830, and that they did not then claim the right to punish an offender.[4] Mr. Blaine was unwilling to admit that the treaty of 1830 gave more than was at that time claimed by European States. He declared, however, that if, as had been suggested, the treaty had inadvertently granted the right to punish, and had thus given more than had been contemplated by the grantor, it was futile to deny the existence of the specific grant. He was likewise unwilling to depart from the stand taken by his predecessors, that the reference to the usage observed towards other Franks was explanatory of, rather than a limitation upon, what was yielded. The position of Mr. Blaine

crime or offence, shall not be molested; and even when they have committed some offence they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their Minister or Consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks."

[1] The original texts of the treaty were in the French and Turkish languages. An agreement was signed by the American Chargé d'Affaires prior to the exchange of ratifications, to the effect that the Turkish text should be held the correct one in case differences should arise between the contracting parties.

Concerning the negotiation of the treaty and the dispute relative to Article IV, see documents in Moore, Dig., II, 668–714; correspondence in For. Rel. 1905, 885–898, with respect to the cases of Charles Vartanian and H. Afarian. especially Mr. Root, Secy. of State, to Mr. Leishman, Oct. 19, 1905; also F. E. Hinckley, 21–27.

See, also, in this connection, André Mandelstam, *La justice ottomane*, 1911, 154–174; Philip M. Brown, Foreigners in Turkey, 75–81.

[2] The following is an English translation thereof: "American citizens peaceably attending to matters of commerce shall not be molested without cause so long as they shall not have committed any offense or fault. Even in case of culpability they shall not be imprisoned by the judges and police agents, but they shall be punished through the agency of their ministers and consuls, according to the practice observed in regard to other Franks." Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 22, 1890, and contained in For. Rel. 1900, 915, 917, Moore, Dig., II, 697, 701.

[3] *Id.* [4] *Id.*

was reaffirmed by Mr. Hay, Secretary of State, in 1901. The latter adverted to the fact that the extraterritorial right in question belonged to the United States by virtue of the most-favored-nation clause of the treaty, and that that right was given by the Ottoman Porte to Belgium by treaties of 1838 and 1862, and to Portugal by treaties of 1843 and 1868.[1]

(e)

§ 264. Legislation of the United States.

The legislative action of a State by means of which it fits itself to exercise extraterritorial jurisdiction, and incidentally to enable its officers to exercise judicial functions in foreign countries, is a matter of domestic rather than of international law.[2] Brief attention may, however, well be called to certain aspects of the laws of the United States.[3] Its statutes purport to be applicable to the several countries with which treaties have been or may be concluded, and also, as has been noted, to countries not inhabited

[1] Note to Mr. Griscom, American Chargé, March 16, 1901, For. Rel. 1900, 914, Moore, Dig., II, 713. The texts of the treaties to which Mr. Hay referred are published in Noradounghian, those with Belgium of 1838 and 1862, respectively, in II, 243, and III, 160; those with Portugal of 1843 and 1868, respectively, in II, 354, and III, 263. Concerning the practice of certain European States relative to the trial and punishment of their subjects or citizens in Turkey, see communications received by Department of State in 1891, published in Moore, Dig., II, 714–722; also F. E. Hinckley, 26–27.

Adjustment of differences with Turkey may have been retarded by reason of the scope of demands made in former years upon its Government. In 1895 Mr. Olney, Secy. of State, went so far as to assert that the United States was entitled to be represented by its dragoman at every stage of the criminal proceedings against a Turkish subject charged with the commission of an offense against an American citizen. See report to the President, Dec. 19, 1895, For. Rel. 1895, II, 1256, 1259, Moore, Dig., II, 666–667.

[2] Report on Citizenship of the United States by Messrs. Scott, Hill and Hunt, 200.

[3] The statutory law of the United States with respect to the powers of ministers and consuls, and consular courts, is embraced in Rev. Stat. §§ 4083–4091, U. S. Comp. Stat. 1918, §§ 7633–7641; Rev. Stat. §§ 4097–4122, U. S. Comp. Stat. 1918, §§ 7642–7667; and Rev. Stat. §§ 4126–4130, U. S. Comp. Stat. 1918, §§ 7672–7676.

Provision for the United States Court for China was made by the Act of June 30, 1906, Chap. 3934, 34 Stat. 814, U. S. Comp. Stat. 1918, §§ 7687–7695. Concerning the scope of the jurisdiction of the United States Court for China, see Swayne & Hoyt *v.* Everett, 255 Fed. 71.

By an Act of March 2, 1909, Chap. 235, 35 Stat. 679, U. S. Comp. Stat. 1918, § 7696, the judicial authority of the Consul-General of the United States at Shanghai was vested in and to be exercised by a vice-consul-general of the United States. By an Act of March 4, 1915, Chap. 145, 38 Stat. 1122, U. S. Comp. Stat. 1918, § 7696 *a*, the judicial authority formerly vested in the Consul-General at Shanghai and transferred to the Vice-Consul-General was vested in and to be exercised by a vice-consul at Shanghai.

See, also, in this connection Moore, Dig., II, 613–637, and documents there cited; also Hinckley, American Consular Jurisdiction in the Orient, 41–69.

by civilized peoples or recognized by any treaties with the United States.[1] Specified officers are clothed with power to exercise rights of jurisdiction. Those specified are the ministers and consuls of the United States, and with respect to China, the United States Court for that country.[2] Jurisdiction is to be exercised according to the laws of the United States, in so far as they are adapted to carrying the treaties into effect. When those laws are not so adapted, or are deficient in their provisions, the common law and the law of equity and of admiralty are declared to be applicable; and if none of the foregoing laws appear to furnish appropriate remedies, the ministers are empowered to make regulations which, it is said, shall have the force of law to supply such defects.[3] In China, the power to make such regulations is lodged in the United States Court for that country. The statutes provide that a consular officer acting as a judge may be assisted by American citizens of good repute who shall be summoned to act as associate judges in the more important criminal and civil cases.[4] This provision is restricted so as not to be applicable to the United States Court for China.[5] Elaborate provision is made for appeals. The duty is imposed on American ministers and consuls to encourage the settlement of civil controversies by mutual agreement,

[1] Extraterritorial Jurisdiction, In General, *supra*, §§ 259–260.

[2] See Rev. Stat. § 4084, U. S. Comp. Stat. 1918, § 7634, respecting the jurisdiction to arraign and try American citizens charged with "offenses against law."

Rev. Stat. § 4085, U. S. Comp. Stat. 1918, § 7635, invests the officers "with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person."

According to Rev. Stat. § 4128, U. S. Comp. Stat. 1918, § 7674, judicial duties devolve upon the Secretary of State, who is authorized and required to discharge the same if at any time there be no minister in any of the countries previously mentioned in the title of the statute.

According to Rev. Stat. § 4109, U. S. Comp. Stat. 1918, § 7654, "The jurisdiction of such ministers in all matters of civil redress, or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only: Provided, that in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction."

[3] Concerning the scope of the power to make regulations, see documents in Moore, Dig., II, 617–622.

[4] Apparently the summoning of associate judges depends upon the opinion of the consular officer as to the legal difficulties involved in the particular case. See Rev. Stat. §§ 4106–4107, U. S. Comp. Stat. 1918, §§ 7651–7652.

[5] See § 5 of Act of June 30, 1906, 34 Stat. 816, U. S. Comp. Stat. 1918, § 7691. This section provides also that the procedure of the Court for China shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: "Provided, however, that the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure."

or by the submission of them to the decision of referees according to a specified procedure.[1]

(f)

§ 265. Tendencies towards the Relinquishment of Extraterritorial Jurisdiction.

The compelling of a country by any process to consent to the exercise within its territory of judicial functions by foreign judges and pursuant to the requirements of a foreign code necessarily signifies that the territorial sovereign is regarded, at least for the time being, as incapable of performing itself those duties of jurisdiction which are required of every independent State, and, therefore, that it has not reached the stage where it is to be treated for all purposes as a full-fledged member of the family of nations. Countries yielding such jurisdiction have been alert to perceive this, and to endeavor to rid themselves of such a mark of inequality; and this has been true, whether or not their existing judicial systems were essentially inapplicable to aliens and their affairs,[2] or insufficient to render justice with respect to them.

For these reasons the progress of civilization and the development of political communities into entities entitled to claim the full benefits of statehood, have marked a gradual emancipation of countries yielding extraterritorial privileges from such a token of inequality. The United States has long understood and encouraged the aspirations of foreign peoples endeavoring, in the course of their normal advancement, to establish judicial systems calculated to assure the administration of justice for resident aliens.[3]

[1] Rev. Stat. § 4098, U. S. Comp. Stat. 1918, § 7643. That Congress is not obliged by the Constitution of the United States to extend to an American citizen accused of crime in a country where extraterritorial jurisdiction is exercised, the same guarantees that he would enjoy if prosecuted in the United States, is established by the case of In re Ross, 140 U. S. 453.

[2] On Sept. 9, 1914, the Turkish Government announced to the ambassadors of the several Powers at Constantinople, a decision to abolish or suppress the Capitulations and the rights of extraterritorial jurisdiction thereunder on Oct. 1, following. The American Ambassador protested, declaring that the United States did not recognize the right of the Porte to abrogate the treaty arrangements by a unilateral act, and made formal reservation of American rights in the premises. See Second Russian Orange Book, 1914, No. 43, *The Times* (London) Doc. Hist. of the War, IX (diplomatic, part 3), p. 269; also *Rev. Gén.*, XXI, 487–493; *Am. J.*, VIII, 873.

[3] See provisions of Act of March 23, 1874, Chap. 62, 18 Stat. 23, U. S. Comp., Stat. 1918, § 7670, contemplating the suspension of the exercise of judicial functions in certain countries upon the receipt by the President of satisfactory information that there were organized therein local tribunals on a basis likely to secure to citizens of the United States the same impartial justice which they then enjoyed by virtue of the exercise of judicial functions by American officers.

In certain places the requisite improvement has been effected as an incident of the establishment of a protectorate under an enlightened power, such as Great Britain or France;[1] in others, it has been achieved in the course of the normal exercise of rights of political independence.[2]

In the case of territory under Turkish rule and incidentally subject to Mohammedan law, it may be doubted whether the old reasons calling for extraterritorial privileges are no longer applicable. While it may be true that the full measure of rights claimed and enjoyed by foreign powers in virtue of the Capitulations ought not still to be maintained, it is probably equally true that Turkish tribunals, as well as any code evolved from the theory of the Koran, still remain unadapted to the administration of criminal justice with respect to non-Mussulmans. It may be acknowledged, however, that in any territorial area under Turkish sway the nature and scope of extraterritorial jurisdiction with respect to contro-

Art. XV of the treaty between the United States and China of Oct. 3, 1903, declares: "The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extra-territorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing." Malloy's Treaties, I, 269.

See, also, V. K. Wellington Koo, The Status of Aliens in China, 354–356.

[1] By Art. 142 of the treaty of peace of June 28, 1919, Germany, having recognized the French Protectorate in Morocco, agreed to accept all the consequences of its establishment, and thereby renounced the régime of the Capitulations therein, such renunciation taking effect from Aug. 3, 1914. By Art. 147, Germany professed to recognize the Protectorate proclaimed by Great Britain over Egypt on Dec. 18, 1914, and renounced the régime of the Capitulations in Egypt, such renunciation taking effect from Aug. 4, 1914.

See also Arts. 97 (Morocco) and 102 (Egypt) of the treaty of peace with Austria of Sept. 10, 1919.

[2] This was true with respect to Japan. Concerning the full recognition of the right of Japan to be rid of every obligation to permit extraterritorial jurisdiction to be exercised within its domain, see President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, XXIV–XXV; documents in Moore, Dig., II, 654–661; Art. VI, treaty of 1858, and Art. XVIII, treaty of 1894, Malloy's Treaties, II, 1003 and 1035, respectively. The treaty of 1894 was superseded by that of Feb. 21, 1911, Charles' Treaties, 77.

See convention between Denmark and Siam of March 15, 1913, providing for the relinquishment of Danish consular jurisdiction in Siam, *Am. J.*, VIII, Supp., 169. By Art. 135 of the treaty of peace of June 28, 1919, Germany recognized that all rights of extraterritorial jurisdiction in Siam were terminated as from July 22, 1917. See also Art. 110 of the treaty of peace with Austria of Sept. 10, 1919.

The great progress of Siam, and the increasing recognition thereof by foreign States, such as the United States (in whose behalf a treaty was signed in December, 1920, contemplating, as has been noted, *supra*, § 33, the ultimate relinquishment of American jurisdictional privileges in Siamese territory), is believed to have been due in part to the constructive work of American and British advisors.

versies of every character should be definitely fixed by general agreement.[1]

It may be observed that a potent means of enabling a country to reach that stage where it may fairly claim the benefits and the capacity to fulfill the corresponding burdens of full membership in the family of nations, is to coöperate with rather than to retard its efforts to establish a judicial system designed to administer justice with respect to foreigners as well as nationals. Moreover, as a practical means of furthering such efforts, the territorial sovereign should be permitted and encouraged at an early moment to exercise judicial functions in civil matters pertaining to foreigners, just as far as may be compatible with the protection of their interests. The exercise of civil jurisdiction must afford valuable experience in fitting a country to fulfill the more difficult task of ascertaining the guilt of persons charged with the commission of crimes, and of imposing what the world at large would regard as reasonable penalties upon individuals justly convicted.

2

DUTIES OF JURISDICTION

a

§ 266. Maintenance of a Judicial System. An International Standard.

As the territorial sovereign is in legal contemplation supreme within its own domain, and supposedly capable of enforcing obedience to its will therein, as well as the sole possessor of the right to deal with foreign affairs, there is imposed upon it the corresponding obligation to do justice, or to exercise what may be called a duty of jurisdiction with respect to matters pertaining to the outside world.

[1] According to Art. 136 of the Turkish treaty of peace signed at Sèvres, Aug. 10, 1920, a Commission of four members, to be appointed by the British Empire, France, Italy and Japan, respectively, was to be established within three months from the coming into force of the treaty, and was to prepare, with the assistance of technical experts representing the other capitulary Powers, Allied or neutral (which with that object were each to be invited to appoint an expert), a scheme of judicial reform to replace the existing capitulary system in judicial matters in Turkey. That Commission might, it was declared, recommend, after consultation with the Turkish Government, the adoption of either a mixed or an unified judicial system. It was provided that the Turkish Government should accept the new system prepared by the Commission and submitted to the Allied and neutral Governments concerned, upon the approval of the scheme by the Principal Allied Powers and upon notification. British Treaties Series No. 11 (1920), Cmd. 964, p. 32.

The Treaty remains as yet unratified.

A universal demand that the national of a State receive protection in whatsoever country he is permitted to enter or hold property, calls for the local administration of justice in his behalf.[1] In his own right, he doubtless possesses no claim to special consideration. His relation to the territorial sovereign as a resident within its domain does not appear to differ from that of the national; it is essentially domestic. Through his connection, however, with the State of his allegiance, he finds himself in a different position. That State will generally assert that there is due to it an obligation on the part of the territorial sovereign to accord him a certain measure of justice. As that obligation is of an international character, its existence and scope may be said to depend upon the law of nations; and the resident alien so becomes the beneficiary of what that law prescribes.[2]

There is also a demand that the public agencies or representatives of a State, as well as its nationals, be accorded protection by the foreign territorial sovereign,[3] and that even the territory of such State be protected from the operation of injurious forces set in motion against it within the domain of another.[4]

The precise mode by which a State endeavors to do justice is

[1] See Resolution of the Institute of International Law, of Sept. 10, 1900, respecting the responsibility of States by reason of damages suffered by aliens in case of riot, insurrection or civil war, *Annuaire*, XVIII, 254–256, J. B. Scott, Resolutions, 159–161, Moore, Dig., VI, 953–954. See, also, Westlake, 2 ed., I, 108–111; Hall, Higgins' 7 ed., § 11.

[2] D. Anzilotti in *Rev. Gén.*, XIII, 5 and 285; L. de Bar in *Rev. Droit Int.*, 2 ser., I, 464; Report and plan of resolutions for consideration of the Institute of International Law, by E. Brusa, 1898, *Annuaire*, XVII, 96–137; Proceedings of the Institute and Resolution adopted Sept. 10, 1910, *Annuaire*, XVIII, 233 and 254. (A translation of the resolutions is contained in Moore, Dig., VI, 953.) See, also, D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale*, Florence, 1902.

[3] It will be seen that officers of a foreign State, such as consular representatives and other agents thereof, in their official capacity, frequently have recourse to the courts in the country to which they are accredited. Oftentimes, moreover, a foreign State itself finds it necessary and desirable, through an appropriate agency, to become itself a litigant before a domestic tribunal. In such case its rights are unaffected by changes in its form of government. The Sapphire, 11 Wall. 164.

[4] The criminal or hostile acts which a State may be called upon to suppress are varied. Indians or other marauders may attempt predatory incursions into adjacent foreign territory; revolutionists may similarly force their contest for the reins of government beyond the limits of the national domain; the territory of a neutral State may be used as a strategic base of operations against a belligerent; the money and seals of a friendly power may be counterfeited. The territorial sovereign in its work of suppression may find that the exercise of power for purposes of control is to be adequately and conveniently effected through the civil rather than the military arm of the government. Not infrequently, however, the use of military and naval force is necessitated. See correspondence between the United States and Mexico, in relation to border troubles between the two States, contained in For. Rel. 1911, 348,

doubtless internationally unimportant, so long as the attempt is successful. As a practical means, however, of fulfilling its duty towards the outside world, the territorial sovereign finds itself obliged to have recourse to a judicial system and valiantly to maintain it; for by no other means is it able under normal circumstances to meet the requirements of the law of nations. Even the military arm of the government appears to offer no adequate substitute in seasons of peace for civil tribunals.[1]

The value of a judicial system with respect to foreign powers depends upon the means which it affords them and their nationals to obtain redress in local forums. The efficacy of those means is always to be tested by the standard which the family of nations has fixed; and the evidence of that standard is to be found in the practice of enlightened States.[2]

§ 267. The Same.

The individual State cannot itself alter the international standard. The freedom of a State in adopting a form of government of its own choice, or in framing a constitution of its own devising, is always subject to the requirement that the territorial sovereign shall not thereby render itself impotent to fulfill acknowledged duties of doing justice with respect to foreign powers.[3] If a State, acting designedly, renders itself deficient in this regard, it not only fails to escape responsibility, but also, by reason of its conduct, invites the intervention of aggrieved States.

and following; also President Taft, Annual Message, Dec. 7, 1911, *id.*, XI–XVI. *Cf.* also communication of Mr. Lansing, Secy. of State, to the Secy. of Foreign Relations of the *de facto* Government of Mexico, June 20, 1916, with respect to conditions calling for the pursuit of Villa, *Am. J.*, X, Supp., 211.

[1] At least such is the profound conviction in States such as the United States where Anglo-American theories prevail, and where trial by jury is firmly planted in the fundamental law.

[2] Declared Mr. Root, President of the American Society of International Law, April 28, 1910: "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territories the benefit of the same laws the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

"There is a standard of justice very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content and compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." *Proceedings*, Am. Soc. Int. Law, IV, 16, 20–21.

[3] Robert Lansing, *Proceedings*, Am. Soc. Int. Law, II, 44, 45.

The United States, in which the power to deal with the outside world is lodged exclusively in the Federal Government, could not avoid responsibility for the neglect of a duty of jurisdiction towards a foreign power, occurring within the bounds of one of the States of the Union, by showing, if such were the fact, that by the Constitution, the right and power to do justice in the particular matter were vested in the government of the commonwealth within whose domain there had been a denial of justice.[1] Nor could the United States fairly deny responsibility for the consequences of neglect in the performance of duties of jurisdiction with respect to aliens resident in a State of the Union by reason of the failure of Congress to enact laws necessary to insure performance.[2] Lack of legislation which may be requisite to enable a State to fulfill its international obligations, howsoever arising, never affords a defense in public law for the consequences of such inaction.[3]

It cannot be admitted that a State may by local enactment lessen the scope of its duty of jurisdiction, inasmuch as it is always fixed by international law. Thus the effort to restrict by local legislation the measure of justice to be accorded the resident alien,[4] or the right of his State to interpose in his be-

[1] Art. IV of the Resolution adopted by the Institute of International Law September 10, 1900, declares:

"The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations." *Annuaire*, XVIII, 255, Moore, Dig., VI, 954; also J. B. Scott, Resolutions, 160.

Compare Mr. Evarts, Secy. of State, to the Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820.

[2] See President Harrison, Annual Message, Dec. 9, 1891, For. Rel. 1891, v, Moore, Dig., VI, 840.

Concerning the need of legislation by Congress to enable the Federal Government to perform international obligations with respect to aliens, see also President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxii–xxiv, Moore, Dig., VI, 846; President Roosevelt, Annual Message, Dec. 3, 1906, For. Rel. 1906, I, xliii; President Taft, remarks before Am. Soc. Int. Law, April 29, 1910, *Proceedings*, Am. Soc., IV, 44–45; Charles H. Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens", *Yale Law J.*, XXV, 561.

[3] Mr. Root, *Proceedings*, Am. Soc., IV, 16, 25. Also, Claims Arising from Mob Violence, *infra*, §§ 290–292.

Compare Mr. Evarts, Secy. of State, to Sir E. Thornton, British Minister, March 7, 1881, MS. Notes to Great Britain, XVIII, 461, Moore, Dig., VI, 663; see, also, distinction made by Mr. Fish, Secy. of State, to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875, MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815.

[4] See, for example, Venezuelan decrees of 1873, For. Rel. 1883, 917–918, Moore, Dig., VI, 318; also concerning these decrees, Mr. Fish, Secy. of State, to Mr. Pile, Minister to Venezuela, No. 63, May 29, 1873, United States and

half,[1] is commonly protested against by the country whose national is thus adversely affected. The United States will not, for example, admit that the failure of an American citizen to be matriculated in accordance with the provisions of a statute of a foreign State where he may reside, deprives him of the protection of his own government, or lessens its right to interpose in his behalf.[2]

It is frequently asserted that the alien is entitled, with respect to the protection of his life and property, to no greater safeguards, and to no better means of redress by judicial process, than are accorded nationals of the State where he finds himself.[3] This contention may be due to the circumstance that in the territories of enlightened States, such individuals are commonly able to obtain justice whether as plaintiffs or defendants, and in both civil and criminal causes. It may be partly attributable also to the habit of States in demanding by treaty that their respective nationals be placed upon an equal footing with those of the country of residence in what relates to the protection of life and property within its borders. Thus it happens that the true test of the extent of the duty of the territorial sovereign oftentimes disappears from view. Whenever, on the other hand, the local judicial system serves to work injustice to the national of the territorial sovereign by failing to accord him that protection which enlightened States habitually place within the reach of their own citizens, and which, therefore, it is believed that he should

Venezuelan Claims Commission (1895), 451, Moore, Dig., VI, 319; Mr. Frelinghuysen, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 292, April 18, 1884, Senate Ex. Doc. 143, 50 Cong., 1 Sess., 81, 85, Moore, Dig., VI, 320.

[1] Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister, April 4, 1884, For. Rel. 1884, 599, Moore, Dig., VI, 321; Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, No. 732, Feb. 17, 1885, For. Rel. 1885, 575, Moore, Dig., VI, 312.

[2] See, for example, Mr. Bayard, Secy. of State, to Mr. Morgan, Minister to Mexico, May 26, 1885, MS. Inst. Mexico, XXI, 297, Moore, Dig., VI, 313; Mr. Bayard, Secy. of State, to Mr. Howe, May 8, 1885, 155 MS. Dom. Let. 323, Moore, Dig., VI, 313; also, generally, documents in Moore, Dig., VI, 309–324.

[3] Mr. Butler, Atty.-Gen., 3 Ops. Attys.-Gen., 254, Moore, Dig., IV, 2; Mr. Cushing, Atty.-Gen., 7 Ops. Attys.-Gen., 229, Moore, Dig., IV, 7; Mr. Webster, Secy. of State, to Mr. Calderon de la Barca, Spanish Minister, Nov. 13, 1851, 6 Webster's Works, 509, 511, Moore, Dig., VI, 812; Mr. Evarts, Secy. of State, to the Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820, 822; Mr. Hay, Secy. of State, to Baron Riedl, Austro-Hungarian Chargé d'Affaires *ad interim*, Feb. 4, 1899, For. Rel. 1898, 152, 155, Moore, Dig., VI, 874, 879.

See, also, Wadsworth, Commissioner, in case of Salvador Prats, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2886, 2888; Opinion of Palacio, Commissioner, in same case, *id.*, 2892, 2893.

enjoy, it becomes apparent that the duty of jurisdiction is to be tested by a different standard. Thus if the alien suffers absolute wrong through the operation of local laws or procedure, although applied without discrimination, the State of his allegiance will raise its voice in protest.[1] Whenever it does so, the insufficiency of the domestic standard is emphasized.

The alien may no doubt be the object of some discrimination without necessarily imputing to the country of his residence a violation of international law. This is true when it appears that, notwithstanding the discrimination, he is able to secure such a measure of justice as States commonly require and obtain for their nationals resident abroad. The provision in the French law that an alien shall give security for costs in a suit brought against a citizen is typical.[2] So long as foreign powers acquiesce, the discrimination cannot be regarded as internationally illegal.

The alien may, however, by reason of his foreign nationality, need and actually receive a means of redress other than that accorded the national of the territorial sovereign. The tribunals and processes found adequate for the exercise of jurisdiction with

[1] See, for example, Baron von Riedenau of the Austro-Hungarian Legation, to Mr. Hay, Secy. of State, For. Rel. 1899, 31, 35; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 85, Aug. 24, 1886, MS. Inst. Peru, XVII, 231, Moore, Dig., VI, 252; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–233, Moore, Dig., VI, 275; Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 803.

[2] Art. 16 of the Code Civil, as amended by the law of March 5, 1895, Dalloz, *Codes Annotés*, I, 199.

See, also, J. Brissaud, History of French Private Law, translated by Rapelje Howell, Continental Legal History Series, § 582; James Barclay, *Proceedings*, Am. Soc., V, 57; Joseph H. Beale, *Harv. Law Rev.*, XXVI, 193 and 283; Mr. Adee, Acting Secy. of State, to Signor Carignani, Italian Chargé, Oct. 10, 1901, For. Rel. 1901, 310.

"We find in continental Europe a good deal of diversity in regard to the furnishing of indemnity *judicatum solvi*. Some nations, among which we find Italy, Portugal, Denmark and a few smaller ones, have abolished it entirely. The Italian Civil Code of 1865, Article 8, provides that: 'the alien is admitted to the enjoyment of the civil rights accorded to citizens.' Italy in this respect, as in many other matters relating to private law, is in the forefront of civilization. Countries like Belgium and Luxemburg follow the French rule, as does Holland. Russia exacts indemnity *judicatum solvi* except in the case where the plaintiff is solvent. Switzerland, like England and the United States, does not discriminate between its citizens and aliens, but requires all non-residents to furnish security. Germany bases its law entirely upon the system of legislative reciprocity. The German judge must ascertain the law regarding security prevailing in the country to which the plaintiff belongs. Austria, since 1898, has adopted the same system, as has been done by Spain and Hungary. All these countries, however, have also numerous treaties of exemption, and it is necessary in each case to ascertain whether the country of the forum does not have a treaty with the nation to which the plaintiff in the particular case belongs." Frederic R. Coudert, in *Proceedings*, Am. Soc., V, 192, 206.

respect to the latter may notoriously fail when the complainant is an alien and local prejudice is aroused against him. This has been recognized both by the Constitution and legislation of the United States in conferring upon aliens under specified circumstances the right to invoke the jurisdiction of the Federal Courts.[1] The reason for the distinction, which is manifested also in the frequent efforts made to encourage the Congress to enact a law causing certain offenses in derogation of rights conferred by treaty upon foreigners residing in American territory to be cognizable in the Federal courts,[2] is not for the purpose of affording the alien more favorable treatment than is accorded the national, but rather to give to the former by a different process, an equal opportunity to secure such measure of justice as should be within the reach of every resident of the national domain.

b.

Operation of the Judicial System

(1)

§ 268. When the Alien Invokes the Aid of the Courts.

The alien must be given access to the courts whether as a complainant in a civil action or as instigator of criminal proceedings to be undertaken by the State.[3] Except for the possible obligation to furnish security for costs in a civil action, he must not be subjected to discrimination by reason of his foreign nationality.[4]

[1] Constitution, Art. III, Section 2. According to paragraph 17, of the Federal Judicial Code, 36 Stat. 1093, U. S. Comp. Stat. 1918, § 991 (17), the United States District Courts are given original jurisdiction "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States."

See, also, § 34 of Federal Judicial Code, 36 Stat. 1098, U. S. Comp. Stat. 1918, § 1016, specifying conditions when a personal action brought in any State court by an alien against a citizen of a State who is, or was at the time the alleged action accrued, a civil officer of the United States, may be removed to the United States District Court.

[2] See, for example, President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxii-xxiv, Moore, Dig., VI, 846.

[3] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 104, Nov. 1, 1886, MS. Inst. Peru, XVII, 252, Moore, Dig., VI, 267. In this connection it may be observed that it is not the duty of a State to clothe its courts with jurisdiction to adjudicate with respect to claims of aliens against other aliens arising in places outside of the territory or control of the State. See, for example, The *Gloria De Larrinaga*, 196 Fed. 590.

[4] Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699; Mr. Porter, Acting Secy. of State, to Mr. Phelps, Minister to Peru, No. 131, June 4, 1885, MS. Inst. Peru, XVII, 154, Moore, Dig., VI, 253.

If there are no courts in the country of residence, or if access thereto is denied him, the territorial sovereign is believed to fail in its duty.[1]

When the alien is a complainant, he should be enabled to invoke the aid of a tribunal free to disregard the political importance of his adversaries, even though they are the agents or officers of the State.[2] If he is the object of criminal prosecution, the court should be able and disposed to protect him from persecution.

If in anticipation of injury to his person or property the alien invokes the aid of the judicial department, the agencies thereof must be diligently employed according to the means available and commensurate with the circumstances arising, to prevent the perpetration of wrongful or criminal acts; and the requisite force must be set in motion to prosecute criminally wrongdoers who succeed in accomplishing their will. Thus the failure of the local authorities, when duly warned, to invoke judicial aid either to prevent the commission of acts of mob violence, or to ascertain the identity of and institute proceedings against the actors, would indicate a distinct neglect of a duty of jurisdiction.[3] Such remissness would be the more reprehensible should the judicial or other authorities of the territorial sovereign connive at the acts of violence, or abet the actors.[4]

Finally, the courts should be clothed with power not only to denounce the illegality of acts that are proven to be wrongful, but also to decree that a guilty defendant make restitution. It is believed that this is true even when the wrongdoer is an agency of

[1] Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mexico, XIX, 18, Moore, Dig., VI, 678.

Declared Mr. Bayard, Secy. of State, in a communication to Mr. Jackson, Minister to Mexico, Sept. 7, 1886: "In the present case, for instance, it was the duty of the claimant, if possible, to exhaust his remedy in the Mexican courts before he came to this Department for its intervention. But when he was precluded from so doing by the adverse proceedings instituted against him by the Mexican authorities, by which he was prevented from making out his case, we must hold that justice was not only denied him, but denied in violation of settled principles of international law." MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680.

See opinion of Dr. Wharton, Solicitor of State Dept., in case of W. A. Davis *v.* Great Britain, 1885, cited in letter of Mr. Day, Acting Secy. of State, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699.

[2] Lord Palmerston, in the House of Commons, June 25, 1850, in case of Don Pacifico, Moore, Dig., VI, 681. See, also, Promemoria of the German Embassy at Washington, Dec. 11, 1901, concerning claims against Venezuela, For. Rel. 1901, 192, Moore, Dig., VI, 692.

[3] Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 803.

[4] Mr. Fish, Secy. of State, to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875, MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815, 816.

the State itself. Whether the alien suffers wrong at the hands of a private individual or through the laches of the State, the victim should be given a means of redress by judicial process against the wrongdoer. Whenever such means are lacking the territorial sovereign fails, at least in principle, to fulfill a duty of jurisdiction.[1]

(2)

§ 269. When the Aid of the Courts Is Invoked against the Alien.

When an alien is the object of criminal prosecution or is made a defendant in a suit instituted by the territorial sovereign, the duty of jurisdiction with reference to him is equally apparent.[2] Obviously the judicial system designed for the protection of life and property must not be employed as an instrument of oppression.[3]

The alien when prosecuted criminally must be given opportunity to summon witnesses in his own behalf and to interrogate them.[4] He must be informed of the nature of the charges preferred against him and be enabled to defend himself with the aid of counsel.[5]

3

CLAIMS

a

§ 270. In General.

A claim in international law may be defined as a demand for redress made by one State upon another by reason of the alleged

[1] "How Far is the Position of Resident Aliens Recognized and Protected by International Law", *Proceedings*, Am. Soc. Int. Law, V. 32.

[2] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680. See Rights of Jurisdiction, The Establishment of a Judicial System, *supra*, § 219.

[3] Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, Oct. 15, 1880, For. Rel. 1880, 1041, 1043, Moore, Dig., VI, 768; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 423, Dec. 29, 1890, MS. Inst. Mexico, XXII, 687, Moore, Dig., VI, 773; Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 1, 1907, For. Rel. 1907, II, 744.

[4] Mr. Conrad, Acting Secy. of State, to Mr. Peyton, Chargé to Chile, Oct. 12, 1852, MS. Inst. Chile, XV, 93, Moore, Dig., VI, 274.

[5] Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–233, Moore, Dig., VI, 275; Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 453–454, Moore, Dig., VI, 277–279.

wrongful conduct of that other.[1] The same term is also commonly used to signify the ground of complaint which is the basis of the

[1] "A claim 'is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.' [Prigg *v.* Penna., 16 Pet. 539, U. S. Sup. Ct.]

"In my judgment a claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the *Government* not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. [Moore's Int. Arb., 3623, *citing* Dowell *v.* Cordwell, 4 Saw., U. S. Cir. Ct., 228, and quoting from Deady, J.]

"On a claim against a foreign government for spoliation the demand is founded upon the law of nations and the obligation of the offending government is perfect. [Emerson *v.* Hall, 13 Pet. 409, U. S. Sup. Ct.]

"Claim: 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. 'Doth he lay *claim* to thine inheritance?' — Shak. 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another. 'A bar to all *claims* upon land.' — Hallam. 3. The thing claimed or demanded; that to which any one has a right, as a settler's claim [U. S. and Australia]. [Webster.]

"Claim: 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another. [Johnson.]

"In the Spanish language the word of corresponding meaning is *reclamación*.

"'The opposition or contradiction which is made to anything as unjust.' This is *reclamatio, oppositio*. [Salvá.]

"'The demand made for anything by him who has the right of property in it against him who possesses or *denies* it.' This is *reclamatio*. [Salvá.]

"*Reclamación* [claim]: The opposition or contradiction that is made in words or in writing against anything as *unjust*, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it. [Escriche, Dict. of Legis.]" Authorities cited by Plumley, Umpire, in the Aroa Mines Case, British-Venezuelan Commission, 1903, Ralston's Report, 354–355.

See, also, Paúl, Commissioner, in the Boulton, Bliss & Dallett Case, American-Venezuelan Commission, 1903, Ralston's Report, 26; Bruce, Arbitrator, in the Bond Cases, United States-Colombian Commission, Convention of Feb. 10, 1864, Moore, Arbitrations, IV, 3615. All of the foregoing definitions are contained in J. H. Ralston, Arbitral Law, 153–154.

Concerning Claims generally, see American Society Int. Law, *Proceedings*, II, 44–67; *id.*, IV, 16–27, 46–193; *id.*, V, 32–43, 192–212; Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, New York, 1915; David J. Brewer and Charles Henry Butler, in *"Cyc."*, XXII, 1734–1756; Hershey, Essentials, 161–169, with bibliography; William Lawrence, The Law of Claims against Governments, Washington, 1875; J. H. Ralston, International Arbitral Law and Procedure, 1910; George Winfield Scott, in *Annals, Am. Acad. Pol. & Social Science* (1903), p. 74.

Cf., also, D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale*, Florence, 1902; same, in *Riv. Gén.*, XIII, 5–29, 285–309; Emilio Brusa, Report to the Institute of International Law, in Behalf of the Ninth Commission, on the Responsibility of States by Reason of Damages Sustained by Foreigners in cases of Riots and Civil Wars, *Annuaire*, XVII, 96–137; *id.*, XVIII, 47–49; Resolution of the Institute, *id.*, 254–256; Bibliography in Clunet, *Tables Générales*, I, 468–472, 885; Oppenheim, 2 ed., I, 206–225; J. Tchernoff, *Le droit de protection, exercé par un État à l'égard de ses nationaux, résidant à l'étranger*, Paris, 1908; Gaston de Leval, *De la protection diplomatique des nationaux à l'étranger*, Brussels, 1907; Diplomatic Protection of Citizens Abroad, International Law Association, *Proceedings*, 24th Conference (1907), 196–210; Carlos Wiesse, *Le droit international appliqué aux guerres civiles*, Lausanne, 1898.

demand.[1] From an international point of view a claim does not arise until the demand for redress has been presented to the State charged with having been at fault. The bare right to demand redress, however much it may justify complaint, is not the equivalent of a claim, and does not always ripen into one. The making of the demand is the significant fact. This act implies that in the judgment of the complainant State, the foreign power to which the demand is addressed has itself, through some agency of its own, violated a duty imposed by international law or by treaty, and that it offers no adequate means of obtaining redress through any domestic channel. It will be found that the adequacy of such means may depend upon the nature of the claim.

The demand for redress may be made by diplomacy; it may also be urged by force. Thus Germany, Great Britain and Italy in 1902 united in blockading certain ports of Venezuela as a means of securing redress for wrongs charged against that State.[2]

The redress sought may assume a variety of forms. The relinquishment of control over territory, or the payment of an indemnity, or the salute to a national flag may, for example, be demanded.

Claims may be divided into two broad classes: first, those which are based upon private complaints of individuals whose government acts as their representative in espousing their cause; secondly, those which "concern the State itself considered as a whole."[3] Pecuniary claims are usually, although not necessarily, of the former class. It will be found that pecuniary claims of a national character have rarely been sought to be adjusted by arbitration.

The act of demanding reparation from a foreign State in behalf of an individual is commonly known as interposition. In so far as it does not purport to interfere with the political independ-

[1] Little, Commissioner, in the Alexander Scott Case, United States-Venezuelan Commission Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 4393–4394.

[2] For. Rel. 1903, 417–439.

[3] Lord Salisbury to Sir Julian Pauncefote, No. 65, March 5, 1896, For. Rel. 1896, 222, where Lord Salisbury also declared: "A claim for an indemnity or for damages belongs generally to the first class; a claim to territory or sovereign rights belongs to the second." The proposed general arbitration treaty of Jan. 11, 1897, between the United States and Great Britain (which failed to receive the approval of the Senate) made provision for the adjustment of "pecuniary claims" referred to in Art. II, and "territorial claims" referred to in Art. VI. A sharp distinction was drawn in respect to the means to be employed for the solution of controversies of the latter kind. Furthermore it was also declared that when a pecuniary claim was believed by either party to involve "the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative", the claim should be dealt with by the procedure to be followed with respect to territorial claims. *Id.*, 238–240.

ence of the country whose conduct is the source of complaint, such action does not resemble intervention. The preferring of a claim by interposition may, however, lead to intervention if the demands of the aggrieved State are ignored or treated with contempt.[1]

The study of claims involves a fourfold inquiry concerning, first, the relation of the aggrieved individual (if the claim be a private rather than a public one) to the State called upon to espouse his cause; secondly, the relation of the actors whose conduct is the source of complaint to the State against which a demand for redress is contemplated; thirdly, the responsibility of that State for the consequences of the acts committed; and fourthly, the procedure to be followed in order to obtain redress. Thus it will be found that a State, such as the United States, may refrain from interposition because the aggrieved individual is not one of its own nationals, or because the acts giving rise to complaint have not been committed by any authority of the territorial sovereign, or because the acts, although committed by an official within the scope of his duty, have not been internationally illegal, or because notwithstanding a denial of justice by the territorial sovereign, the individual claimant has failed to exhaust the local remedies available to him. When the propriety of interposition is questioned, it becomes important to observe upon which of the foregoing reasons reliance is placed.[2]

b

Mode of Presentation of Private Claims

(1)

§ 271. Claims against the United States.

International claims against the United States must be presented through the diplomatic channel. The claim of an alien must be

[1] Intervention, *supra*, § 69. See J. R. Clark, Jr., Solicitor, Dept. of State, Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces, October, 1912, p. 30.

[2] "Claims presented by the Government of the United States against a foreign Government are based fundamentally, among other things, upon loss or injury (1) which was suffered by the United States or by its citizens or those entitled to its protection, and (2) for which a foreign Government, including its officials, branches, or agencies, was responsible. If either of these elements is lacking the validity of the claim is doubtful and, as a rule, the Government of the United States is not in a position to be of any assistance in obtaining reparation." Department of State, Circular respecting the application for

preferred by the regular accredited representative of his government.[1]

(2)

§ 272. Claims against Foreign Governments.

The presentation of claims against a foreign State in behalf of the United States or citizens thereof must be made through the Department of State.[2]

If the claim is founded upon the complaint of an individual, and based upon contract, a diplomatic representative of the United States is not permitted to interfere without specific instructions. Where it is founded in tort, he is required likewise to await instructions, unless the person of the claimant be assailed or there be pressing necessity for action before the Department of State can be consulted; in which event he "will communicate in full the reasons for his interference."[3]

the support of claims against foreign governments, 1919, Senate Doc. No. 67, 66 Cong., 1 Sess., p. 7, and contained in revision of Jan. 30, 1920.

It should be noted that the Claims Circular of 1919 superseded Circular issued by the Department of State March 5, 1906, and was issued in revised form Jan. 30, 1920.

[1] Mr. Fish, Secy. of State to Mr. Lawrence, M. C., April 22, 1874, Magoon's Reports, 338, Moore, Dig., VI, 607; Mr. Frelinghuysen, Secy. of State, to Baron de Fava, June 21, 1884, MS. Notes to Italy, VIII, 83, Moore, Dig., VI, 608.

Declared Chief Justice Waite, in United States *v.* Diekelman: "A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." 92 U. S. 520, 524.

According to Rev. Stat. § 1068, Act of March 3, 1911, Chap. 231 (Judicial Code, § 155), 36 Stat. 1139, U. S. Comp. Stat. 1918, § 1146: "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

[2] Mr. Marcy, Secy. of State, to Mr. Crain, Feb. 24, 1854, 42 MS. Dom. Let. 244, Moore, Dig., VI, 609.

[3] Instructions to Diplomatic Officers (1897), § 174, p. 68, Moore, Dig., VI, 609; see, also, Mr. Olney, Secy. of State, to Mr. Smythe, Minister to Haiti, No. 136, March 20, 1896, MS. Inst. Haiti, III, 479, Moore, Dig., VI, 609; also other documents cited in Moore, Dig., VI, 609–610; Mr. Bayard, Secy. of State, to Mr. Denby, Feb. 5, 1886, MS. Inst. China, IV, 118, Moore, Dig., VI, 614, where it was declared that the Department of State requires as a condition precedent to the presentation of a claim to a foreign government "simply a *prima facie* case such as would authorize a chancellor to issue *ex parte* process."

c

The Prosecution of Private Claims

(1)

§ 273. Discretion as to Presentation.

As a matter of domestic law, a State exercises a broad discretion with respect to the preferment of demands for redress in behalf of its own nationals.[1] Over such claims the prosecuting State has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender or compromise them without consulting the claimants.[2] It may decide for itself the time and manner of pressure.[3] Thus the Department of State is disposed to suspend the prosecution of a claim when either House of Congress has called for the papers with a view to consideration of the subject.[4]

(2)

§ 274. Obstacles to Presentation.

"Diplomatic aid will not be rendered to press on a foreign government a claim which is based on an act against public policy."[5] Thus the Department of State has declined to recognize as worthy of support, a contract alleged to have been concluded by a citizen of the United States with the executive or agent of another government, for the purpose of setting aside a treaty between the United States and that government.[6]

[1] Mr. Frelinghuysen, Secy. of State, to Mr. Suydam, Sept. 25, 1882, cited in Report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, For. Rel. 1887, 606, Moore, Dig., VI, 616.

[2] The language in the text is that of Mr. Frelinghuysen, Secy. of State, to Messrs. Mullan and King, Feb. 11, 1884, quoted in report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, For. Rel. 1887, 607, Moore, Dig., VI, 616.

"The presentation of a claim does not bind the government presenting it to insist upon it; nor does reception amount to a recognition of its validity." Ralston, Arbitral Law, 158, *citing* Bruce, Arbitrator, in the case of *La Constancia*, American-Colombian Commission, Convention of Feb. 10, 1864, Moore, Arbitrations, 2742.

[3] "Where a government takes up the claim of one of its citizens against another government it necessarily possesses and exercises the power to decide for itself when and to what extent it will press the claim, as well as the means which it will employ for that purpose." Moore, Dig., VI, 627.

[4] Mr. J. C. B. Davis, Acting Secy. of State, to Messrs. Bartley et al., Sept. 26, 1871, For. Rel. 1887, 594, Moore, Dig., VI, 627.

[5] The language of the text is that used in Moore, Dig., VI, 617, *citing* Mr. Seward, Secy. of State, to Mr. Whitney, July 24, 1868, 79 MS. Dom. Let. 119.

[6] Mr. Blaine, Secy. of State, to Mr. Matchett, March 19, 1891, 181 MS. Dom. Let. 273, Moore, Dig., VI, 620; also other documents cited in Moore, Dig., VI, 617–620.

A citizen by reason of his own acts may lose his right to be protected by his government, in the prosecution of any demand for redress against a foreign State.[1] The censurable conduct of the claimant may cause his own State to withhold interposition in his behalf. Thus fraudulent acts on his part for the purpose of enhancing the value of his claim, or of influencing proceedings in support of it, should serve to deprive him of affirmative aid which he might otherwise receive from his government.[2] Nor should a State lend its aid to one who founds his cause upon illegal or immoral conduct.[3] It should be observed, however, that it is the judgment of the State whose aid is invoked in pursuance of its domestic policy, that is decisive of whether the acts of the claimant have been such as to preclude interposition.[4]

Unneutral conduct on the part of an individual is deemed to be internationally illegal, even though in the particular case the circumstances are such as to impose no duty of prevention upon his own State itself not a belligerent.[5] Hence the person engaged in such transactions may be fairly regarded as forfeiting the right to demand and secure the protection by his own country from the consequences of his misconduct.[6] Obviously a State should always

[1] Concerning generally the loss of right to national protection, see Nationality, Loss of Right to National Protection, *infra*, §§ 388–393; also, documents in Moore, Dig., III, 757–795; *id.*, VI, 621–622; Moore, Arbitrations, III, 2729–2857.

[2] Mr. Seward, Secy. of State, to Lord Lyons, British Minister, May 30, 1862, MS. Notes to Great Britain, IX, 187; Moore, Dig., VI, 622.

See, also, Department of State, Claims Circular of 1919, Section 20, where it is announced that the making of false statements in the application of a claimant or in connection therewith, pertaining to the diplomatic relations of the United States with foreign countries, may result in the instigation of legal proceedings or in the withdrawal of the Government's assistance and support in connection with the settlement of a claim.

[3] Such was the emphatic opinion of Mr. Bayard, Secy. of State, in a Report to the President, Jan. 20, 1887, For. Rel. 1887, 592, 607, Moore, Dig., VI, 622–623. See, also, Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, May 4, 1906, For. Rel. 1906, II, 871.

[4] Theodore S. Woolsey, *Proceedings*, Am. Soc., IV, 99; Arthur K. Kuhn, *id.*, 110.

[5] "Acts which have in the past been regarded as sufficient grounds for the Government to decline protection to Americans in particular cases are, among others, maintaining extended domicile in a foreign country, unneutral conduct, acceptance of office under a foreign Government, active participation in foreign politics, participation in filibustering or insurrectionary movements against a friendly foreign Government, seeking refuge from justice, and, generally, acts inconsistent with allegiance to the United States." Department of State, Claims Circular of 1919, revision of Jan. 30, 1920, Section 7.

See Neutrality, *infra*, §§ 871–872. Report of War Department Commission of 1912, to investigate claims against Mexico, with respect to Case of Converse and Blatt, For. Rel. 1912, 971.

[6] Mr. Fish, Secy. of State, to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453, Moore, Dig., VI, 623; Mr. Bayard, Secy. of State, to Messrs. Morris and Fillette, July 28, 1888, 169 MS. Dom. Let. 263, Moore, Dig., VI, 623.

refrain from presenting a claim arising from or incidental to a breach of international law on the part of a national.[1]

d

Conditions of Interposition in Behalf of a Private Claimant

(1)

§ 275. Nationality of Claimant.

A State should not undertake to press a claim for redress in behalf of an individual against a foreign government, unless he was one of its own nationals both at the time when the claim arose and continuously thereafter until its preferment.[2] In 1919, the

See, also, J. H. Ralston, Arbitral Law, § 397, *citing* Thornton, Umpire in the Fitch Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3476.

[1] Mr. Sherman, Secy. of State, to Mr. Coxe, Minister to Guatemala and Honduras, No. 71, April 21, 1897, For. Rel. 1897, 332, Moore, Dig., VI, 624. See, also, Young *v.* United States, 97 U. S. 39, 62.

Membership by an American citizen in a so-called "Urban Guard", a temporary committee of safety confining its efforts to safeguarding life and property, and avoiding taking either side in a civil strife dividing the Republic of Peru in 1885, was not regarded by the Department of State as conduct such as to preclude the presentation of a claim for the forcible taking from a member of the guard of live stock by the Peruvian Government. Mr. Olney, Secy. of State, to Mr. Neill, Chargé, No. 209, Dec. 22, 1896, MS. Inst. Peru, XVIII, 11, Moore, Dig., VI, 626.

[2] Therefore the Department of State incorporated the following statement in Section 6 of its Claims Circular of 1919 "Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, after the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, after the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or vice versa, cannot be espoused by the United States. For example, a claim for a loss or injury which occurred before the claimant obtained final naturalization as a citizen of the United States (except in case of an American seaman who has made a declaration of intention) will not, by reason of his subsequent naturalization, be supported by the United States." Senate Doc. No. 67, 66 Cong., 1 Sess.

See, also, Mr. Moore, Assist. Secy of State, to Mr. Eustis, July 26, 1898, 230 MS. Dom. Let. 378, Moore, Dig., VI, 631, where it was also declared that "the acquisition of a title to a government's protection does not operate retroactively." *Cf.*, also, Mr. Forsyth, Secy. of State, to Mr. Champly, April 15, 1837, 29 MS. Dom. Let. 71, Moore, Dig., VI, 628; Mr. Gresham, Secy. of State, to Mr. Lodge, April 17, 1895, 201 MS. Dom. Let. 534, Moore, Dig., VI, 630; Burthe *v.* Denis, 133 U. S. 514, 520–522, Moore, Dig., VI, 628.

"With extremely rare exceptions, and such exceptions based upon the particular language of treaties having exceptional circumstances in view, the language of commissions has been that the claim must be founded upon an injury or wrong to a citizen of the claimant government, and that the title

Department of State made the following statement in the course of its general instructions for claimants:

> The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government cannot undertake to present his claim to a foreign government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States except in case of American seamen.[1]

to such claim must have remained continuously in the hands of citizens of such government until the time of its presentation for filing before the commission." Ralston, Arbitral Law, 105, *citing* the Abbiatti Case before United States and Venezuelan Claims Commission, Moore, Arbitrations, III. 2347. See, also, Ralston, Arbitral Law, 105–107, and other cases there cited, especially the Corvaïa Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 782, 802.

See, also, award of the Court of Arbitration, at the Hague, May 3, 1912, in the Canevaro Case between Italy and Peru, especially in denying compensation to Raphael Canevaro as an Italian claimant by reason of his Peruvian nationality, *Am. J.*, VI. 746, 747; also editorial comment, *id.*, 709; J. B. Scott, Hague Court Reports, 522.

While in the opinion of the Department of State, an American citizen is not entitled to invoke the assistance of the United States in respect to a claim against another government acquired from a foreigner by marriage and assignment (by a partnership arrangement or otherwise), "yet it is believed that where such claim comes to the wife by succession, upon the death of her husband . . . the offices of this Government should be extended to her." Mr. Hill, Assist. Secy. of State, to Messrs. Coudert Brothers, June 9, 1900, 245 MS. Dom. Let. 484, Moore, Dig., VI, 630.

Although a seaman in the naval or mercantile marine under a foreign flag is doubtless entitled to the special protection of the country to which the vessel belongs, the United States may not be disposed to prefer a claim against another State in behalf of a seaman on an American vessel when his foreign nationality has been established. See Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, July 31, 1885, MS. Inst. Haiti. II, 511, Moore, Dig., III. 796; Claim of Patrick Shields against Chile, For. Rel. 1900, 66–71, Moore, Dig., III, 796; Mr. Uhl, Acting Secy. of State, to Messrs. Goodrich et al., April 10, 1894, For. Rel. 1895, I, 229, 231, Moore, Dig., III, 798.

Regarding the Protection of Seamen, *cf.* Nationality, *infra*, § 394; also In re Ross, 140 U. S. 453.

[1] Senate Doc. No. 67, 66 Cong., 1 Sess., Section 5, p. 8; Revision of Jan. 30, 1920, p. 2. See, also, Report of War Department Commission of 1912, on Claims against Mexico, in respect to cases arising in El Paso, Texas, and Douglas, Arizona, from gunshot wounds inflicted from the Mexican side of the border, For. Rel. 1912, 975, 979.

There have been instances, however, where aliens domiciled within the territory of the United States, and who have declared an intention to become citizens thereof, appear to have been regarded as entitled to claim the benefits of American nationality when they have suffered wrong at the hands of foreign States other than the country of origin. The attempts to secure the adjudication of the claims of such individuals before commissions under claims conventions between the United States and countries alleged to have been at fault, have been successful when it has been shown that the claimant was domiciled in American territory at the time of the commission of acts complained of, and continuously thereafter until the preference of the claim; and when also prior to its preference, he had perfected his American naturalization.[1] Such a situation rarely arises, and the conditions permitting interposition must be regarded as exceptional.

A mere declaration of intention by a foreigner to become a citizen is, and should be, regarded as in itself insufficient to cause the State whose nationality is sought to be acquired to prefer a claim in his behalf.[2] A declaration of intention on the part of a foreigner to become an American citizen, even though coupled with residence in a State of the United States and participation in the political life of such commonwealth, would not preclude the country of origin from preferring a claim against the United States in behalf of the individual, because such acts on his part

[1] See reasoning in the cases of Jarr and Hurst, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2707; case of Hellman, before same Commission, *id.*, 2715; case of Eigendorff, before same Commission, *id.*, 2717. Note the singular application of the principle asserted in the foregoing cases to that of Gosch, before same Commission, *id.*, 2713.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Alfonso, Nov. 13, 1884, 153 MS. Dom. Let. 194, Moore, Dig., VI, 632; Mr. Porter, Acting Secy. of State, to Messrs. Kennedy & Shellaberger, Jan. 4, 1887, Senate Doc. 287, 57 Cong., 1 Sess., Moore, Dig., VI, 633; also correspondence with the Italian Embassy, concerning the lynching of persons of Italian origin at Tallulah, La., 1899, For. Rel. 1899, 440–466, *id.*, 1900, 715–731, referred to also in Moore, Dig., VI, 634–636.

Numerous cases have arisen before claims commissions where it has been asserted that persons of foreign origin who had merely declared their intention to become American citizens should be regarded as such. While the decisions have not been uniform, the Commissioners or Umpires have in most cases declared that a declaration of intention is insufficient to enable the foreigner to be regarded as a citizen of the claimant State within the meaning of a claims convention. See case of Kern, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2719; Case of Perez, before same Commission, *id.*, III, 2718; Opinion of Thornton, Umpire, in Case of Schreck, before same Commission, *id.*, III, 2720. See, also, Stevenson Case, British-Venezuelan Commission, 1903, Ralston's Report, 438; also discussion in Ralston, Arbitral Law, 107–109.

would not constitute naturalization according to the laws of the United States.[1]

Neither the United States nor any other State should, as a matter of policy or equity, espouse the cause of one who, according to its own laws, has by residence abroad or by any other process expatriated himself.[2] Nor should the State of origin prefer a claim in behalf of one who, according to the laws of the foreign State of residence, has voluntarily become naturalized.[3] In the latter situation the fact of domicile in the territory of a foreign country is important only so far as it indicates compliance with one of the conditions prescribed by the local law as a means of perfecting naturalization. In the former it is important only so far as it indicates conduct which the law of the State of origin

[1] In 1896, the Italian Embassy demanded the payment of indemnities in behalf of the heirs of three Italian subjects who had been lynched at Hahnville, La. It was contended by Mr. Olney, Secy. of State, that the Federal Government was inclined to doubt any right of the Italian Government to prefer a claim against the United States because the victims were "not Italians temporarily residing in the United States," that at the time of their death they apparently intended to remain in the United States permanently, that they were performing no duties as subjects of Italy, that they were successfully evading military service in Italy, and that by qualifying and becoming electors in Louisiana, according to its Constitution and laws, they had become citizens of that State and eligible to hold office. The Italian Ambassador, Baron Fava, was able to show that there had been no evasion of military service. He was unwilling to admit that there was proof of a change of domicile, notwithstanding the long absence of the victims from Italy. Finally, he protested vigorously that declarations of intention to become American citizens together with the qualifying and acting as electors in Louisiana (if such acts were proven to have occurred) did not change the nationality of the victims, or constitute naturalization according to Section 2165 of the Revised Statutes, and hence did not preclude the Italian Government from preferring a claim for indemnity. The Act of Congress that ultimately provided for the payment of an indemnity referred to the decedents as subjects of Italy. See 30 Stat. 106; also For. Rel. 1896, 396–422, Moore, Dig., III, 344–353.

Cf., also, case of three Italian subjects murdered in Colorado, in 1895, on account of whose death an indemnity was paid to the Italian Embassy in 1893, although two of the decedents had declared their intention to become American citizens. For. Rel. 1895, II, 938–956; *id.*, 1896, 426, Moore, Dig., III, 344.

Declares Mr. Ralston: "A declaration of intention may, nevertheless, have effect in divesting the citizens or subjects of certain nations of their right to claim national protection; at least it may be strong evidence of such a state of mind or fact as forfeits the right of appeal to the nation of their origin." Ralston, Arbitral Law, 109, *citing* the Deucatte Case, French-American Commission, convention of Jan. 15, 1880, Moore, Arbitrations, III, 2582.

See, also, argument of Mr. Ashton, Agent and Counsel of the United States, in brief filed before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2696.

[2] See Sec. 2 of the Act of March 2, 1907, in reference to the expatriation of citizens and their protection abroad, 34 Stat. 1228.

[3] Argument of Mr. Ashton, Agent and Counsel of the United States, in brief filed before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2696, 2698–2699.

declares shall result in the loss of nationality, or of the right to claim protection. The fact of domicile appears otherwise to be without significance.[1]

(2)

§ 276. Assignment of Claimant's Interests.

It is believed to be a settled rule of the Department of State that a claim which the United States cannot take cognizance of in its inception, because of the alienage of the claimant, is not brought within its cognizance by an assignment to an American citizen.[2] The same principle has been followed by courts of arbitration.[3] There seems to be no objection, however, to the preferment of a demand for redress in behalf of a citizen who is the assignee of the rights of an assignor of the same nationality.[4]

[1] This principle has been applied to cases where the individual was domiciled in a country engaged in war, and against which there was preferred a claim arising from the consequences of military operations. See Case of Barclay, British-American Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, III, 2721. *Compare* Case of Laurent, British-American Claims Commission, Convention of Feb. 8, 1853, Moore, Arbitrations, 2671.

[2] The language in the text is substantially that employed in a communication of Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 42, Feb. 5, 1886, MS. Inst. China, IV, 118, Moore, Dig., VI, 639. See, also, Mr. Evarts, Secy. of State, to Mr. Hodgskin, Oct. 25, 1877, 120 MS. Dom. Let. 238, Moore, Dig., VI, 638; Mr. Gresham, Secy. of State, to Mr. McDonald, Minister to Persia, Nov. 11, 1893, For. Rel. 1894, 485, Moore, Dig., VI, 639. Also, Department of State, General Instructions for Claimants, revision of Jan. 30, 1920, Section 6.

The rule announced does not concern the situation where a foreign concessionaire transfers his concession, capable of assignment, to an American citizen, who upon the violation of his rights thereunder by the grantor State, invokes the aid of the United States. Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, No. 291, Dec. 23, 1898, MS. Inst. Haiti, IV, 103, Moore, Dig., VI, 639; also Eldredge's Case, American-Peruvian Commission, Convention of Jan. 12, 1863, Moore, Arbitrations, IV, 3460.

[3] Thornton, Umpire, in L. S. Hargous Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2327, 2329; Parrott and Wilson Case, Mexican-American Commission, Convention of April 11, 1839, *id.*, 2381; same case before Mexican Claims Commission, Act of Cong., of March 3, 1849, *id.*, 2384; Slocum Case, before same Commission, *id.*, 2385; Dimond Case before same Commission, *id.*, 2386; J. F. Lasarte Case, American-Peruvian Commission, Convention of Jan. 12, 1863, *id.*, 2394–2396; see, also, cases cited in Ralston, Arbitral Law, 103.

[4] Declares Prof. Moore: "The principle that the right of intervention cannot be transferred by the assignment of a claim by the citizen of one country to the citizen of another is altogether independent of the assignability of diplomatic claims as between citizens of the same country, where nothing but the private interest passes. [Judson *v.* Corcoran, 17 How. 612.]" Dig., VI, 639. See Camy Case, French-American Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, III, 2399; H. G. Norton Case, Mexican American Commission, Convention of July 4, 1868, *id.*, 2163; The *Sir William Peel*, British-American Claims Commission, treaty of May 8, 1871, *id.*, IV, 3935, 3948.

Nor can there be doubt that a claim against a foreign government is assignable.[1]

(3)

§ 277. Partnership Associations.

A citizen by adopting a foreigner as a partner cannot spread over him the protection of the government of the former.[2] The preferment of a claim in behalf of a partnership should be solely on account of those members thereof who are nationals of the claimant State.[3] Nor can a foreign partner evade the operation

[1] E. M. Borchard, Diplomatic Protection, § 290, and documents there cited.

[2] The language of the text is substantially that contained in a communication of Mr. Fish, Secy. of State, to Mr. De Long, Sept. 19, 1871, MS. Inst. Japan, 1, 472, Moore, Dig., VI, 641. See, also, Thomas Morrison Case, Mexican Claims Commission, under Act of Cong., of March 4, 1849, Moore, Arbitrations, 2325; Campbell v. Mullett, 2 Swanston, 551, Moore, Dig., VI, 640.

[3] In the Canevaro Case, under an Italian-Peruvian agreement of April 25, 1910, three questions were submitted to the Court assembled at the Hague: first, whether the Peruvian Government ought to pay in coin or in accordance with the provisions of the Peruvian law on the domestic debt of June 12, 1889, certain drafts possessed by the brothers Napoleon, Carlo and Raphael Canevaro, and drawn by the Peruvian Government to the order of the firm of José Canevaro & Son, for the sum of 43,140 pounds sterling, plus the legal interest upon the said amount; secondly, whether the Canevaro brothers were entitled to demand the total of the amount claimed; and thirdly, whether Count Raphael Canevaro had the right to be considered as an Italian claimant. The debt giving rise to the claim was created by a decree in 1880, following which pay checks (*bons de paiement, libramientos*) were issued to the order of the firm of José Canevaro & Sons for 77,000 pounds sterling, payable at different periods, of which 35,000 pounds sterling were paid in 1885. The firm was of Peruvian nationality by reason of the Peruvian nationality of its members and continued in existence until the death of José Francisco Canevaro in 1900. The Court at the outset announced that: "whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant." This was due to the fact that he had on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, to which none were admitted except Peruvian citizens, and where he also went to defend his election, and also especially by accepting the office of Consul General of the Netherlands, after having solicited the authorization of the Peruvian Government and Congress.

The other claimants, Napoleon and Carlo Canevaro, were, however, of Italian nationality. Their interest in the firm claim of José Canevaro & Sons arose after the act complained of — the law of June 12, 1889, substituting one per cent. bonds in payment of the domestic debt; and their claim was derived by inheritance from José Canevaro. The Court declared that the Canevaro brothers could not enjoy more favorable treatment than the firm, even if they were regarded as the heirs of José Francisco Canevaro; that the situation was unchanged by the fact that Italians had succeeded to a Peruvian claim. Hence, being subjected to the Peruvian law of 1889, it was decreed that their portion of the unpaid balance of the principal indebtedness should be payable in bonds rather than in pounds sterling. It was ordered, however, that the interest after Jan. 1st, 1889, should be payable in gold. The case presents four noteworthy points: first, the recognition of the Peruvian nationality of Raphael Canevaro; secondly, the consequent denial of the right of Italy to interpose in his behalf; thirdly, the willingness on the

of this principle by the assignment of his interest in a claim of the firm to his co-partners who are nationals of the State which contemplates interposition.[1]

The fact that an American citizen enters into a partnership with foreigners whose business is established in a foreign State (either their own or any other), so as to be regarded as domiciled therein, does not affect his right or that of the United States acting in his behalf to regard his individual interest in the firm as essentially American property, entitled to the same protection as any other such property similarly located. The opinions of arbitrators appear to sanction this view.[2] Even when the partnership according to the law of the country where it is established is regarded as a juridical entity possessing functions similar to those of a corporation, the United States does not hesitate to espouse the cause of individual members who may be American citizens when circumstances necessitating interposition arise.[3]

part of Peru, for whatsoever reasons, to submit to arbitration, the scope of its duty to pay to Italian subjects, an obligation derived by inheritance from a Peruvian citizen; and fourthly, the definite decision, that those subjects were in no more favorable position than their Peruvian predecessor, and were subject in like manner to the operation of the domestic law. For text of the award, see G. G. Wilson, Hague Arbitration Cases, 242; J. B. Scott, Hague Court Reports, 522; *Am. J.*, VI, 746. Concerning the case, see Editorial Comment, *id.*, VI, 709, also C. De Boeck, in *Rev. Gén.*, XIX, 317–372.

[1] Thornton, Umpire, L. S. Hargous Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2327; also, concerning same case, Mr. Blaine, Secy. of State, to Mr. Hargous, June 14, 1890, 178 MS. Dom. Let. 38, Moore, Dig., VI, 641.

[2] See Ruden Case, Peruvian Claims Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1653, 1654, where the Umpire said: "If it may be said that business firms have a nationality, such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed."

See, also, *dictum* of Thornton, Umpire in the Case of Jennings, Laughland & Co., Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3135, 3136; Wm. Homan Case, Mexican Claims Commission, Act of Cong., of March 3, 1849, *id.*, 3409.

"Other claims [in addition to that shown in the Case of Massardo, Carbone & Co., Italian-Venezuelan Commission, 1903, Ralston's Report, 703] in the condition of having diverse citizenship among the members of the partnership were presented before the Italian-Venezuelan Commission [1903], and awards were given proportionate to the amount of the Italian interest, no suggestion having been made on the part of Venezuela that their domicil in Venezuela had created Venezuelan citizenship in the partnerships." Ralston, Arbitral Law, 89. See, also, Baasch & Römer Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 906. *Contra, dictum*, in L. H. Finn Case, United States-Venezuelan Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, III, 2348.

[3] According to a protocol concluded between the United States and Chile Dec. 1, 1909, the so-called Alsop Claim was submitted to His Majesty, King Edward VII, as an "amiable compositeur", to determine what amount, if any, was equitably due to the claimants. King George V consented to act in place of his late Majesty. The firm of Alsop and Co. was registered in Chile, its seat of business being in Valparaiso, but it was com-

(4)

Corporations

(a)

§ 278. Interposition in Behalf of a Corporation.

It is declared to be well settled that a government may intervene in behalf of a company incorporated under its laws, or under the laws of a constituent State or province. In such case the act of incorporation is considered as clothing the artificial person thereby created with the nationality of its creator, without regard to the citizenship of the individuals by whom the securities of the company may be owned. Hence we find in general claims conventions that the submission or settlement uniformly embraces "all claims on the part of corporations, companies, or private individuals, citizens of the United

posed of American citizens. The claim arose out of a contract made with Bolivia in 1876, by the liquidator of the firm, one Wheelright, for the adjustment of a debt, based upon previous transactions between the Bolivian Government and a Brazilian citizen who had assigned it to Alsop & Co.

This claim had been submitted to the United States and Chilean Claims Commission, Convention of May 24, 1897, but had been disallowed, on the ground that as Alsop & Co. was a firm organized as a partnership under the Chilean law, it had become a juridical entity possessing Chilean nationality. It had been held, therefore, that the firm must be regarded as a citizen of Chile, incapable of prosecuting a claim against Chile as an American citizen before an International Commission (Henry Chauncey *v.* Chile, No. 3, United States & Chilean Claims Commission, 1901, The Alsop Claim, Appendix to the Case of the United States, II, 558–569, Moore, Dig., III, 802.).

In the Arbitration before King George, the Chilean Government again suggested that as the firm was registered in Chile and was a Chilean company, their grievances could not properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they might possess. The learned commissioners to whom His Majesty referred the case declared, in their Report accepted by him as his award, that this contention would be inconsistent with the very terms of the reference to the King, as it would "practically exclude the possibility of any real decision on the equities of the claim put forward." They added that they were "clearly of opinion, by looking to the terms of the reference and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected. We think that it may be disregarded by Your Majesty." Award pronounced by His Majesty, King George V, as "amiable compositeur" in the matter of the Alsop Claim at London, July 5, 1911, Washington, 1911, 9–10. *Am. J.*, V, 1079, 1085. See, also, case presented by the Government of Chile, London: 1910, Part III, "Locus Standi of Alsop & Co. and of the United States", 7–13. It should be observed that the United States interposed specifically and by name, "for the persons who had composed the firm or their representatives and not for the firm itself." See Opinion of J. Reuben Clark, Jr., Solicitor to the Dept. of State, Aug. 14, 1912, respecting the "Distribution of the Alsop Award", Washington, 1912, 46–53.

See Award of President Cleveland, March 2, 1897, in the Cerruti Case, Protocol between Italy and Colombia of Aug. 18, 1894, *Am. J.* VI, 1015, 1016; *compare* Report of Segismundo Moret, Jan. 26, 1888, in the same case, Protocol between the same countries of May 24, 1886, *id.*, 1003, 1011.

States", or of some other government, as the case may be. In other words, the corporation is recognized as having, for purposes of diplomatic protection, the citizenship of the country in which it is created.[1]

There appears to be no disposition on the part of the Department of State to question the soundness of the foregoing statement, or to act on a different principle.[2] Nevertheless, as a matter of domestic policy, the United States may be unwilling to protect the interests of an American corporation of which all of the shareholders are aliens and nationals of the State in opposition to which protection is sought, and in whose territory the corporation carries on its principal operations.[3]

(b)

§ 279. Interposition in Behalf of Shareholders or Bondholders.

The solution of the question whether a State may reasonably interpose to protect the interests of its nationals who are shareholders or bondholders of a corporation incorporated in a foreign State appears, according to American opinion, not to be necessarily tested by any single theory respecting the nationality of a

[1] Statement in Moore, Dig., VI, 641. See, also, Mr. Olney, Secy. of State, to Mr. Sleeper, Minister to Colombia, Feb. 24, 1897, For. Rel. 1899, 228, Moore, Dig., VI, 642. Also, 794–796; National Character in Relation to Property at Sea in Time of War, Corporations, *infra*, §§ 795–796.

[2] See, for example, Mr. Knox, Secy. of State, to Mr. Arnold, American Consul, No. 80, April 25, 1910, For. Rel. 1910, 197. Also Section 5 of Claims Circular of 1919.

[3] Mr. Adee (for Mr. Knox, Secy. of State), to Mr. Bergholz, American Consul General, No. 191, Oct. 12, 1909, For. Rel. 1909, 67, with respect to a missionary society incorporated in California in 1908. A majority of the incorporators were described in the articles of incorporation as residents and citizens of California. All, however, were of the Chinese race. The society had appointed as agents in China, five Chinese persons, no one of whom was an American citizen. It had acquired land in China and desired protection as an American missionary society. Mr. Adee (referring to a previous instruction of the Department) declared: "The Department is of the opinion that the . . . . . Society, as it represents itself in China, does not seem to represent sufficient American interests to entitle it to the protection of this Government, nor does it seem to fall within the spirit of the provisions of the treaties with regard to the privileges of American missionary societies. The Department deems it advisable, therefore, to require more convincing proof of the citizenship of the incorporators of the society and of the persons at present holding the controlling interest therein. And further, in view of the actual situation in China, it is deemed desirable to require the American missionary societies to employ American citizens (not necessarily Caucasians) as their principal and responsible agents in China if they wish to obtain American protection."

corporation. The conflict of opinion between the publicists of America and England on the one side, and those of continental Europe on the other, as to the correct basis of nationality,[1] although persistent and doubtless illuminating, has not served to convince statesmen that any technical rule should deter them from looking behind the corporate entity when the *bona fide* and substantial interests of their countrymen in foreign territory have required protection or governmental representation.

The Department of State has not infrequently been confronted with the general problem. Mr. Seward, as Secretary of State in 1866, in respect to the case of the *Antioquia*, seemed to deny the propriety of interposition in behalf of American shareholders in a foreign corporation.[2] In 1884, Mr. Frelinghuysen, Secretary of State, appeared to share his view.[3] Later opinions of the Department of State, manifested in the case of the Delagoa Bay Railway, and in that of the Salvador Commercial Company, were, however, to the effect that certain circumstances might arise where interposition became justifiable.

The case of the Delagoa Bay Railway related to a railway belonging to a Portuguese corporation of which practically the entire stock and bonds had been owned by one MacMurdo, an American concessionaire, who had assigned the same to an English corporation, receiving in exchange its entire issue of stock and an undertaking to pay him a lump sum. The English company thereupon issued bonds in order to pay that sum, as well as to build the railway concerned. Following a controversy as to the extension of the line, the Portuguese Government in 1899 seized the railway and canceled the concession. Both the United States and Great Britain protested. Notwithstanding the contention of Portugal that it could only recognize the Portuguese company which had the power of appealing for protection to the law of Portugal, that State finally agreed, in 1891, to refer to arbitration the amount of compensation due to the American and British claimants as a

[1] Attention is called to the thorough discussion of the nationality of corporations and the diversity of the opinions still prevailing, contained in E. M. Borchard, Diplomatic Protection, §§ 277–282.

[2] See communication to Mr. Burton, Minister to Colombia, April 27, 1866, Dip. Cor. 1866, III, 522, Moore, Dig., VI, 644. It should be noted that it appeared from this despatch that there was abundant reason why interposition should be withheld apart from the circumstance that the corporation was a foreign one, even though some of its stockholders were American citizens.

[3] Communication to Mr. Phelps, Minister to Peru, Dec. 6, 1884, MS. Inst. Peru, XVII, 101, Moore, Dig., VI, 646. See, also, *dictum* of Bertinatti, Umpire, in the Accessory Transit Co. Case, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, II, 1562.

consequence of the rescission of the concession of the railway and the taking possession of its property. There was an award of damages.[1] In one sense the agreement to arbitrate was more important than the decision of the tribunal. The former was a yielding to the assertion by the United States and Great Britain of a right to interpose in behalf of their nationals interested in a Portuguese corporation. The latter was a determination of the extent of the harm done to those nationals through the wrongful conduct of the territorial sovereign. The decision itself is, therefore, without value as a judicial precedent respecting the propriety of interposition.

In the claim of the Salvador Commercial Company against Salvador, it appeared that that corporation, incorporated in California, together with certain American citizens were the principal owners of a Salvadorean corporation styled "El Triunfo Company." The practical destruction or cancellation of the franchise of the latter by arbitrary and illegal action on the part of the Salvadorean Government resulted in interposition by the United States. According to the terms of a protocol of an agreement to arbitrate, of December 19, 1901, the issue presented was whether any liability rested upon the respondent State with respect to the Salvador Commercial Company or to any American citizens.[2] Two arbitrators, constituting a majority of the court, concluded that the action of Salvador illegally directed against a domestic corporation served to paralyze the efforts of American shareholders to save it, and also to despoil them of their interests in the enterprise. These arbitrators purposely refrained from discussing in their opinion the right of the United States to make reclamation for the American shareholders for the reason, they declared, "that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration."[3] As that question was not presented to the tribunal in the case relied upon, it is believed that the foregoing language weakens the value of

[1] Concerning the case of the Delagoa Bay Railway, see Moore, Arbitrations, 1865–1899; Moore, Dig., VI, 647–649; For. Rel. 1900, 845–849, 903–904. Decision and final award of March 29, 1900. *Cf.*, also, Ralston, Arbitral Law, 97–98.

[2] For. Rel. 1902, 857. Concerning the Salvadorean case generally, see For Rel. 1902, 838–873, embracing opinion of W. L. Penfield, Solicitor of the Dept. of State, Award of the Arbitrators of May 8, 1902, and separate opinion of same date of Sir Henry Strong and Hon. Don M. Dickinson, constituting a majority of the tribunal; also Moore, Dig., VI, 649–651.

[3] For. Rel. 1902, 859, 873, Moore, Dig., VI, 651.

the opinion of the arbitrators in the Salvadorean case, as to the right of interposition.[1]

§ 280. The Same.

It is believed that the Department of State would not be reluctant to interpose in behalf of American shareholders or bondholders, should the foreign State of incorporation irreparably injure their interests through illegal conduct, and should there be offered no reasonable means of obtaining redress through domestic channels. The decision as to interposition might, however, in the particular case, depend upon the extent of the American interest involved. Thus it might be regarded as essential that, as measured by the number of individuals concerned, or the amount of capital invested, that interest should represent a substantial proportion of the stock of the corporation or of its bonded indebtedness.[2]

In the event of arbitration before an international claims commission, the problem arises not whether a claimant State may with reason espouse the cause of its nationals who are owners of stock or bonds of a foreign corporation (possibly incorporated under the laws of the respondent State), but whether the convention providing for the arbitration fairly embraces the claims of such individuals.[3] Possibly such claims may be fairly said to fall within the scope of an agreement providing for the arbitration of "all claims owned by citizens" of one of the contracting

[1] *Compare* opinion of Plumley, Umpire, in the Baasch & Römer Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 906, 909–910, where it was declared that the Commission had no jurisdiction over the claim of the liquidators of a firm, three quarters of whose members were Dutch, which held stock to the amount of 26,800 bolivars in a Venezuelan corporation of which the paid-up capital was 240.000 bolivars. The claim was based upon the destruction of the plant of the latter by troops in command of General Freites. The learned Umpire cited P. Arminjon, "*Nationalité des personnes morales*", in *Rev. Droit. Int.*, 2 ser., IV, 381–440. See, also, Opinion of Paúl, Commissioner, Kunhardt & Co. Case, American-Venezuelan Commission, 1903, Ralston's Report, 63, 70; Andor Jacobi, "*La condition juridique des sociétés anonymes étrangères*", Int. Law Association, 27th Conference, *Proceedings*, 368, 379.

[2] There is no intimation in the General Instructions for Claimants of 1919, Revision of Jan. 30, 1920, that the Department of State would take a different stand. The obvious design of the Questionnaire appended thereto is to enable the Department to ascertain with precision the extent of the essentially American interest in foreign corporate property concerned.

[3] The problem of interpretation has been a troublesome one for arbitrators generally. See, for example, William E. Fuller, Special Report on work of Spanish Treaty Claims Commission, Dept. of Justice, 1907, 28–30, respecting Art. VII of the treaty of peace between the United States and Spain of Dec. 10, 1898. Also discussion in E. M. Borchard, Diplomatic Protection, §§ 281–282.

parties.[1] It is believed, however, that the terms of the agreement should specify with greater precision than has heretofore been manifest, the nature and extent of the corporate interests to be adjudicated. In a word, what corporations, what shareholders, and what bondholders are to be deemed to be entitled to the benefits of the adjudication should be definitely established by the provisions of the convention.

e

Grounds of Interposition

(1)

§ 281. Denial of Justice. Exhaustion of Local Remedies.

Before a State prefers a claim in behalf of an aggrieved citizen it should appear that the foreign territorial sovereign upon which the demand for redress is made has itself been guilty of a denial of justice. A denial of justice, in a broad sense, occurs whenever a State, through any department or agency, fails to observe, with respect to an alien, any duty imposed by international law or by treaty with his country. Such delinquency may, for example, be manifest in arbitrary or capricious action on the part of the courts, or in legislative enactments destroying the exercise of a privilege conferred by treaty, or in the action of the executive department in ordering the seizure of property without due process of law.[2] The conduct of the State may either be the direct source of complaint, or it may supplement and aggravate the conse-

[1] In the case of Kunhardt & Co., American-Venezuelan Commission, 1903, Bainbridge, Commissioner, declared in the course of his opinion that "While the property of a corporation *in esse* belongs not to the stockholders individuually or collectively, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to the real and personal property of the corporation, as well as to its rights of contract and choses in action, are not destroyed by dissolution or liquidation. . . . Messrs. Kunhardt & Co., as citizens of the United States and the equitable owners of their proportionate share in the property of the dissolved corporation, have a standing before this Commission to make claim for indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession. . . . The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities." Ralston's Report, 63, 67, and 68.

[2] See excellent statement by Eugene Wambaugh, *Proceedings*, Am. Soc. Int. L. (1910), IV, 126, 128–129; Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, No. 134, June 23, 1886, MS. Inst. France, XXI, 330, Moore, Dig., VI, 266.

quences of the unlawful acts of individuals, as, for example, on the occasion of mob violence which the territorial sovereign, heedless of warning, makes no serious effort to suppress.[1]

The term denial of justice is also not unfrequently employed in a narrower sense to refer to the failure of a State to afford a means of redress by judicial process to the individual with respect to whom it has already failed in its duty; and the assertion is made that no denial of justice occurs until the aggrieved alien has exhausted his judicial remedies, and the territorial sovereign charged with fault has again been found wanting through the inadequacy of its judicial system.[2] It is believed that this contention betrays confusion of thought. Whether the act of a State constitutes a denial of justice depends solely upon the quality of lawfulness or unlawfulness which international law attaches to the act, and not upon the means of redress afforded the individual against whom it was directed. While the adequacy of those means vitally affects the propriety of interposition, it is unrelated to the character of the conduct giving rise to complaint.

As the preferring of a claim implies wrongfulness of action on the part of public authority, the State demanding redress must always be prepared to show that the territorial sovereign is responsible for the acts of those whose conduct is the source of grievance. The inquiry as to national responsibility is distinct from that respecting the propriety of interposition. The distinction has not, however, always been apparent. It has been asserted in substance, that the responsibility of the territorial sovereign for the acts of a particular official is dependent upon the steps taken by the aggrieved individual to exhaust his judicial remedies.[3] This contention is reasonable when the act complained

[1] Mr. Sherman, Secy. of State, to Mr. Angell, Minister to Turkey, Aug. 23, 1897, For. Rel. 1897, 592, Moore, Dig., VI, 867. According to Section 8 of the Claims Circular of 1919: "Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimant will be futile. It is essential, therefore, for claimants to show that the responsibility for their losses or injuries is attributable to an official, branch, or agency of a foreign Government."

[2] See, for example, position taken by Mexico in the case of the *Rebecca*, shown especially in communication of Mr. Mariscal, Minister of Foreign Affairs, to Mr. Jackson, American Minister, April 2, 1886, H. Ex. Doc. No. 328, 51 Cong. 41, Moore, Dig., VI, 668.

[3] See, for example, Thornton, Umpire, in Chas. B. Smith Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations III, 3146. The difficulty is increased by the various significations perhaps unavoidably attached to the same terms. Thus in the foregoing case when the learned Umpire declared that Mexico was not "responsible" for the "illegal" acts of inferior judicial authorities in the absence of an appeal to a higher court, he doubtless sought to express the opinion that no absolute duty rested

of is not in itself internationally illegal.[1] When, however, an agent of a State acting within the scope of his authority commits an internationally illegal act with respect to an alien, there is a denial of justice on the part of the State, and its responsibility is established.[2] The establishment of responsibility imposes upon the territorial sovereign the duty either to afford the victim a means of obtaining redress by some reasonable process, or in lieu thereof, to make reparation upon the demand of the State of which the victim is a national. The propriety of interposition would, therefore, seem to depend upon which alternative the delinquent State has chosen. Thus, in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition.

Whenever a State is charged with the denial of justice in respect to an alien, the inquiry presents itself: Is there evidence of a principle of law recognized in the practice of nations, making the exhaustion by the victim of local remedies capable of affording

upon that State to respond in damages until the aggrieved alien himself had exhausted his local remedies. The Umpire did not intend to suggest that the commission of an illegal act by an official of whatsoever rank failed to impose upon Mexico a duty to afford a means of redress. The duty to pay an indemnity to an aggrieved alien is but a single consequence of national responsibility which particular circumstances may impose. The duty of the territorial sovereign to do justice by some process whenever through any agency it wrongs an alien, is proof of a responsibility co-extensive with every form of national delinquency. Also, Acts of Judicial Officers, *infra*, § 287.

[1] It frequently happens that a claim finds its origin in acts for the commission of which the territorial sovereign is not to be held internationally at fault, as for example, where the actors are private individuals, for whose conduct the State may not be responsible. In such a situation no ground for interposition arises until, through failing in its duties of jurisdiction, as by preventing the claimant from having access to the courts, the territorial sovereign denies justice.

[2] In his note communicated to the Mexican Government by the American Chargé d'Affaires, under date of Nov. 30, 1919, in relation to the arrest and prosecution of one W. O. Jenkins, an American Consular Agent, Mr. Lansing, Secy. of State, declared: "The Mexican Government maintains that it cannot grant the request of the United States for Jenkins's release for the reason that under international law no diplomatic intervention is appropriate unless a denial of justice has occurred, and because the Mexican Government is not in a position to demand Jenkins's release in view of the separation of the executive and judicial powers under the Mexican form of government, and the independence of the State courts, by one of which Jenkins is held. The succinct answer to this contention is, as every one knows, that a denial of justice has already taken place, and also because the Mexican Constitution specifically gives the Federal tribunals jurisdiction of 'all cases concerning diplomatic agents and consular officers.'" New York *Times*, Dec. 2, 1919.

complete redress, a condition precedent to just interposition in his behalf?

If the answer be affirmative, numerous instances of interposition may need explanation as limitations of the applicability of the rule; and the operation of it will doubtless appear to exclude, at the present time, a large variety of cases. If the answer be negative, almost all instances of interposition must be attributed to the domestic policy of the aggrieved State, and its freedom of action be regarded as unfettered, except in some irreconcilable situations. A casual glance at certain declarations which have emanated from the Department of State as well as from other foreign offices, might lead to the conclusion that such an answer accurately portrays the existing practice of nations. Such declarations are, however, almost invariably *dicta*, in the sense that they have found expression (and usually the most emphatic expression) on occasions when interposition was a necessity by reason of the impossibility of securing redress by any other process, and when, therefore, the existence of the principle suggested was not at issue.[1] Inasmuch as the reason requiring the exhaustion of local remedies in certain groups of cases is capable of universal application, one may be led to believe that the preferment of claims is due primarily to defects in the machinery of the government of recalcitrant States rather than to any other consideration.

§ 282. The Same.

The principal cause of the frequency of cases where the aggrieved alien is not in fact obliged to exhaust his local remedies prior to interposition, is the failure of the State charged with wrongdoing to make provision whereby the nature of its own conduct may be rigidly scrutinized,[1] and redress accorded when that conduct is found to be at fault. It is because justice is not to be had in any domestic forum, rather than on account of the nature of the acts giving rise to complaint, that interposition is oftentimes the immediate consequence of national delinquency. Where, on the other hand, the territorial sovereign offers ample means of obtaining justice by judicial process, the reason for interposition disappears, and the detriment to the society of nations by the unnecessary transformation of a domestic issue into an international

[1] See, for example, Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313, Moore, Dig., VI, 254.

one suffices to establish a rule of practice. The existence of such a rule, however obscured by the frequency of the occasions when it may be fairly disregarded, is shown not only by its applicability to almost every situation where a State has established adequate machinery for righting its own wrongs, but also by the increasing tendency of States to insist upon its observance.[1] The United States generally respects the rule both in dealing with American claimants and in regulating its interposition in their behalf.[2]

The natural growth of this tendency of restraint in the preferring of claims must be largely dependent upon the attitude

[1] The Marquis Saionji, Japanese Minister of Foreign Affairs, in a communication addressed to Mr. Wilson, American Chargé, April 8, 1906, declared that during the period of consular jurisdiction in Japan, the Government was not infrequently called upon to consider in a diplomatic way questions in respect of which unexhausted judicial remedies existed; that disappointed in the expectation that "this irregular and unusual practice would cease after the system to which it gave birth had come to an end", the Government deemed it necessary to establish by formal notice the change in practice. He said, therefore, that "the Imperial Government will be unable hereafter to regard any contentious matter in respect of which a judicial remedy exists as ripe for diplomatic intervention until such remedy has been completely exhausted and a case justifying such intervention is presented." For. Rel. 1906, II, 1071.

The broadening of the practice of the withholding of interposition will only be retarded by the attempts of particular States to check by contract the right of the resident alien to invoke the aid of his own country, or to limit by legislation the circumstances when it may justly interpose in his behalf. To the outside world such attempts do not indicate a disposition to mete out justice, but rather a desire to shield the territorial sovereign from the consequences of its own wrongdoing. Concerning attempts to limit interposition by contract, see documents in Moore, Dig., VI, 293–309; concerning attempt to limit such action by legislation, *id.*, 309–324; also, Harmodio Arias, in *Am. J.*, VII, 725, 761–762.

[2] Thus according to Section 8 of the General Instructions for Claimants, Revision of Jan. 30, 1920, the Department of State declared: "If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards, or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards, or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes. After such remedies have been exhausted with the result of a denial of justice attributable to an official, branch, or agency, of a foreign Government, or have been found inapplicable or inadequate, or if no legal remedies are afforded, the Department of State will examine the claim with a view to ascertain whether, in all the circumstances of the case and considering the international relations of the United States, the claim may properly be presented for settlement through diplomatic channels, by arbitration or otherwise."

"The Department is not disposed to counsel the Nicaraguan Government to resist demands of European countries through diplomatic channels for the direct settlement of their claims; but if the Nicaraguan Government of its own initiative should decide that European claimants must first exhaust the remedies afforded by the Nicaraguan courts or other local tribunals, including the claims commission, the Department believes that international law and practice furnish ample precedents therefor." Mr. Knox,

of each State with respect to its own delinquencies. In proportion to the sincerity of its regret for its own shortcomings will be manifest a readiness to devise means to afford redress. In so far as complete reparation will in practice prove to be obtainable through domestic channels, cases of interposition may be expected to decrease proportionally in frequency, and instances of denial of justice to aliens not to be productive of international controversy except when local courts have utterly failed to observe the law of nations.

It is believed to be of highest importance to observe with care the theory of current practice, especially that followed by the United States, and to note the circumstances when national delinquency commonly and justly causes interposition, as well as the occasions also when the principle demanding the exhaustion of local remedies is regarded as applicable and hence obligatory.

(2)

When Local Remedies Need Not Be Exhausted

(a)

§ 283. When Justice is Wanting.

A rule requiring the exhaustion of local remedies prior to interposition is based upon the assumption that "at the time of the injury complained of, there were duly established courts to which resort was open and practically available." [1] When, therefore,

Secy. of State, to Mr. Gunther, American Chargé d'Affaires, Nov. 10, 1911, For. Rel. 1911, 643; Mr. Adee, Acting Secy. of State to the American Chargé d'Affaires at Madrid, Oct. 10, 1911, *id.*, 639.

Declared Mr. Knox, Secy. of State, to the American Chargé d'Affaires in Mexico, Aug. 17, 1911: "In view of the rule of international law requiring claimants against a government to resort to local tribunals for remedy in the matter of the wrongs which they allege, the Government of the United States could obviously have no ground to object to the establishment of any appropriate tribunal or the endowing of any existing tribunal with the authority to hear and pass upon claims of American citizens for losses sustained during the recent disturbed conditions in that country [Mexico], providing access to the court is easy and prosecution of the claims before the court is not made unduly onerous. The Government of the United States, therefore, would be inclined in the first instance to refer its citizens to any appropriately constituted tribunal authorized to hear and determine their complaints." For. Rel. 1912, 939. See, also, Mr. Wilson, Acting Secy. of State, to Mr. Wilson, American Ambassador, April 8, 1912, *id.*, 961; Mr. Carr, for Mr. Knox, Secy. of State, to Mr. Edwards, American Consul at Ciudad Juárez, April 23, 1912, *id.*, 963.

[1] The language quoted in the text is that of Mr. Bayard, Secy. of State, in a communication to Mr. Buck, Minister to Peru, No. 104, Nov. 1, 1886, MS. Inst. Peru, XVII, 252, Moore, Dig., VI, 267.

Mr. Knox, Secy. of State, in a communication to the American Ambassador to Mexico, Jan. 18, 1912, For. Rel. 1912, 954, while acknowledging that

the State of an aggrieved citizen has reason to believe that justice is not to be had by any process, within the domain of the territorial sovereign, and through domestic channels, interposition does not lack justification, and is to be anticipated.[1] This is true whether the claim arises from contract or tort. Illustrations have been frequent and varied. Justice has been deemed to be wanting where "it would be absurd to attempt to seek it by judicial process",[2] or where local authorities prevent the claimant from making out his case,[3] or where the courts lack power to denounce the illegality of the acts of another department of the territorial sovereign,[4] or where the invocation of judicial aid imposes a burden on the claimant disproportional to the redress obtainable.[5]

If the existing local remedies may be fairly regarded as insufficient, the individual claimant will not be compelled by his own government to exhaust them. This is true where the courts are deemed unworthy of respect by reason of their known subserviency to the political department, or of their habit of disregarding the local laws or existing treaties, or well-defined principles of international law.[6]

"under the rules of international law local remedies should be exhausted", declared that the Ambassador was not precluded from "pressing diplomatically" certain specified claims for an early consideration by a local Mexican Claims Commission (which, he stated, "being an administrative rather than a judicial body, apparently may be approached by the Executive without incurring the objection of interference with the judiciary"), or by some other duly constituted body.

[1] Mr. Fish, Secy. of State, to Mr. Pile, Minister to Venezuela, May 29, 1873, MS. Inst. Venezuela, II, 228, Moore, Dig., VI, 677; Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Lord Palmerston in the House of Commons, June 25, 1850, on the Case of Don Pacifico, Moore, Dig., VI, 681.

[2] Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 54, Dec. 16, 1873, MS. Inst. Mexico, XIX, 48, Moore, Dig., VI, 975; Case of Pradel, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, 3141; Case of Donoughho, under same convention, *id.*, 3012.

[3] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Lieber, Umpire, in Garrison's Case, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3129; opinion of Mr. Frazer, American Commissioner, respecting certain cases before the American and British Claims Commission under treaty of May 8, 1871, Moore, Arbitrations, 3154, 3156; Ballistini Case, French-Venezuelan Commission, 1902, Ralston's Report, 1903, 503, 504.

[4] Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313, Moore, Dig., VI, 254.

[5] Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, No. 570, May 17, 1884, For. Rel. 1884, 358, Moore, Dig., VI, 679.

[6] See Promemoria of the German Embassy at Washington, Dec. 11, 1901, respecting conditions in Venezuela, For. Rel. 1901, 192, Moore, Dig., VI, 692; Mr. Everett, Secy. of State, to Mr. Marsh, Minister to Turkey, No. 24, Feb. 5, 1853, Senate Ex. Doc. 9, 33 Cong., 2 Sess., 5, 8, 9, Moore, Dig., VI,

In theory, the nature of the act giving rise to complaint is not necessarily related to the capacity of the claimant to obtain redress by local process. In practice, however, the character of the grievance or of the authority to which it is attributable oftentimes appears to be decisive of the respect with which local remedies are regarded by the outside world. Thus the confiscatory breach of a contract committed by the executive department of the territorial sovereign shatters confidence in the local judicial system and encourages interposition.[1] The manifestation of bad faith on the part of the highest responsible officials of one department of a government serves to diminish respect for those in control of any other.

Where a denial of justice is apparent in the neglect, whether wanton or passive, on the part of the authorities, to use the means at their disposal to prevent the commission of wrongful acts, or to prosecute the actors, the victim rarely finds a means of obtaining redress through domestic channels. This is due to the lack, even in enlightened States, of essentially judicial tribunals clothed with jurisdiction to denounce the acts complained of, and to award compensatory damages against the State.[2] Hence interposition is the natural consequence of such forms of national delinquency. For the same reason similar action is to be anticipated in cases where local authorities are charged with the commission of outrages.[3] The same difficulty will also later be seen to offer an insurmountable barrier to the attempt of the foreign holders of unpaid bonds of a State to obtain justice by local judicial process from the obligor.[4]

262; Mr. Adee, Acting Secy. of State, to Mr. McKenzie, Minister to Peru, July 9, 1895, MS. Inst. Peru, XVII, 650, Moore, Dig., VI, 691.

Also Prize Courts and Procedure, Discussion between the United States and Great Britain during The World War, *infra*, §§ 894–895.

[1] Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 725; Mr. Bayard, Secy. of State, to Mr. Thompson, Mar. 9, 1886, MS. Inst. Hayti, II, 544, Moore, Dig., VI, 704; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 179, Jan. 19, 1888, MS. Inst. Peru, XVII, 313, Moore, Dig., VI, 254.

[2] Glenn's Case, under Convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3138; Case of Zambrano, For. Rel. 1904, 473–482, Moore, Dig., VI, 747; Case of Ruden & Company, before Peruvian Claims Commission, under Convention between the United States and Peru of Dec. 4, 1868, Moore, Arbitrations, II, 1653. Also, Cases of Mob Violence, *infra*, §§ 290–292.

[3] Case of John E. Wheelock, Moore, Dig., VI, 744 and 769, and documents there cited; Case of William Wilson, For. Rel. 1894, 465–477, Moore, Dig., VI, 745; Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895 (concerning Case of George Webber), S. Ex. Doc. No. 33, 54 Cong., 1 Sess., 4, Moore, Dig., VI, 746.

[4] Public Bonds, *infra*, §§ 307–308.

It will be seen that oftentimes when an individual has been wrongfully arrested and held in custody contrary to the local law, interposition follows, not merely for the purpose of securing redress for injuries already sustained, but also to prevent the perpetration of obvious and irreparable wrong incidental to prolonged detention, and which the prisoner, unaided by his own government, would be helpless to prevent.[1]

(b)

§ 284. When Local Remedies Have Been Superseded.

The rule that an alien must, before seeking the aid of his government, endeavor to obtain redress in the courts, does not apply where the offending government has, by the acts of its proper organ, relieved the party complaining from appealing to the courts.[2] A typical case was that of an American Consul, Mr. Myers, at San Salvador. In 1890, in the course of a revolution, governmental troops violated the American Consulate, destroying property belonging both to the United States and to the Consul, and injuring the person of the latter. After having agreed to pay for the destruction of the property of the United States and of the Consul, the Salvadorean Government declared in substance that the claim could not be regarded as fixed in amount and justifying payment on demand until judicial proceedings appropriate to that end had been had in the local courts. In response, Mr. Blaine, Secretary of State, maintained that the question whether an indemnity was due had been adjusted by the agreement, that the execution of the agreement was not, therefore, a matter for the consideration of the local courts, and that the effect thereof was to render any issue as to the amount of damages a matter for diplomatic adjustment.[3]

[1] Case of Pflaum, Moore, Dig., VI, 771, and documents there cited; Van Bokkelen's Case, under protocol between the United States and Haiti, of May 24, 1888, Moore, Arbitrations, II, 1807–1853, Moore, Dig., VI, 699 and 772.

[2] The language in the text is that in Moore, Dig., VI. 682, *citing* opinion of Mr. Akerman, Attorney-General, Dec. 28, 1871, in the matter of the New Granadian Passenger-Tax, 13 Ops. Attys.-Gen., 517.

[3] Although the matter of reparation for the personal injuries sustained by Mr. Myers was not covered by the agreement, it was "upon general principles" regarded by Mr. Blaine "as one likewise to be determined solely by the agreement of the two governments." Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, For. Rel. 1892, 34, 36, Moore, Dig., VI, 682–684. See, also, concerning the same case, For. Rel. 1892, 37–43, 49–51, and *id.*, 1893, 174–180, 181, 182, 184.

Cf., also, award of Hon. Wm. R. Day, Arbitrator, in the matter of the Claims of John D. Metzger & Co. *v.* The Republic of Haiti, under protocol of Oct. 18, 1899, For. Rel. 1901, 262, Moore, Dig., VI, 689.

After a claimant has appealed to his own State for protection, and it has interposed in his behalf, there is removed from him, in a domestic sense, so far as his own government is concerned, any duty to exhaust local remedies. Nevertheless the fact of interposition is not decisive of the propriety of such action, or of the correctness of conduct on the part of the aggrieved State, in not requiring its own citizen to have recourse to the courts of the respondent.[1]

Where the claim is contractual, and an agreement for its adjustment has been made, either with the individual claimant, or with his government, the matter is thereafter regarded as one of an international character, justifying governmental action if the agreement is not performed.[2]

(c)

§ 285. When Unjust Discriminations Are Applied.

If the territorial sovereign subjects the resident alien to a discrimination believed to be unjust, interposition is to be anticipated.[3] That a denial of justice takes this form of national delinquency does not necessarily serve, on principle, to excuse the failure to exhaust local remedies. Such a discrimination usually,

[1] In connection with the Bluefields incident of 1899, Mr. Hill, Acting Secy. of State, declared in a communication to Mr. Merry, Minister to Nicaragua, Sept. 29, 1899: "The Government of the United States does not admit the competency of any Nicaraguan court or tribunal to determine the rights of American citizens in Nicaragua when they have appealed to their Government for protection, and when it has taken up and made their cause its own." For. Rel. 1900, 809, Moore, Dig., VI, 685. It should be observed that this language had reference to a situation where the Governments of Nicaragua and the United States had agreed the previous year, that the issue, which related to the second payment by American merchants of certain duties, should be adjusted if possible by the two Governments.

[2] Lord John Russell, British For. Secy., to Sir C. L. Wyke, British Minister, March 30, 1861, Brit. and For. State Pap., LII, 237, 238, Moore, Dig., VI, 719; Mr. Trail, Chargé at Rio de Janeiro, to Mr. Bayard, Secy. of State, Jan. 21, 1887, For. Rel. 1887, 54, 55, Moore, Dig., VI, 720; Edwin M. Borchard, "Contractual Claims in International Law", *Columbia Law, R.*, XIII, 457, 470. *citing* the foregoing authorities.

See, also, Mr Frelinghuysen, Secy. of State, to Mr. Phelps, Minister to Great Britain, March 30, 1883, MS. Inst. Great Britain, XXVI, 609, Moore, Dig., VI. 711. with relation to the position of France respecting its convention of July 29, 1864, with Venezuela, for the payment of 600,000 francs in full settlement of all claims against the latter.

[3] Mr. Fish, Secy. of State, to Mr. White, Jan. 7, 1874, MS. Inst. Argentine Republic, XVI, 57, Moore, Dig., VI, 698; Opinion of Dr. Wharton, Solicitor of the Dept. of State, in case of W. A. Davis *v.* Great Britain, 1885, cited in Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699.

however, serves either to thwart the effort to invoke judicial aid, or to shatter confidence in the local judicial system. Hence, the situation commonly resembles one where justice is deemed to be wanting.

Whenever the discrimination is considered unjust because deemed to be in violation of the terms of a treaty, special grounds for diplomatic protest arise.[1] As the breach of the agreement is a wrong peculiarly directed against another contracting party, and is likely to be applied generally to its nationals, the claim may be fairly regarded as a public one. In so far as it is based upon the interpretation of a treaty, it raises an issue not believed to be capable of final adjustment by any domestic tribunal; for the foreign contracting party may always rightly contend that it is not bound by the opinions of judges to whom it has not consented to refer its cause.[2]

f

Claims Arising from Acts Primarily Attributable to the Authorities of a State

(1)

§ 286. Arrest and Imprisonment.

It has been seen that in the enactment of criminal laws, and in their application without discrimination to aliens and citizens alike, the ultimate test of the propriety of the conduct of the territorial sovereign is the international standard which civilized States have fixed.[3] It has also been observed that that standard is such as to enable each State to enjoy largest freedom in the administration of criminal justice.[4] For that reason the rigor with which the territorial sovereign applies to aliens its criminal code will rarely be looked upon as decisive of internationally illegal conduct, when it appears that the proceedings are in every

[1] Report of Thrasher's Case by Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, 6 Webster's Works, 530, Moore, Dig., VI, 698.

[2] See Operation and Enforcement of Treaties, Province of the Courts in the United States, *infra*, § 526.

[3] Duties of jurisdiction, *supra*, §§ 266–267; also Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to England, April 25, 1882, For. Rel. 1882, 230–234, Moore, Dig., VI, 275–277.

[4] Mr. Gresham, Secy. of State, to Mr. Morse, May 31, 1893, 192 MS. Dom. Let. 184, Moore, Dig., VI, 282. See, also, Mr. Root, Secy. of State, to Minister Furniss, May 4, 1906, concerning claim of M. J. Kouri, For. Rel. 1906, II, 871.

way regular.[1] Even when an alien prosecuted in good faith and with careful regard for his rights of defense is, nevertheless, convicted of a crime of which he is innocent, the result does not necessarily indicate a denial of justice.[2] Nor does the sustaining of the conviction by an appellate court of last resort indicate conclusively that the territorial sovereign has abused its right of jurisdiction or violated any principle of international law.[3] The reluctance in such a case on the part of the State of the accused to interpose in his behalf for the purpose of either securing his release or of obtaining an indemnity, is due to the absence of internationally illegal conduct in the matter of prosecution. The case differs from that where, notwithstanding delinquency on the part of the territorial sovereign, a foreign State deems it necessary to refrain from interposition until the accused shall have endeavored to obtain redress through domestic channels.

At any stage of his prosecution the accused may, however, be subjected to what may be regarded as internationally illegal treatment. This is obvious when, for example, the provisions of the local law are disregarded,[4] or a treaty with the State of the accused is violated,[5] or any requirement of the international standard, such as that forbidding the cruel or arbitrary treatment of prisoners,[6] or the

[1] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé, at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., VI, 275.

"Detention of witnesses to prevent their disappearance and insure their giving testimony when called for is common in the jurisprudence of all countries, and special provisions exist in those where the principles of the civil law are in force relative to the detention *au secret* of an accused person; but such detention should be reasonable and not unduly prolonged or harshly enforced, and is merely a temporary measure in the administration of justice." Mr. Frelinghuysen, Secy. of State, to Mr. Langston, Minister to Haiti, No. 324. Jan. 20, 1885, For. Rel. 1885, 490, Moore, Dig., VI, 773.

[2] Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, June 28, 1882, MS. Notes to Austria, VIII, 338, Moore, Dig., VI, 765. See, also, Mr. Marcy, Secy. of State, to Mr. Starkweather, Aug. 24, 1855, MS. Inst. Chile, XV, 124. Moore, Dig., VI, 264; Same to Chevalier Bertinatti, Sardinian Minister, Dec. 1, 1856, MS. Notes to Italy, VI, 178, Moore, Dig., VI, 659; Thornton, Umpire, in Benjamin Burn Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3140.

[3] Mr. Gresham, Secy. of State, to Mr. Hevner, June 10, 1893, 192 MS. Dom. Let. 296, Moore, Dig., VI, 282.

[4] Mr. Foster, Secy. of State, to Mr. Terres, Chargé at Port au Prince, telegram, Dec. 2, 1892, For. Rel. 1893, 358, concerning Case of Frederick Mevs, also other documents, *id.*, 355–382, Moore, Dig., VI, 767–768. See, also, case of the unlawful treatment of W. H. Argall by Guatemalan authorities, For. Rel. 1894, 312, *id.*, 1895, II, 771–775, Moore, Dig., VI, 768; Case of Charles Lillywhite, subjected to false imprisonment and deportation from New Zealand to England, For. Rel. 1901, 231–236, Moore, Dig., VI, 768.

[5] Case of C. A. Van Bokkelen imprisoned in Haiti, Moore, Arbitrations, 1807–1853.

[6] Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister,

refusal to hear testimony in their behalf, is unheeded.[1] If the Department of State believes that for any of the foregoing reasons, an American citizen is being wrongfully held in restraint of his liberty, or subjected to ill-treatment, his release will be demanded. Thus in the case of A. K. Cutting, an American citizen, held in custody in Mexico in 1886, the United States was able to show that the criminal prosecution was an abuse of the right of jurisdiction and so contrary to international law, that the judicial proceedings preliminary to imprisonment were palpably unjust, and that the prisoner "was subjected to pains and depredations which no civilized Government should permit to be inflicted on those detained in its prisons." Mr. Bayard, Secretary of State, therefore, demanded (without success, however), the "immediate release" of the prisoner.[2]

More recently, in the case of Mr. W. O. Jenkins, the American Consular Agent at Puebla, who, after having been kidnaped by bandits and held for ransom in October, 1919, was, after his

April 4, 1884, concerning Case of John E. Wheelock subjected to cruelty by an officer of justice of Venezuela in 1879, For. Rel. 1884, 599, Moore, Dig., VI, 321; also concerning same case, For. Rel. 1885, 932–934; Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, Oct. 15, 1880, For. Rel. 1880, 1041, 1043, Moore, Dig., VI, 769; see, also, same to Mr. Langston, Minister to Haiti, No. 23, April 12, 1878, MS. Inst. Haiti, II, 136, Moore, Dig., VI, 656.

Cf. Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 423, Dec. 29, 1890, MS. Inst. Mexico, XXII, 687, Moore, Dig., VI, 773, concerning the enforced labor of two American citizens accused but not convicted of crime in Mexico; also Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 1, 1907, concerning ill-treatment of David A. Backer, For. Rel. 1907, II, 742.

[1] Mr. Conrad, Acting Secy. of State, to Mr. Peyton, Chargé to Chile, Oct. 12, 1852, MS. Inst. Chile, XV, 93, Moore, Dig., VI, 274.

[2] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, telegram, July 19, 1886, For. Rel. 1886, 700, Moore, Dig., VI, 281.

Not infrequently where it has appeared that the accused was not unjustly or even unreasonably being prosecuted, the United States has encouraged its representatives to exert their influence, for light punishment if not the release of the prisoner, especially where the commission of the offense charged was marked by the absence of circumstances indicating moral turpitude on the part of the actor. Mr. Uhl, Acting Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Nov. 17, 1893, For. Rel. 1894, 26, Moore, Dig., VI, 766; Mr. Olney, Secy. of State, to Mr. Gould, June 29, 1896, 211 MS. Dom. Let. 149, Moore, Dig., VI, 766.

When an American citizen has been criminally prosecuted under circumstances creating suspicion as to the propriety or regularity of the conviction or punishment inflicted, the United States has not hesitated to request of the prosecuting State full information as to the conduct of proceedings. Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., VI, 283; Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Feb. 16, 1891, MS. Inst. Mexico, XXIII, 38, Moore, Dig., VI, 284; Mr. Sherman, Secy. of State, to Mr. Sepulveda, American Chargé d'Affaires *ad interim* at Mexico, May 5, 1897, For. Rel. 1897, 396, Moore, Dig., VI, 285.

release, arrested and prosecuted by Mexican authorities on a charge of perjury in a judicial declaration, the Department of State demanded the release of the accused on the ground that Mexico was perverting its judicial system in prosecuting the victim instead of the perpetrators of the crime of abduction.[1]

Again, if the Department of State believes that from the nature of the offense charged or from the proceedings already instituted,

[1] Mr. Jenkins was taken by bandits in the city of Puebla on Oct. 19, 1919, and held for ransom until Oct. 26, following, when he was released after having undergone physical suffering, his captors obtaining cash payments for a part of the sum demanded and security for the balance. In November, he was arrested by Mexican authorities on a charge of having made a false oath in a judicial declaration. On Nov. 20, 1919, the Department of State, through the Embassy at Mexico City, made peremptory demand for Mr. Jenkins's release, declaring that according to evidence in hand, the arrest was deemed "entirely unjustified and an arbitrary exercise of public authority." In a note of Nov. 26, 1909, Mexico declined to yield to this demand, declaring that the imprisonment was not unjust or arbitrary, and that there was evidence justifying the charge made. It challenged the propriety of diplomatic interposition in the case, and adverted to constitutional difficulties preventing the Executive from compelling a judge of a Mexican State court to release an offender. In this connection attention was called to the practice in the United States. In a reply communicated through the American Embassy at Mexico City, under date of Nov. 30, 1919, Secretary Lansing declared in substance that the Mexican arguments were mere excuses for the harassing of an American Consular Officer entitled to fair treatment. He contended that there had been a denial of justice, and noted the impropriety of the assertion of jurisdiction by a Mexican State court, in view of the constitutional requirement conferring jurisdiction in such cases on the Mexican Federal tribunals. He said: "Stripped of extraneous matter, with which the Mexican note of Nov. 26, endeavors to clothe it, the naked case of Jenkins stands forth: Jenkins, a United States Consular Agent, accredited to the Government of Mexico, is imprisoned for 'rendering false judicial testimony,' in connection with the abduction of which he was the victim." He contended in substance that the prosecution was allied with the abduction, in the sense that the abduction and what it entailed was the real cause of the prosecution which was undertaken for the purpose of harassing Mr. Jenkins, and that, therefore, no technical ground for demanding that the United States refrain from interposition was entitled to respect. On Dec. 4, 1919, Mr. Jenkins was released on bail furnished by another person. Somewhat later in December, the Mexican Government, in response to Mr. Lansing's note, declared that the release under bail should remove any motive for misunderstanding between the Governments concerned, and reiterated its contention that the criminal charge against Mr. Jenkins was not unfounded. The Mexican Government, it was said, could not admit that American citizens could be "tried and absolved on simple reports from the State Department, nor on recommendations or suggestions from the United States, instead of trying them by Mexican courts and according to Mexican laws." There appeared to be no disposition to abandon the prosecution. The Department of State was not, however, satisfied with the situation resulting from the release of the accused on bail.

On June 30, 1920, the Department of State reported the receipt of information indicating the confession by a number of peons before the criminal court at Puebla at a re-trial of Mr. Jenkins, that their previous testimony against him had been false, and that they had been forced to give such testimony under threats of death. It was also reported that one Cordova, later a general, had admitted to the court that he alone was responsible for the abduction of Mr. Jenkins. Dept. of State, statement for the Press, June 30,

the prisoner is exposed to improper treatment, it may demand assurance of his adequate protection at trial.[1] Where, however, after his release from custody, the victim seeks pecuniary redress for irregular imprisonment, or on account of improper treatment accorded him during his restraint, the United States is not disposed to intervene when it appears that he can obtain redress by any local process, directed either against the territorial sovereign or the officials made by the local law responsible for the injuries sustained.[2] The exhaustion of the local remedy is thus made a

1920, No. 1. In December, 1920, it was reported that all charges against Mr. Jenkins had been dismissed by a Mexican court which had decreed his freedom and directed the return of bail. See New York *World*, Dec. 6, 1920.

The case illustrates well how a territorial sovereign may pervert or permit the perversion of its judicial system for the purpose of persecuting an alien who, by reason of his official relation to his own State, as well as the treatment to which he has been subjected by criminal offenders, is entitled to special consideration. Under such circumstances the nature of the denial of justice is such as to sweep aside as unworthy of respect the claim that the State of the victim should refrain from interposition, and should await passively the progress and termination of the criminal prosecution. The practice which has developed the rule favoring a withholding of interposition in criminal cases until, at least, the accused has exhausted every local judicial remedy, is based on the principle that justice is within the reach of the aggrieved alien. Because it is commonly within the reach of such an individual prosecuted in the territory of an enlightened State, the principle has found abundant room for application. Whenever, however, a territorial sovereign, by reason of the abuse of those very agencies which should be devoted to a different purpose, applies them as an instrument of oppression, its action is likely to be seen in its true light and dealt with accordingly. No technical argument opposing interposition will in such event be regarded as other than a pretext to disguise the real purposes of prosecution, and as a means of escaping the consequences of it.

[1] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, No. 226, July 26, 1886, MS. Inst. Mexico, XXI, 535, Moore, Dig., VI, 281.

[2] Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 453–454, Moore, Dig., VI. 277–279; Same to Mr. Gebhard, Sept. 9, 1885, 157 MS. Dom. Let. 88, Moore, Dig., VI, 279; Mr. Buchanan, Secy. of State, to Mr. Pakenham, British Minister, Dec. 26, 1846, MS. Notes to Great Britain, VII, 149, Moore, Dig., VI. 659; Mr. Fish, Secy. of State, to Mr. Warren, Feb. 26, 1875, 107 MS. Dom. Let. 7, Moore, Dig. VI, 661; Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 670; Mr. Hay, Secy. of State, to Mr. Lombard, Oct. 3, 1898, 232 MS. Dom. Let. 56, Moore, Dig., VI, 671.

See Award of Señor Quesada, Nov. 19, 1897, in Oberlander and Messenger Case, protocol between the United States and Mexico, March 2, 1897, For. Rel. 1897, 382, 387, 388, Moore, Dig., VI. 670.

In the J. R. Pierce Case, Mexican-American Commission, July 4, 1868, Thornton, Umpire, was of opinion that the reprimanding and dismissal of an official who had arbitrarily arrested an American citizen, freed the respondent State from the obligation to pay an indemnity. Moore, Arbitrations, IV, 3252.

In the Case of Tunstall, a British subject, killed in New Mexico in 1878 while pursued by a sheriff's posse, Mr. Bayard, Secy. of State, in denying the duty of the United States to pay an indemnity, asserted, first, that the killing, in personal malice, by an officer, of a defendant in a civil process in the officer's hand, and after the execution of the writ, was to be considered as col-

condition precedent to the preferring of any claim. When, however, it has not been shown that the aggrieved citizen can obtain redress through domestic channels, the Department of State is unwilling to yield to any suggestion emanating from the territorial sovereign that the victim should be left to his own resources. In such case interposition is to be anticipated.[1]

(2)

§ 287. Acts of Judicial Officers.

When the action of judicial authorities expressed in decisions adverse to the contentions of alien litigants has been the subject of complaint, confusion of thought has arisen from the failure of arbitral tribunals as well as of foreign offices to observe with care what constitutes a denial of justice on the part of a court of first instance. That matter may have oftentimes appeared to be unimportant in view of the common requirement that when an alien claimant has had recourse to domestic courts, or has been compelled to respond to a suit therein, his appeal from an adverse decision to the court of last resort should precede interposition

lateral to his official action and one for which the Government was not responsible; secondly, that it had been held by the Federal courts that the Federal Government was not liable for the torts of officers of a territory organized under Congressional legislation; thirdly, that in countries subject to the English common law where there was an opportunity given for a prompt trial by a jury of the vicinage, damages inflicted upon foreigners should be redressed through the instrumentality of the courts, and were not the subject of diplomatic intervention; and fourthly, that great practical inconvenience would result from the payment of the claim by the confusion of the boundaries between judicial and executive actions, and by opening the door to the bringing of a vast mass of claims of each Government against the other. It was stated also that Tunstall having an apparent domicile in New Mexico "was not even, so far as concerns the administration of the judicial function there, a foreigner", and that his representatives had, "under the law of nations, no title to the intervention of a foreign sovereign." Communication to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450–459. The extract is taken mainly from the statement of Mr. Bayard's position contained in Moore, Dig., VI, 664–666. It is to be doubted whether Mr. Bayard's conclusions derived from the domicile of the decedent were sound.

[1] Mr. Bayard, Secy. of State, to Mr. Cox, Minister to Turkey, Aug. 17, 1885, concerning the Case of Dr. Maurice Pflaum, For. Rel. 1885, 859, Moore, Dig., VI, 771–772; Mr. Frelinghuysen, Secy. of State, to Mr. Soteldo, Venezuelan Minister, April 4, 1884, concerning the Case of John E. Wheelock, For. Rel. 1884, 599, Moore, Dig., VI, 321; Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 91, Oct. 15, 1880, For. Rel. 1880, 1041, Moore, Dig., VI, 744–745; also Case of Dr. John Baldwin, Mexican-American Commission, Convention of April 11, 1839, Moore, Arbitrations, 3235; opinion of Thornton, Umpire, in Pradel Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 3141.

Compare attitude of Mexico in Case of Howard C. Walker, Moore, Dig., VI, 770 and documents there cited from For. Rel. 1884, 1888, 1889 and 1890.

on his behalf.[1] From this practice it has been natural to infer that no denial of justice appears until the decision of the inferior court has been confirmed by the highest judicial authority.[2] Such a conclusion is a reasonable inference from the situation arising in a broad class of cases where, notwithstanding the error of the court of first instance, no act on its part is to be regarded as internationally illegal. Its conduct does not necessarily present an illegal aspect, when, for example, acting in good faith and with impartiality, and without violating local rules of practice upon which the alien litigant relies for protection, the court, nevertheless, errs in its view of the local law, or in the application thereof to the facts of the particular case, and pronounces a decision adverse to the alien.

Nor can the territorial sovereign through the operation of whose judicial system such a result has occurred be justly regarded by the State of the alien as having wronged him.[3] This is believed to be true not only because the courts may, in a domestic sense, be independent of the political department, or because of the existence of an appellate tribunal capable of rendering nugatory the errors of an inferior court, but chiefly for the reason that the decision of the court of first instance did not itself constitute a violation of international law.

Instances are plentiful, however, where the decision of the inferior court has possessed an internationally illegal character. Decisions are believed to be of such a kind when, for example, the terms of a treaty, concerning the interpretation of which there is no dispute, are flagrantly disregarded, or when the safeguards provided by the local law for the security of the accused (in a criminal case) are unheeded.[4] In such cases a denial of

[1] Mr. Clay, Secy. of State, to Mr. Tacon, Feb. 5, 1828, MS. Notes to For. Leg. III, 423, Moore, Dig., VI, 652; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Gresham, Secy. of State, to Mr. Ryan, Minister to Mexico, April 26, 1893, MS. Inst. Mexico, XXIII, 359, Moore, Dig., VI, 270. See, also, Seth Driggs Case, United States-Venezuelan Claims Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, III, 3160.

[2] Mr. Davis, Assist. Secy. of State, to Mr. Moseby, June 23, 1873, 99 MS. Dom. Let. 260, Moore, Dig., VI, 661; Same to Mr. Chase, consul at Tampico, Jan. 10, 1870, 57 MS. Inst. Consuls, 101, Moore, Dig., VI, 750; Mr. Mariscal, Mexican Minister of Foreign Affairs, to Mr. Morgan, Minister to Mexico, April 2, 1886, H. Ex. Doc. 328, 51 Cong., 1 Sess., Moore, Dig., VI, 668. See, also, Ralston, Arbitral Law, 49.

[3] Mr. Forsyth, Secy. of State, to Mr. Welsh, March 14, 1835, 27 MS. Dom. Let. 261, Moore, Dig., VI, 261; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, June 28, 1882, MS. Notes to Austria, VIII, 338, Moore, Dig., VI, 765.

[4] Mr. Forsyth, Secy. of State, to Mr. Semple, Chargé d'Affaires to New

justice is apparent by reason both of the character of the act and of its commission by an authority of the State. It is true that such conduct on the part of that department of the Government entrusted with the special duty to administer justice may destroy all reason for hope on the part of the foreign State that its national may still obtain redress by exhausting his remedies through appeal to a higher agency of the same department. The internationally illegal acts of inferior courts have served more than once to produce such an effect and to inspire interposition.[1] When, notwithstanding a denial of justice by a court of first instance, the State of the alien complainant has refrained from espousing his cause until he has exhausted his judicial remedies, the withholding of interposition has, therefore, betokened significant respect for the principle that the propriety of interposition depends upon something more than the bare fact of national delinquency, and that it lacks justification so long as the claimant may obtain redress through domestic judicial channels.[2]

Courts of arbitration have frequently expressed the opinion that the territorial sovereign is not responsible for the misconduct of an inferior judicial tribunal, when no attempt has been made by the aggrieved litigant to obtain justice from a higher court.[3] Such a statement is misleading in so far as it conveys

Granada, No. 7, Feb. 12, 1839, MS. Inst. Colombia, XV, 58, Moore, Dig., VI, 249. See, also, Parrott Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, 3009, at 3011, where it was said: "The abuse of judicial functions and the perversions of the laws have been such . . . in relation to proceedings in which the claimant was interested, as to have produced great wrong and a denial of justice"; opinion of Thornton, Umpire in the Bronner Case, Mexican-American Claims Commission, Convention of July 4, 1868, Moore, Arbitrations, 3134, in which it was said that "the decision appears to him [the Umpire], so unfair as to amount to a denial of justice"; also opinion of same umpire in the Jonan case, before same Commission. Also Ruden Case, Peruvian Claims Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1653; Tagliaferro Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 764. *Compare* Bertinatti, Umpire, in Medina Case, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, III, 2316, 2317.

[1] Mr. Everett, Secy. of State, to Mr. Marsh, Minister to Turkey, concerning the Case of Rev. Jonas King, No. 24, Feb. 5, 1853, S. Ex. Doc. 9, 33 Cong., 2 Sess., 5, 8, 9, Moore, Dig., VI, 262; Report of Mr. Bayard, Secy. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., VI, 666.

[2] As has been seen, there is no duty on the part of a claimant to exhaust his judicial remedies when it would be useless to do so (Donoughho Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3012, 3014), or when he is prevented from so doing by intrigue on the part of the government (Garrison Case, before same commission, Lieber, Umpire, *id.*, 3129). See, also, Ballistini Case, French-Venezuelan Commission, 1902, Ralston's Report, 503–504; Gray, Admr. *v.* United States, 21 Ct. Cl. 340, 402, Moore, Dig., VII, 644.

[3] See, for example, opinion of Thornton, Umpire, Mexican-American Com-

the idea that national responsibility for the acts of an agent is dependent upon the grade of the actor rather than upon the quality of the act. Moreover, the establishment of responsibility is not decisive of the procedure to be followed in securing redress for wrongs sustained. Thus, it may be that when arbitrators have referred to the absence of responsibility of a State for the misconduct of inferior courts, they have merely sought to convey the idea that whether or not a denial of justice is effected by the conduct of a judge, no duty is imposed upon the political department of the territorial sovereign to respond directly in damages to the alien litigant, or to his country acting in his behalf, until he has exhausted his judicial remedies by appealing to the court of last resort.

In a word, when an inferior court, like any other authority of a State, denies justice, national responsibility is established, but the reasonableness of interposition seems to depend upon the opportunity for redress obtainable by appeal to the court of last resort. The existence of an appellate tribunal empowered to correct the errors of an inferior court is *prima facie* evidence that redress is within the reach of him who invokes its aid.[1]

mission, Convention of July 4, 1868, in case of Jennings, Laughland & Co., Moore, Arbitrations, III, 3135–3137; in Green Case, *id.*, 3139; in Case of the "Ada", *id.*, 3143; in Burns Case, *id.*, 3140; in Blumhardt Case, *id.*, 3146; in Smith Case, *id.*, 3146. Also opinion of Ralston, Umpire in De Caro Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 810, 819; Mr. Clay, Secy. of State, to Mr. Tacon, Feb. 5, 1828, MS. Notes to For. Leg. III, 423, Moore, Dig., VI, 652.

[1] See interesting opinion of Frazer, Commissioner, in case of The Brig Napier, American-British Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, III, 3134; also ground of disallowance of demurrer by the Commission in this and similar cases, *id.*, 3157; also report of Hale, Agent of the United State, *id.*, 3159.

In the course of the Russo-Japanese War the seizures of American-chartered vessels and American cargoes by Russian naval authorities, and the decisions of condemnation by the Vladivostok prize court following and interpreting a Russian Imperial order of Feb. 29, 1904, were believed by the United States to be "in disregard of the settled law of nations in respect to what constitutes contraband of war", Mr. Hay, Secy. of State, to Mr. McCormick, American Ambassador to Russia, Aug. 30, 1904, For. Rel. 1904, 760. The Russian Government informed the United States that appeals could be taken, and that a final decision belonged only to the supreme prize court constituted by the admiralty board. It was contended, therefore, that until the decisions were reviewed by the supreme court "reclamations regarding questions of fact are beyond the jurisdiction of the imperial ministry of foreign affairs." *Id.*, 769. The Government of the United States thereupon rendered all possible assistance to claimants in taking their appeals. *Id.*, 777. Considerable difficulties were, however, experienced in this regard, owing to the existence of a state of war, the remote theater of operations, the differences in procedure of Russian and American Courts, and the uncertainty of American claimants. *Id.*, 1905, 743. Decisions were duly rendered by the Supreme Court. *Id.*, 753.

See, also, The Brig Freemason *v.* United States, 45 Ct. Cl. 555, based upon

(3)

§ 288. Acts of Other Civil Officers.

There is no peculiar rule of procedure to be followed in cases where the acts of civil officials other than those of the judicial department, such as, for example, customs officers, are the subject of complaint. Difficulty may arise in ascertaining whether the particular official, at the time of his misconduct, was acting within the scope of his employment,[1] or whether his acts constituted a denial of justice.[2] It may be observed again that the inferiority of rank of the official is not decisive of the character of his conduct, or of the responsibility of the State for the consequences thereof.[3] Even if, however, his act may be justly regarded as internationally illegal, the obligation of the territorial sovereign to make reparation through the diplomatic channel is, on principle, contingent upon its failure to afford the claimant an adequate means of redress through a remedy either against the offender, or against the State itself, when for any reason the prosecution of an action against the former would appear to be without value. When, therefore, the territorial sovereign meets this requirement, interposition is believed to lack justification until the exhaustion of the judicial remedy has proved unavailing.[4]

the treaty between the United States and France, of Sept. 30, 1800, as interpreted in the case of The Peggy, 1 Cranch, 103.

[1] Thus in the (third) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3018, the act complained of was regarded as outside of the scope of the authority of the actor — the Governor of San Luis Potosí; see, also, Joseph N. Wilson Case, before same commission, *id.*, 3021.

[2] See, for example, (second) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3017.

[3] Arbitrators have oftentimes lost sight of this fact, even when they have correctly denied redress for the misconduct of petty officials in cases where local remedies have not been exhausted. See, for example, Leichardt Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3133, 3134; (second) Bensley Case, Mexican Claims Commission, Act of Cong., March 3, 1849, *id.*, 3017.

See Case of outrages on George Milliken and Simon Shine, American citizens in Guatemala who were subjected to outrage in that country in 1907, For. Rel. 1908, 410–417. In this case following interposition, indemnities were paid and a readiness evinced by the Government of Guatemala to remove from office a certain officer. The State Department did not ask for his removal but merely requested that he be reprimanded, trusting to the good offices of the Guatemalan Government to make appropriate disavowal of wrongful acts committed.

[4] Mr. Fish, Secy. of State, to Mr. Ruger, Oct. 21, 1869, 82 MS. Dom. Let. 224, Moore, Dig., VI, 660; Same to Messrs. Geo. Friend, Jr. & Co., May 31, 1871, 89 MS. Dom. Let. 449, Moore, Dig., VI, 660; message of the President to the Senate, Feb. 8, 1889, concerning the case of the American ship *Bridgewater*, S. Ex. Doc. 103, 50 Cong., 2 Sess., Moore, Dig., VI, 668; Case of Dr. John Baldwin, Mexican-American Commission, Convention of April 11, 1839,

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Claims Arising from Tortious Acts not Primarily Attributable to the State

(1)

§ 289. Acts of Individuals.

The wrongful acts of individuals directed against aliens are not primarily attributable to the territorial sovereign, in the absence of proof of negligence or complicity on its part.[1] No denial of justice is, therefore, apparent, until that sovereign fails in the performance of its duties of jurisdiction, either by thwarting the victim in his efforts to invoke judicial aid, or by neglecting to take appropriate steps to prosecute the actor when his conduct has been criminal.[2] To obtain pecuniary redress the victim must exhaust

Moore, Arbitrations, III, 3126; Wadsworth, Commissioner in Leichardt Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 3133. But see *contra*, Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, No. 25, July 20, 1885, MS. Inst. Mexico, XXI, 337, Moore, Dig., VI, 679; also Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, May 19, 1884, concerning the case of the American schooner, *E. D. Sidbury*, No. 574, MS. Inst. Mexico, XXI, 82, Moore, Dig., VI, 679, in which case a Mexican collector of customs refused to obey a judicial order for the restoration of the vessel which had been seized by the customs authorities, until a final order was issued containing the intimation that non-compliance therewith would result in the use of force. See, also, John C. Jones Case, Mexican Claims Commission, Act of Cong., March 3, 1849, Moore, Arbitrations, III, 3018.

It is to be doubted whether the award of an indemnity in the Sheldon Lewis Case, American-British Claims Commission, treaty of March 8, 1871, by reason of the action of customs officials in New York in wrongly interpreting an order of the Secretary of the Treasury, was sound. Moore, Arbitrations, III, 3019–3021. The contention of the United States that local remedies should have been exhausted, was, it is believed, entitled to the approval of more than one Commissioner (Frazer).

In the Lalanne and Ledour Case, French-Venezuelan Commission, 1902, Ralston's Report, 501, in which damages were allowed because of the unjustified refusal of customs officials to clear a ship, there was no discussion of the question as to the duty of the claimant to exhaust his judicial remedies. In the Davy Case, British-Venezuelan Commission, 1903, Plumley, Umpire, declared that the claimant was not obliged to resort to the courts for his remedy and that "where, as in this case, there has been an agreed submission of the claims of British subjects to a mixed commission created to consider them the tribunal thus constituted has undoubtedly jurisdiction of the parties and of the subject matter." Ralston's Report, 410, 412.

[1] "The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign." The Ship Resolution, 2 Dall. 1.

[2] Mr. Lincoln, Atty.-Gen., 1 Ops. Attys.-Gen., 106, Moore, Dig., VI, 787; Mr. Forsyth, Secy. of State, to Mr. Calderon de la Barca, Sept. 17, 1839, MS. Notes to Spain, VI, 39, Moore, Dig., VI, 787; Mr. Fish, Secy. of State, to Mr. Mariscal, Mexican Minister, Feb. 19, 1875, For. Rel. 1875, II, 973, Moore, Dig., VI, 788; Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 15, 1887, 163 MS. Dom. Let. 306, Moore, Dig., VI, 790; Mr. Hay, Secy. of State, to Mr. Fowler, April 15, 1899, 236 MS. Dom. Let. 354, Moore, Dig., VI,

his judicial remedy by proceeding directly against the wrongdoer.[1] It is the absence of national delinquency rather than a rule of procedure which precludes diplomatic interposition.

The wrongful act may, however, be of a kind such as to call for instant action by the State itself. Thus, for example, the murder of seven Mexican shepherds in Texas in 1873, required immediate and diligent effort on the part of the local authorities to discover and prosecute the perpetrators. It is believed that the Mexican Minister, Mr. Mariscal, was justified in asserting that a denial of justice was apparent in the attitude of the authorities of Texas in not trying to discover the murderers "by all the means used by public authorities in civilized countries (such as Texas doubtless is) for the discovery of the perpetrators of any crime which is not a mere injury or offense of a private character, as murder never has been." [2] He was also correct in declaring in substance that the obligation to take measures for the detection of the wrongdoers was not dependent upon the furnishing of information on oath as to the facts and as to the perpetrators.[3]

When American citizens have sustained criminal violence at the hands of individuals in foreign countries, the United States

792. See, also, Mr. Scruggs, Umpire, Cotesworth & Powell Case, Convention between Great Britain and Colombia, of Dec. 14, 1872, Moore, Arbitrations, 2053, 2082; Wipperman Case, American-Venezuelan Claims Commission, Convention of Dec. 5, 1885, *id.*, 3039; Thornton, Umpire, in Dickens Case, Mexican-American Commission, Convention of July 4, 1868, *id.*, 3037.

[1] Mr. Sherman, Secy. of State, to Mr. Hoshi, Japanese Minister, March 31, 1897, For. Rel. 1897, 368, Moore, Dig., VI. 791, regarding failure of local authorities to prevent boycott against Japanese subjects in Montana. *Compare* position of the United States in demanding of China, in 1905, the suppression of a boycott of American goods in that country. The demand was based upon the contention that the boycott was in violation of treaty provisions, contrary to the law of China, and encouraged by persons of official rank. For. Rel. 1905, 204–234.

[2] Communication to Mr. Fish, Secy. of State, April 17, 1875, For. Rel. 1875, II. 982, 983, Moore, Dig., VI, 787, 789.

[3] Mr. Fish, Secretary of State, had admitted the duty of a State to prosecute such offenders according to the law by all the means in its power, but he insisted that no person could be arrested upon suspicion of having committed a crime except upon the affidavit of a credible witness, and he adverted to the fact that murder could, in the United States, only be prosecuted upon information under oath, and he stated that the Department was not aware that such information had been furnished. It is believed that these suggestions were inept. The public duty to prosecute embraced the duty to investigate and make reasonable efforts to detect the murderers. Fulfillment of the latter would doubtless have established the foundation for criminal prosecution by indictment. Failure, however, in this regard did not shift to the Mexican Government or to interested friends of the victims the burden of securing evidence sufficient to justify complaints on information under oath specifying the offenders. It is to be regretted, therefore, that the United States persisted in its refusal to grant redress. The correspondence with the Mexican Legation is contained in For. Rel. 1875, II. 954–985, and *id.*, 1888, II, 1306–1308. An abstract is contained in Moore, Dig., VI, 787–790.

has declared it to be "the duty of the State diligently to prosecute and properly punish the offenders," maintaining that "for its refusal to do so it may be held answerable for pecuniary damages." [1] This principle has been invoked in discussion where it has appeared, as in the case of Frank Lentz,[2] an American citizen murdered in Kurdistan in 1894, and in that of Charles W. Renton,[3] an American citizen whose wife and niece were abducted, his property destroyed or appropriated and himself murdered in Honduras, that there was gross negligence, if not complicity, on the part of local officials in permitting the escape from their custody of the guilty parties.

In some instances American citizens in foreign countries have suffered injury to their persons or property through the acts of bands of brigands, and frequently under circumstances indicating neglect on the part of the territorial sovereign to afford protection or to prosecute the wrongdoers.[4] When the Department of State has believed the victims to be entitled to redress from the territorial sovereign, they have not been left to their own resources,

[1] The language quoted is that of Mr. Hay, Secy. of State, in a communication to Mr. Combs, Minister to Guatemala and Honduras, Feb. 25, 1904, concerning the claim of Mrs. Charles W. Renton against Honduras, For. Rel. 1904, 352, 363, Moore, Dig., VI, 798.

[2] Concerning the Lentz Case, see Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, For. Rel. 1895, II, 1257, 1316, 1332, *id.*, 1899, 766–767, Moore, Dig., VI, 792–794.

[3] In the Renton Case, the gross misconduct of the officials of Honduras was apparent also in other ways. A United States Naval board "found that Mrs. Renton's claim for $37,420 was a just one; that all the portable property on Renton's place at the time of his murder had since been either destroyed or appropriated by the company; that the Honduran authorities had taken no steps to prevent such destruction or appropriation, and that all legal steps taken by them in relation to the murder of Renton, the abduction of his wife and niece, the burning of his dwelling, and the robbery of his personal property were either half-hearted and farcical, or were smothered at the outset by bribery and corruption." Statement in Moore, Dig., VI, 796. Concerning the case see For. Rel. 1904, 352–369, Moore, Dig., VI, 794–799.

See Baron Komura, Japanese Minister of Foreign Affairs, to Mr. Griscom, American Minister, March 4, 1904, respecting the vigorous efforts taken at the suggestion of the United States to punish the natives of Botel Tobago, who, in 1903, had murdered shipwrecked seamen of the American ship *Benjamin Sewell*, For. Rel. 1904, 444, also Moore, Dig., VI. 799.

Concerning case of the murder of the American Vice-Consul Stuart, a British subject, at Batum, in 1906, see For. Rel. 1906, II, 1290–1295.

[4] Attention is called to Case of Knapp and Reynolds (Turkey), 1883, For. Rel. 1883, 1884, 1885, 1889 and 1890, Moore, Dig., VI, 800–801; Case of L. M. Baldwin (Mexico), 1887, For. Rel. 1888, Moore, Dig., VI, 801–806; Marauders in Peru, 1899, Moore, Dig., VI, 806; Case of Ion Perdicaris (Morocco), 1904, For. Rel. 1904, Moore, Dig., VI, 807; Case of Rev. B. W. Labaree (Persia), 1904, For. Rel. 1904, 1905, 1906, 1907, 1908, in part in Moore, Dig., VI, 806–807.

In the Case of L. M. Baldwin (Mexico), 1887, amplest notice was given to both State and Federal authorities of the lawless proceedings of those who committed the crime. Their depredations had been long continued and the offenders were well known. No serious steps were taken to afford protection.

or been called upon by the United States to press their legal remedies through domestic channels. Nor has it often been urged by respondent States that interposition was premature or unreasonable.[1] Such action on the part of the United States has usually been justified not merely because the territorial sovereign was delinquent in the matter of prevention or prosecution, but rather for the reason that the form of delinquency was such as to destroy all reasonable expectation of securing justice through domestic channels, or because no process was known whereby the territorial sovereign was obliged to respond in damages to the suit of a private claimant.[2]

A situation may arise where brigandage becomes rampant throughout a portion of the State whose government is deemed to evince a chronic attitude of passivity or tolerance. In such case the mere frequency and success with which bandits carry on their operations cannot be acknowledged as indicative of inability on the part of the territorial sovereign to rid the country of such individuals.[3] There may be little ground for the inference that it

Mr. Bayard, Secy. of State, to Mr. Bragg, Minister to Mexico, No. 8, March 15, 1888, For. Rel. 1888, II. 1144, Moore, Dig., VI, 801, Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI. 802. See, also, Mr. Bacon, Acting Secy. of State, to Mr. Leishman, American Ambassador to Turkey, July 2, 1907, For. Rel. 1907, II, 1072.

[1] In the Knapp and Reynolds Case, the Turkish Government informed General Wallace, American Minister, April 6, 1885, "that in penal matters there is no provision giving a private individual, who considers himself injured in his rights, permission to claim pecuniary indemnity from the State. . . . I believe, however . . . that it is lawful for the parties interested to bring suit against the magistrates for prejudice to their cases by reason of irregularities in the proceedings." For. Rel. 1885, 847. See response of Mr. Bayard, Secy. of State, Aug. 17, 1885, *id.*, 859.

In the L. M. Baldwin Case, the Mexican Minister, Mr. Mariscal, "invoked the familiar rule that the claimants must pursue their remedies in the courts of the country before they can resort to diplomatic interposition." Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21, Moore, Dig., VI, 802, 805.

[2] Declared Mr. Blaine, Secy. of State, to Mr. Dougherty, Chargé, Jan. 5, 1891, in the L. M. Baldwin Case, "This Government is not aware of any courts or of any processes by which the issue could be tried and redress obtained by the claimant in Mexico. Nor, where the question presented is whether the Government of a country has discharged its duty in rendering protection to the citizens of another nation, can it be conceded that that government is to be the judge of its own conduct." Moore, Dig., VI, 805. See, also, opinion of Ralston, Umpire, in the Poggioli Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 847, 869.

[3] Concerning the notorious failure of Mexican governmental authorities, for a protracted period between 1911 and May, 1920, to prevent or check the recurrence of acts of brigandage directed against American life and property in various parts of Mexican territory, see Investigation of Mexican Affairs, Preliminary Report (May 28, 1920) and Hearings of the Committee on Foreign Relations, United States Senate, pursuant to S. Res. 106, Senate Doc. No. 285, 66 Cong., 2 Sess.

has made full use of the means at its disposal to suppress and punish the actors. Evidence of failure in this regard clearly justifies interposition. Evidence of protracted impotence or unconcern not only justifies sterner measures, but also serves in fact to arouse aggrieved States to make use of them.[1]

When the denial of justice is confined to neglect in the matter of prosecution, and no delinquency is apparent in the matter of protection or prevention, the United States commonly interposes and demands an indemnity. In some of these cases the neglect of the territorial sovereign, although subsequent to the acts of violence, has produced added harm, where, for example, it has deprived the victims of the means of ascertaining the identity of their assailants and of subjecting them to civil suits for damages.[2] In other cases, where such a result has not followed, the United States has, nevertheless, not refrained from making a similar demand. The amount of indemnity requested and obtained appears, at times, to have been out of proportion to the pecuniary loss sustained by the victims or their dependents in consequence of the laches of the territorial sovereign.[3] In demanding the payment of money, and in applying the sum received even for the benefit of those directly affected by the ill-treatment of the victims, the United States has in reality exacted a penalty on account of the denial of justice. Possibly justification for so doing is to be found in the difficulty in distinguishing cases where

[1] See, in this connection, Mr. Lansing, Secy. of State, to the Secretary of Foreign Relations of the *de facto* government of Mexico, June 20, 1916, *Am. J.*, X., Supp., 211; The Pursuit of Villa, § 67.

[2] This was notably true in the case of the Mexican shepherds murdered in Texas in 1873. It has also been true in certain cases of mob violence.

[3] The situation has resembled that in private law where, by virtue of a penal statute, an individual is enabled to obtain from one who violates the statute, damages which, however remedial, serve to do more than compensate the plaintiff for any loss which he has sustained from the acts of the defendant.

Respecting the Case of Frank Lentz murdered by brigands in Kurdistan in 1894, Mr. Hay, Secy. of State, declared that if the "murderers had been duly punished, this Government would not have felt disposed to demand an indemnity", but because a light punishment was inflicted and the guilty parties permitted to escape, the United States demanded and secured a considerable sum for the parents of the deceased. Communication to Mr. Straus, Minister to Turkey, March 25, 1899, For. Rel. 1899, 766–767, Moore, Dig., VI, 794. It is difficult to see how the parents of the victim in this particular case sustained any pecuniary loss through the misconduct of the Turkish Government, in lightly prosecuting the wrongdoers or in permitting them to escape.

When the territorial sovereign has shown diligence in the matter of prosecution, and has not failed in the matter of protection, the Department of State has not been disposed to demand an indemnity. Mr. Hay, Secy. of State, to Mr. Dudley, Minister to Peru, No. 210, Sept. 5, 1899, MS. Inst. Peru, XVIII, 177, Moore, Dig., VI, 806.

the neglect to prosecute lessens or destroys the value of the local right of the victims or their dependents to sue the wrongdoers, from cases where no such injury or loss is sustained; and secondly, in the value of exemplary reparation as a deterrent of misconduct otherwise to be anticipated.[1]

2

Mob Violence

(a)

§ 290. Claims against the United States.

Numerous demands for redress for the consequences of mob violence have, in years past, been preferred against the United

[1] "The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mex. XIX, 18, *citing* Calvo, *Droit Int.*, II, 397, Moore, Dig., VI, 655. In the Case of Rev. B. W. Labaree, an American missionary, murdered by a band of Kurds near Urumia, Persia, in 1904, the relation of the indemnity to the prosecution of certain accessories to the murder, became the matter of diplomatic discussion. It was reported that the chief ecclesiastic of Urumia had instigated the crime and sheltered the criminals. For. Rel. 1904, 659–660. The reported failure of the Persian Government to punish the murderers impelled the United States to demand an indemnity of fifty thousand dollars in behalf of the widow and children. *Id.*, 675–676. An arrangement for settlement was, however, made on the following basis: The imprisonment of the principal murderer who had been caught, the arrest and punishment of the accomplices, and the payment of fifty thousand dollars in gold, of which sum thirty thousand dollars was to be paid at once to the American Minister and the balance of twenty thousand dollars was to be paid to him in case of the escape from prison of the principal murderer through official negligence or connivance, or in case the known accomplices identified as participants were not captured and punished by a fixed date, or if any portion of the indemnity should be exacted from the Christian population in Urumia or elsewhere in Persia. *Id.*, 1905, 723. The chief accomplices were captured, brought to the capitol, there held for seven months, and then remanded to Urumia for trial; but they escaped or were liberated on the way. *Id.*, 1906, II, 1209. In response to the suggestion that the Kurdish tribes in sympathy with the accused persons would pay the widow the twenty thousand dollars which was conditionally abated, as a substitute for the punishment of the accused, the Persian Government was informed that "gold cannot atone for American blood", and that punishment according to the measure of guilt was the only reparation acceptable to the United States. *Id.* Then the effort was made by the Persian Government to settle finally the controversy by paying to the American Minister the twenty thousand dollars for the benefit of the widow and children. This offer was rejected. *Id.* II, 1215. Thereupon through its Legation at Washington the Persian Government suggested that the punishment of the accomplices take the form of a fine rather than imprisonment. *Id.* 1907, II, 941. There was some misunderstanding as to the exact meaning of this offer. Mr. Root, Secy. of State, took occasion to point out the distinction between the "remedial reparation due to the widow", which had been fully made and the "exemplary redress due to the

States. A denial of justice has usually been apparent, for the attending circumstances have commonly revealed gross neglect on the part of local authorities either to prevent what occurred or to prosecute the wrongdoers.[1] Trivial effort to afford protection has

Government of the United States." He added that that Government would not accept blood money from Persia or from innocent Persians in substitution of the just claim that punishment be visited upon the guilty; and that that punishment, of whatsoever form, should possess an exemplary character and effect a deterrent purpose. He also suggested that a money penalty exacted as punishment, if devoted to the erection of a memorial structure, such as a hospital, would serve as a lasting lesson in favor of law and order. For. Rel. 1907, II, 943, 944. It later appearing that the principal murderer had died in jail, that some of his accomplices had been killed in skirmishes, and that all the others were on Turkish soil, the United States agreed to abandon further insistence on the exaction of a pecuniary indemnity from their relatives, and to consider the matter closed, with the understanding that the Persian Government would visit punishment upon the fugitives should they return to its territory. *Id.*, II, 947–948; *id.*, 1908, 680–681.

See, also, opinion of Plumley, Umpire, in the Maal Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 914, 916.

[1] Attention is called to the following cases: Spanish Consul and Spanish subjects at New Orleans, 1851, Moore, Dig., VI, 811–815, and documents there cited; Chinese at Denver, 1880, For. Rel. 1881, 319–337, Moore, Dig., VI, 820–822; Chinese at Rock Springs, Wyoming, 1885, For. Rel. 1886, 101–168, Moore, Dig., VI, 822–835; Italians at New Orleans, 1891, For. Rel. 1891, 658–728, Moore, Dig., VI, 837–841; James Bain, a British subject, at New Orleans, 1895, For. Rel. 1895, I, 686–696, For. Rel. 1896, 298–301, Moore, Dig., VI, 849–850; Italians at Walsenburg, Colorado, 1895, For. Rel. 1895, II, 938–956, Moore, Dig., VI, 841–843; Mexicans at Yreka, California, 1895, Moore, Dig., VI. 851, and documents there cited; Italians at Hahnville, La., 1896, For. Rel. 1896, lxxvi, 396–422, For. Rel. 1897, 353–354, Moore, Dig., VI, 843–845; Italians at Tallulah, La., 1899, For. Rel. 1899, xxii, 440–466, For. Rel. 1900, xxii, 715–731, Moore, Dig., VI, 845–848; Italians at Irwin, Miss., 1901, For. Rel. 1901, 283–299, Moore, Dig. VI, 848–849; nationals of Austria-Hungary, Greece, and Turkey, at South Omaha, 1909, House Doc. No. 576, 64 Cong., 1 Sess.; Angelo Albano, an Italian killed in Florida, 1910, Senate Rep. No. 118, 63 Cong., 1 Sess.; Albert Piazza, and J. Speranza, Italians killed in Illinois, 1914 and 1915, respectively, reported by C. H. Watson, in *Yale Law J.*, XXV, 561–581.

Attention is also regretfully called to the deplorable case at Rock Springs, Texas, where in 1910, following the killing of certain officers by a body of Mexicans who had crossed the Rio Grande at San Benito, one Antonio Rodriguez was burned alive on account of the rape and murder of an American woman. For. Rel. 1911, 349 and 354.

Between Aug. 5 and 8, 1920, certain Italians at West Frankfort, Ill., were victims of mob violence, which caused the death of one Luigi Carrero and the destruction and loss of much property. The perpetrators remain as yet unconvicted of any crime.

See, also, the case of Etienne Derbec, before Commission under convention between the United States and France of Jan. 15, 1880, Moore, Arbitrations, 3029; James Bryce, "Legal and Constitutional Aspects of the Lynching at New Orleans", *New Review* (London, 1891), IV, 385; J. B. Moore, "Responsibility of Government for Mob Violence", *Columbia Law Times*, V, 211; E. W. Huffcut, "International Liability for Mob Injuries", *Annals*, Am. Academy, Pol. & Soc. Sc., II, 69; H. Arias, "The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War", *Am. J.*, VII, 724; Julius Goebel, Jr., "International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars", *Am. J.*, VIII, 802. All of these monographs have been noted by Dr. Borchard in his Diplomatic Protection § 89. See, also,

at times been the only response to warnings of the violence to be anticipated.[1]

The attempts to prosecute have usually been a travesty on justice. Inquests over the remains of victims have been purposeless. Oftentimes local officials have failed to discover any responsible perpetrators of the acts committed. Even when such persons have been known, grand juries have usually failed to indict.[2] In one instance the action of such a body was aptly described as a burlesque.[3]

When the violence has occurred within the domain of any State of the Union, the National Government, by reason of the lack of a Federal law permitting it to instigate criminal proceedings therein, has been obliged to content itself with requesting the Governor of such State to set in motion the local machinery of justice, or with sending an agent to make an investigation or to observe any local judicial proceedings. Frequently a painful lack of efficiency or zeal on the part of local officials entrusted with the duty of prosecution has resulted in a miscarriage of justice.

In the earlier cases it was stoutly maintained that there was no legal duty on the part of the United States to pay indemnities.[4] This was due, at least in one instance, to the fact that national responsibility for the occurrence was denied, and such denial was based upon the assertion that there had been no neglect in the matter of protection or prosecution.[5] Constitutional reasons for

discussion, Borchard, Diplomatic Protection, §§ 89–92; Charles H. Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens", *Yale Law J.*, XXV. 561.

[1] This was true in the case of the lynching of Italians at New Orleans, in 1891. Baron Fava, Italian Minister, to Mr. Blaine, Secy. of State, March 15, 1891, and March 18, 1891, with enclosure, For. Rel. 1891, 666 and 668, respectively. It may have also been true in the case of the lynching of Italians at Hahnville, La., in 1896. Such at least was the contention of the Italian Embassy. See For. Rel. 1896, 412, 413, in response to the suggestion of the Department of State that all normal precautions for the safety of the prisoners had been taken. *Id.*, 409–410. In the cases of Italians at Walsenburg, Colorado, in 1895, at Tallulah, La., in 1899, and Irwin, Miss., in 1901, neglect in the matter of protection was not apparent, and if it existed, such delinquency was overshadowed in all but one of these cases by the evidence of neglect with respect to prosecution.

[2] In the case of Italians at Tallulah, La., 1899, the Italian Embassy furnished the names of persons believed to have been active participants. For. Rel. 1900, 715–718. No persons were indicted.

[3] Mr. Cheng Tsao Ju, Chinese Minister, to Mr. Bayard, Secy. of State, Nov. 30, 1885, respecting the Rock Springs Case, For. Rel. 1886, 102, Moore, Dig., VI, 823.

[4] Statement of Mr. Moore, in Moore, Dig., VI, 809. Such was the position of Mr. Webster in 1851 in the New Orleans case, of Messrs. Evarts and Blaine in 1881, as to the Denver case of the previous year, and of Mr. Bayard in 1886, in the Rock Springs case.

[5] In the case of Chinese subjects who were victims of mob violence in

the inaction of the Federal Government, in view of the existing state of law, were also emphasized.[1] Even where neglect on the part of local authorities was admitted, the obligation to respond in damages was not acknowledged. Moreover, in one such case it was grimly announced that the courts were open to the alien victims or their dependents who should therein exhaust their judicial remedies.[2] While such a contention would have been sound if the wrongful acts had been chargeable solely to private individuals, it was not applicable where, through the laches of public officials, there had been a denial of justice, unless the nation or some agency thereof afforded not merely free access to the courts, but also the means whereby the public treasury should be chargeable with the payment of such compensatory damages as should be judicially awarded. As no such remedy was available the demand for redress through the diplomatic channel found ample warrant.

Colorado in 1880, the duty to pay an indemnity was denied by Mr. Evarts, Secretary of State, chiefly because he was of opinion that there had been no neglect on the part of the local authorities in suppressing the mob. For. Rel. 1881, 319–320. The Chinese Minister, Mr. Chen Lan Pin, thereupon called attention to the verdict of the coroner's jury imputing neglect to the local police force, and declaring that its incompetency and inefficiency as well as the failure of county authorities to render necessary aid, enabled the mob to destroy human life. *Id.*, 321, 322. Mr. Blaine, who succeeded Mr. Evarts as Secretary of State, approving of the attitude of his predecessor, was of opinion that while at the outset one or two local functionaries might have "shown some timidity and hesitation", a more successful resistance to a mob of such character and numbers could not be found in the history of any community or country. He adverted also to the fact that certain ringleaders had been arrested, and that two of them, identified as assailants of a Chinese victim, were held for trial for murder. *Id.*, 335–336.

[1] Mr. Evarts, Secy. of State, to Mr. Chen Lan Pin, Chinese Minister, Dec. 30, 1880, For. Rel. 1881, 319, Moore, Dig., VI, 820; Mr. Bayard, Secy. of State, to Mr. Chen Tsao Ju, Feb. 18, 1886, For. Rel. 1886, 158, 160; see, also, Robert Lansing, *Proceedings*, Am. Soc., II, 44, 52–53; Elihu Root, *id.*, III, 16, 24.

[2] In the deplorable instance of mob violence at Rock Springs, Wyoming, Sept. 2, 1885, twenty-eight Chinese subjects were killed, fifteen were wounded, and property of considerable value destroyed or appropriated. For. Rel. 1886, 101–168. Mr. Bayard, Secretary of State, denied emphatically all liability on the part of the United States to indemnify any individuals, and declared with equal emphasis that "just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government." He stated, however, that as there was a "gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed," the President would be disposed to bring the matter before the benevolent consideration of Congress. For. Rel. 1886, 158, 168, Moore, Dig., VI, 826, 834. A suitable indemnity was paid.

See, also, Mr. Bayard, Secy. of State, to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450, 456.

§ 291. President Harrison's Attitude.

It remained for President Harrison to declare with candor in his message of December 9, 1891, that in the absence of an Act of Congress making offenses against the treaty rights of foreigners domiciled within the United States cognizable in the Federal Courts:

> the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such cases as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.[1]

In the case which inspired this utterance (that of the lynching of certain Italians at New Orleans in 1891), Mr. Blaine, Secretary of State, ultimately announced to the Marquis Imperiali, the Chargé d'Affaires of Italy, that the President deemed it to be "the solemn duty, as well as the great pleasure of the National Government to pay a satisfactory indemnity." [2]

In the cases that have since arisen an indemnity has commonly been paid by the United States. Payment has been accompanied by a declaration expressed either by Congress or by the Department of State that such action was taken out of humane consideration and without reference to the question of liability.[3] It is not understood, however, that in any case where the facts have clearly indicated neglect in the matter of prevention or prosecution, there has been a definite denial of a legal duty to respond in damages.[4] Nor has the suggestion been made that in

[1] For. Rel. 1891, vi, Moore, Dig., VI, 840.

[2] For. Rel., 1891, 728, Moore, Dig., VI, 840. See, also, Mr. Blaine, Secy. of State, to the Marquis Imperiali, Royal Italian Chargé d'Affaires, April 14, 1891, For. Rel. 1891, 682, 685. Concerning this case generally see For. Rel. 1891, 658–728, Moore, Dig., VI, 837–841; Clunet, XVIII, 1147–1161; F. Despagnet, "*Les Difficultés Internationnles venant de la Constitution de certains pays*", *Rev. Gén.*, II, 184; also City of New Orleans *v.* Abbagnato, 62 Fed. 240; James Bryce, in *New Review*, IV, 385.

[3] See, for example, Act of Nov. 14, 1913, authorizing payment of the sum of $6000 to the Italian Government as full indemnity to the heirs of Angelo Albano, an Italian subject who was killed by an armed mob at Tampa, Florida, Sept. 20, 1910. 38 Stat. 1229.

[4] In the case of Italians at Walsenburg, Colorado, in 1895, there was little or no proof that the local authorities had failed in their duty. See report of the Italian Consul at Denver, For. Rel. 1895, II, 944. Nevertheless, Mr. Olney, Secretary of State, invited the Italian Ambassador to formulate a claim. *Id.*, 950. In the case of Italians at Hahnville, La., in 1896, Mr. Olney, Secretary of State, and similarly President Cleveland, did not agree with the Italian Ambassador that the facts indicated a denial of justice. For. Rel.

such a case local remedies should have been exhausted as a condition precedent to reasonable interposition. While attention has been called to the dilemma of the Federal Government in the absence of appropriate legislation permitting Federal prosecution of offenders, that circumstance does not appear to have been relied upon as a means of evading national responsibility. In the Italian case at Irwin, Mississippi, in 1901, the Department of State took pains to inform the Italian Embassy that the President had recommended to Congress not only the tendering of an indemnity, but also the enactment of legislation "to give the Federal Courts original jurisdiction of treaty offenses against aliens." [1]

1896, 410, and lxxvi. With respect to the case of Italians at Tallulah, La., in 1899, Mr. Hay, Secretary of State, declared to the Italian Ambassador, June 12, 1900: "It having been shown that Italian subjects were slain by said lynching and that there has been a failure on the part of the only competent authorities to indict or bring the guilty parties to trial in any form, the President feels that a case has been established that should be submitted to the consideration of Congress, with a view to the relief of the families of Italian subjects who lost their lives by lawless violence, which will accordingly be done on the reassembling of Congress in December next." For. Rel. 1900, 722. See, also, President McKinley, Annual Message, Dec. 3, 1900, *id.*, xxii, Moore, Dig., VI, 847.

In the case of Greeks and others who were victims of mob violence at South Omaha in 1909, the Department of State declared that an investigation made by an official of the Department of Justice revealed evidence tending strongly to rebut conclusions of the representative of the Greek Legation "to the effect that prior to the beginning of the riots the police had been warned against possible violence to the Greeks and that while the rioting was taking place the authorities did not take all proper and possible steps to suppress them." In this case the Department was not ready to admit legal liability on the part of the United States to pay an indemnity. In view of the circumstance, however, that Greek subjects were driven out of the city, their property destroyed, and personal injuries inflicted on some of them, the Department was disposed to recommend that an appropriation be made by Congress in satisfaction of the claims. Mr. Lansing, for Mr. Bryan, Secy. of State, to the Greek Legation, Sept 2, 1914, House Doc. No. 576, 64 Cong., 1 Sess., 16–17.

[1] Mr. Hill, Acting Secy. of State, to Signor Mayor des Planches, Italian Ambassador, Jan 2, 1902. For. Rel. 1901, 299. This communication was in response to a severe arraignment of the United States by the Italian Embassy in which it was stated that "In this condition of things the Government of the King has sent me express instruction to enter the most energetic protest against what is, all at once, a denial of justice, a flagrant violation of contractual conventions, and a grave offense to every human and civil sentiment. The Federal Government itself admitted after the preceding lynching that in this respect the judiciary organization of the country is deficient, and that the defect calls for a prompt remedy, since it is thereby placed in the irksome position of being unable to keep faith with the treaties that bear its signature. The illustrious President recently carried off by a tragic death had earnestly recommended in one of his messages that provisions be made therefor, but the bills introduced in both Houses of Congress at the suggestion of the President did not come to the test of a vote. Until the desired reform shall have become an accomplished fact the Government of the King not only will have grounds of complaint for violation of the treaties to its injury, but will not cease to denounce the systematic impunity enjoyed by crime, and to hold the Federal Government responsible therefor." *Id.*, 297.

§ 292. Local Statutory Liability.

In certain States of the United States a county or municipality is made liable for the consequences of mob violence occurring therein.[1] In the cases of Piazza and Speranza, Italians who were lynched by mobs in Illinois in 1914 and 1915, respectively, the criminal prosecutions proved abortive. Civil suits in both cases, instituted in the United States District Court against the County (in the Piazza case) and the municipality (in the Speranza case) rendered liable by local statute for the consequences of mob violence, resulted in verdicts and judgments for the plaintiffs, awarding damages in favor of dependents residing in Italy.[2]

(b)

§ 293. Claims against Foreign States.

The United States has frequently interposed in behalf of American victims of mob violence in foreign States. In so doing it has correctly asserted that when any agency of a territorial sovereign either wantonly or passively fails to use the means at its disposal to prevent violence or to prosecute the perpetrators, a denial of justice is apparent and national responsibility therefor established, irrespective of the relationship of such sovereign to the delinquent local authorities.[3] The principle that national responsibility should be measured by such a test has generally

[1] Concerning the statutory liability of counties, see S. Blair Fisher in "Cyc.", XI, 501–502, and cases there cited. Concerning the statutory liability of municipal corporations, see H. H. Ingersoll, in "Cyc.", XXVIII, 1295–1298, and cases there cited. See, also, E. M. Borchard, Diplomatic Protection, § 92.

[2] Illinois Criminal Code, Chap. 38, Section 256w, Hurd's Rev. Stat. of Illinois, 1917, p. 1007, declaring that: The "surviving spouse, lineal heirs, or adopted children or any such other person or persons who, before the loss of life, were dependent for support upon any other person who shall hereafter suffer death by lynching at the hands of a mob, in any county or city of this State, may recover from such county or city damages for injury sustained by reason of the loss of life of such person, to a sum not exceeding five thousand dollars." Concerning the criminal prosecutions in these cases see Charles H. Watson in *Yale Law J.*, XXV, 561.

[3] Declared Mr. Fish, Secy. of State, in a communication to Mr. Partridge, Minister to Brazil, No. 141, March 5, 1875: "It is the duty of Brazil when she receives the citizens of a friendly State, to protect the property which they carry with them or may acquire there. If persons in the service of that Government connive at or instigate a riot, for the purpose of depriving a citizen of the United States of his property, the Imperial Government must be held accountable therefor." MS. Inst. Brazil, XVI, 455, Moore, Dig., VI, 815, 816. See, also, Mr. Evarts, Secy. of State, to Mr. Gibbs, Minister to Peru, No. 107, May 28, 1878, MS. Inst. Peru, XVI, 362, Moore, Dig., VI, 817; Mr. Blaine, Secy. of State, to Mr. Egan, Minister to Chile, Jan. 21, 1892, respecting the case of violence directed against sailors of the U. S. S. *Baltimore*, Oct. 16, 1891, For. Rel. 1891, 307, Moore, Dig., VI, 857. Con-

been observed by arbitral tribunals.[1] In cases at Harpoot and Marash, in Asiatic Turkey in 1895, the United States was able to adduce abundant proof that the destruction of American missionary property was due to the complicity and participation of local Turkish soldiery.[2] It has rarely been suggested that individual claimants should have exhausted any judicial remedies prior to interposition, for it has not appeared that redress was obtainable through any domestic channel.[3]

It should be observed, however, that in 1912, the Department of State, in response to an inquiry from the American Embassy at Mexico City with respect to possible attacks on property by

cerning this case generally, see For. Rel. 1891, vi, and 194–313; For. Rel. 1892, xiii, Moore, Dig., VI, 854–864.

See, also, Resolution of the Institute of International Law of Sept. 10, 1900, *Annuaire*, XVIII, 254.

[1] Sir E. Thornton, Umpire in the Jeannotat Case, under convention between the United States and Mexico, of July 4, 1868, Moore, Arbitrations, 3673; same Umpire, in the Donoughho Case, under same convention, *id.*, 3012, 3014; *dictum* of Sir Henry Strong, Umpire in the Gelbtrunk Case against Salvador, For. Rel. 1902, 877, 879; *dictum* of Henry Barge, Umpire in the Underhill Case against Venezuela, Ralston's Venezuelan Arbitrations, 1903, 49.

No different test is asserted in the Derbec Case, under convention between the United States and France of Jan. 15, 1880, Moore, Arbitrations, 3029. *Compare* the *dictum* of the Commissioners in the early Case of Laguerue ne, before the Commission under Act of Congress of March 3, 1849, Moore, Arbitrations, 3027, 3028. Concerning the claims resulting from the Panama Riot of April 15, 1856, and the special obligation of protection assumed by New Granada in consequence of Art. XXXV of its treaty with the United States of Dec. 12, 1846, and of Art. I of the convention of Sept. 10, 1857, see Moore, Arbitrations, II, chap. XXVIII, 1361–1420.

[2] For. Rel. 1895, II, 1255–1470, concerning condition of affairs in Asiatic Turkey, espccially, Report of Mr. Olney, Secy. of State, to the President, Dec. 19, 1895, *id.*, 1256–1260, and also documents, *id.*, 1342, 1345, 1356, 1357, 1369, 1370, 1395, 1423, 1430, 1434, 1444, 1446–1448, 1455; also For. Rel. 1896, xxviii, 880, 881, 882, 883, 892, 893, 894, 895, 897; For. Rel. 1901, 518, Moore, Dig., VI, 865–868.

Concerning the destruction of Anatolia College, at Marsovan, by an unrestrained mob, in 1893, see President Cleveland, Annual Message, Dec. 4, 1893, For. Rel. 1893, x; Mr. Wharton, Acting Secy. of State, to Mr. Thompson, American Minister, March 1, 1893, *id.*, 604. Concerning case of attack on the premises of Dr. Christie, at Tarsus, Aug. 4, 1895, see For. Rel. 1895, II, 1271–1292; see, also, Mr. Sherman, Secy. of State, to Mr. Angell, Minister to Turkey, Aug. 23, 1897, For. Rel. 1897, 592.

Concerning riots at Lienchou, Province of Canton, 1905, and resulting claims of the United States, see For. Rel. 1906, I, 308–324.

[3] In response to such a suggestion in a Peruvian case, Mr. Evarts, Secy. of State, declared to Mr. Gibbs, American Minister to Peru: "As regards the alleged failure of Messrs. Wexel and De Gress to pursue the rioters in court, it is not made evident that they could have indemnified themselves for their losses by such proceeding; it is not made clear, indeed, that the police discovered any responsible perpetrators of the deeds complained of." No. 107, May 28, 1878, MS. Inst. Peru, XVI, 362, Moore, Dig., VI, 817.

See, also, opinion of Sir E. Thornton, Umpire, in the Donoughho Case, under convention between the United States and Mexico of July 4, 1868, Moore, Arbitrations, III, 3012, 3014.

mobs, and the inability of local authorities to render protection, announced that it could not lay down any rules other than those provided by international law, which, it was declared, would doubtless meet the situation.[1]

h

Claims Based on War

(1)

§ 294. In General. Local Remedies.

War claims are those which arise from and are deemed to be chargeable to the conduct of a State while a belligerent, or while engaged in hostilities as though it were one.[2] Such claims are of great variety. They may be founded on any form of activity incidental to the prosecution of war, whether on sea or land, and whether attributable to the military or civil arm of the government. Thus they may spring from the conduct of the commander of a submarine or that of the occupant of enemy territory; they may grow out of the acts of an army in the field, or of a collector of a port. Such claims may have an enemy as well as neutral origin. The treaty of peace terminating the conflict may, however, contain a waiver of such claims,[3] or it may provide that one party shall itself adjust those possessed by its nationals against its former enemy.[4] Again, the treaty may burden one party with respon-

[1] For. Rel. 1912, 958, where attention was called to Moore, Dig., VI, 809, and following. Prof. Moore there makes the following statement: "The question of a government's liability for injuries suffered by foreigners within its jurisdiction has on various occasions been discussed and determined in cases of mob violence. Such cases sometimes apparently present strong grounds of national liability because of the popular approval of the mob's action, and the consequent immunity of the actors from prosecution and punishment. The rule, however, which has generally been maintained in argument, even if not in practice, is that while a government is bound to employ all reasonable means to prevent such disorders, it is not required to make indemnity for the losses that may result from them, unless, as in the case of Art. XXXV of the treaty of 1846 with New Granada, or as in the case of an attack on official representatives, there is a special obligation of protection."

[2] See, in this connection, E. M. Borchard, Diplomatic Protection, §§ 98-100.

[3] See, for example, Sections 8 and 9 of Annex III, following Art. 244 of treaty of peace with Germany of June 28, 1919, embracing the waiver by Germany of certain claims against the Allied and Associated Governments with respect to German vessels detained, employed, damaged, sunk or salved.

"Local remedies, however, for the adjustment of claims growing out of war are seldom provided, as their settlement is generally comprehended in the treaty of peace." Department of State, Claims Circular of 1919, Section 8.

[4] See, for example, Art. VII of the treaty of peace between the United States and Spain, of Dec. 10, 1898, Malloy's Treaties, II, 1692.

sibility for illegal acts attributable to it, and impose a duty upon it to meet claims of nationals of the enemy arising therefrom.[1]

Claims of neutral origin are obviously unaffected by the terms of a treaty of peace. Moreover, they may be based upon the theory that the particular act of a belligerent State involving the taking or injury of property was not internationally illegal, but merely of a kind such as to require as a condition subsequent, a duty to compensate the owner; and the absence of adequate arrangement to establish locally such an obligation and to satisfy it, may be the reason for interposition.

The preferring of a war claim must be based upon the principles applicable to interposition on account of claims of other classes, and thus involves inquiry whether the conduct of the belligerent with respect to the claimant, either on account of the nature of the particular act complained of, or by reason of neglect of any concurrent or subsequent obligation to make compensation to him, violated the requirements of international law; and secondly, whether the State charged with wrongdoing affords any adequate local remedy within the reach of the claimant.

It is perhaps distinctive of war claims that there is rarely available a local remedy which the State of the claimants deems to be adequate. It must be acknowledged that domestic tribunals or commissions, regardless of the scope of their powers, are likely to be incapable of judging without prejudice of the propriety of the conduct of the authorities of their own State. In cases arising from belligerent operations or activities, such bodies find it difficult to disapprove of conduct believed to be necessary or incidental to the successful prosecution of a war, especially when the lawfulness of an act is challenged by a foreign power. For that reason, if adjudications are to be responsive to the requirements of justice, a reference to neutral judges would commonly appear to be essential. It may be noted that the United States has frequently agreed both as complainant and respondent, to the adjustment of war claims by arbitration before tribunals possessed of a neutral umpire.

In order to determine generally whether a particular act of a belligerent in relation to an alien or his property was lawful or unlawful, reference must be had to the requirements of the law

[1] See obligation imposed upon Germany, by Art. 231 of the treaty of peace of June 28, 1919. See, also, Arts. 232–247, with annexes, embodying the reparation clauses of Part VIII of the treaty. See *infra*, § 298.

of nations; and these must be examined partly in the light of the position taken by the State charged with wrongdoing, and as revealed by the terms of general conventions to which it may be a party, such as, for example, those emanating from the Hague Peace Conferences of 1899 and 1907. Such is believed to be the mode of ascertaining whether neutral property, public or private, has been lawfully taken or destroyed under any of the numerous and varying conditions confronting a belligerent fighting by land and sea, and in territory other than its own, and whether also the act of taking or destruction, even though not unlawful, gives rise to a duty to make reparation to the owner.[1]

It may be fairly claimed that whenever a belligerent violates a principle of international law with respect to a State which is not engaged in the conflict, by reason of the treatment accorded the persons or property of its nationals, the rights of the latter in seeking to obtain justice are as broad as those arising from claims of non-belligerent origin, and that the propriety of interposition is not altered or limited by any special rule due to the nature of the claim or the grounds on which it may be opposed.

(2)

§ 295. Certain Hazards of War.

An alien residing within the domain of a belligerent State is said to accept, like the nationals thereof, the hazards of war, and to possess no greater rights than they to demand compensation from the territorial sovereign.[2] This is doubtless true so long as such belligerent respects the requirements of international law. When, however, its acts are heedless of those requirements, with respect to persons and property in places under its control, the rights of alien victims are not, as in analogous cases, measured by the treatment accorded the nationals of the belligerent. It is only when that treatment conforms to the standard which the usages and agreements of enlightened States have fixed, that it indicates the full measure of the obligation involved.[3]

[1] It is not here sought to discuss the propriety of various forms of belligerent activities, or the circumstances when they impose upon the actor special obligations with respect to the owners of property. These matters are dealt with under the appropriate headings in connection with topics dealing with the prosecution of war on land, and with maritime warfare.

[2] Little, Commissioner in Castel Case, United States and Venezuelan Claims Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 3710, Moore, Dig., VI, 893.

[3] See reasoning of Lord Palmerston in the House of Commons, June 4, 1850, concerning adjustment by Great Britain of a claim preferred by Austria

Courts of arbitration have emphasized the broad scope of the hazards encountered by neutral aliens residing in or having property in the territory of a belligerent, and which sustained injury in the course of hostilities.[1] A few may be noted. Houses may catch fire from buildings destroyed by shells,[2] or may be deliberately burned when affording cover to the enemy;[3] walls and pavements may be torn up in the course of a siege,[4] and crops ruined by cavalry passing over them in a battle or while approaching the scene of conflict.[5] In numerous other ways devastation may be the natural result of hostilities.[6] Such occurrences do not necessarily imply that international law has been violated by the territorial sovereign, or that the neutral owners of property so injured or destroyed are entitled to compensation from it on account of their losses.

With respect to persons and property of neutrals within territory of the enemy of the belligerent whose operations result in injury or destruction, the individual claimants find themselves subject to the familiar rule that they and their property may be fairly regarded as, respectively, enemy persons and enemy property by the State whose acts were productive of the loss sustained.[7]

arising from the plundering of a brig wrecked on the Irish coast, Hansard Parliamentary Debates, CXI, 717–719, Moore, Dig., VI, 887.

[1] See Upton Case, American-Venezuelan Commission, 1903, Ralston's Report, 172; Bembelista Case, Netherlands-Venezuelan Commission, 1903, *id.*, 900; Volkmar Case, American-Venezuelan Commission, 1903, *id.*, 258.

Declared Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, April 28, 1871: "The Court of Claims, adopting the language of my predecessor, Mr. Seward, has decided it to be the law and usage of nations that one who takes up his residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chooses to reside; and his only chance, if any, is against the government of that country, in which his own sovereign will not interest himself. Such has been the doctrine and practice of the United States and of the great powers of Europe, and this Government, therefore, cannot intervene in behalf of Mr. Fougen, or of any citizen of the United States, under the same circumstances." For. Rel. 1871, 335, Moore, Dig., VI, 888.

[2] Donaldsonville Cases, French-American Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, IV, 3689, 3697; see, also, Bercier Case, before same Commission, *id.*, 3706; Cleworth Case, British-American Claims Commission, Convention of May 8, 1871, *id.*, 3675.

[3] Jardel Case, French-American Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, IV, 3699.

[4] Blumenkron Case before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3669.

[5] Cole Case, Mexican-American Claims Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3670. See, also, Hale's Report of the Work of the American-British Claims Commission, treaty of May 8, 1871, *id.*, 3678.

[6] Wilson Case, Spanish Claims Commission, agreement of Feb. 12, 1871, Moore, Arbitrations, IV, 3674; see, also, Giles Case, French-American Commission, Convention of Jan. 15, 1880, *id.*, 3703.

[7] Mr. Seward, Secy. of State, to Count Wydenbruck, Austrian Minister,

It may here be noted that the courts of the United States have applied the same rule in the treatment of the claims of American citizens having property in the limits of the Confederate States during the Civil War,[1] and in Cuba during the war between the United States and Spain in 1898.[2]

It is believed that, in general, the equities of the neutral claimant whose property suffers injury or destruction in the course of military operations, through the acts of the territorial sovereign, are likely to be stronger than where complaint is made of the acts of the enemy of that sovereign and incidental to attacks upon its territory. In the former situation, the circumstances of the particular case may be such as to establish a just demand for compensation even when the act of injury or destruction is in no sense unlawful.

(3)

The Relation of the Belligerent Sovereign to Certain Acts Giving Rise to Complaint

(a)

§ 296. Acts of Soldiers.

While illegal acts, wanton or otherwise, which are attributable to a belligerent may justify a demand for redress in behalf of neu-

Nov. 16, 1865, MS. Notes to Austrian Legation, VII, 193, Moore, Dig., VI, 885; Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, No. 272, April 28, 1871, For. Rel. 1871, 335, Moore, Dig., VI, 888; Same to Sir E. Thornton, British Minister at Washington, May 16, 1873, MS. Notes to Great Britain, XVI, 101, Moore, Dig., VI, 890.

"Foreign Offices and municipal and international courts have frequently laid down the rule that neutral property permanently situated in enemy territory, or property of neutrals who voluntarily enter or continue to reside in belligerent territory assumes the risks of injury incident to war." E. M. Borchard, Diplomatic Protection, § 101. See, also, Gallego, Messa & Co. *v.* United States, 43 Ct. Cl. 444.

See, also, Brief of Messrs. Strobel and Cruz, in behalf of the Respondent in Case of C. D. Blodgett, No. 14, United States and Chilean Claims Commission, under convention of May 24, 1897, reviving convention of Aug. 7, 1892; award in Matter of William Hardman, Claim No. 2, June 18, 1913, American and British Pecuniary Claims Arbitration, convention of 1910, *Am. J.*, VII, 879, 881, where it was declared that "notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitary conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest."

See Schoenrich's Report of Nicaraguan Mixed Claims Commission, under Nicaraguan laws of 1911, p. 61, announcing as Rule 1 adopted by the Commission that "The Government is not responsible for damages suffered during a battle, or as a direct consequence of military operations."

[1] See, for example, Mrs. Alexander's Cotton, 2 Wall. 404, 419; Brandon *v.* United States, 46 Ct. Cl. 559.

[2] Juragua Iron Co., Ltd. *v.* United States, 212 U. S. 297, 307; Herrera *v.* United States, 222 U. S. 558, 569.

tral victims, difficulty may arise in determining whether the relation of the actors to the belligerent was such as to fasten responsibility upon it. Courts of arbitration have frequently declared that the liability of a belligerent on account of the conduct of its soldiers is dependent upon whether their acts were committed in the presence or with the consent of officers,[1] as otherwise, according to Mr. Ralston, "no such relation of agency existed as would make a government liable." [2] Thus, in certain adjudicated cases the fact that soldiers were unaccompanied by officers,[3] or that the latter although aware of the commission of unlawful acts by their subordinates, were unable to enforce discipline, served to shield the belligerent sovereign from responsibility.[4]

Mr. Bayard, Secretary of State, declared in 1885, that the mere fact that an act might be committed without orders from superiors in command was indecisive of the question of liability.[5] He stated

[1] See, for example, Webster Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 3004; Dunbar & Belknap Case before same Commission, *id.*, 2998; Standish Case, before same Commission, *id.*, 3004; statement by Mr. Moore, as to various cases before same Commission, *id.*, 2996–2997; Jeannaud Case, French-American Commission, Convention of Jan. 15, 1880, *id.*, 3000; Terry & Angus Case, Mexican Claims Commission, Act of Congress, March 3, 1849, *id.*, 2993; Roberts Case, American-Venezuelan Commission, 1903, Ralston's Report, 142. See, also, Claim of Bernard Campbell against Haiti, For. Rel. 1895, II, 811–813, Moore, Dig., VI, 764; case of ill treatment of D. A. Backer by Haitian soldiers, For. Rel. 1907, II, 742–744; Brief of Messrs. Strobel and Cruz, in behalf of Respondent, in Case of C. D. Blodgett, No. 14, United States and Chilean Claims Commission under Convention of May 24, 1897, p. 12 and following.

[2] Ralston's Arbitral Procedure, 284.

[3] Declares Mr. Moore: "In numerous cases before the Commission under the Convention between the United States and Mexico of July 4, 1868. it was held by Sir Edward Thornton, as umpire, that the government was not liable for the acts of individual soldiers or of bodies of stragglers or marauding soldiers not under the command of an officer." Moore, Arbitrations, III, 2996–2997. Among the instances cited are the Trippler Case, Moore, Arbitrations, 2997, and the Culberson Case, *id.*, 2997. See, also, Buentello Case before same Commission, *id.*, 3670; Michel Case before same Commission, *id.*, 3670; Vesseron Case before same Commission, *id.*, 2975; Foster Case, Spanish Claims Commission, agreement of Feb. 12, 1871; Henriquez Case, Netherlands-Venezuelan Commission, 1903, Ralston's Report, 910. In Ralston, Arbitral Procedure, 286, are cited the Edgerton Case, Reclamaciones Presentadas al Tribunal Anglo-Chileno, I, 126; also Bacigalupi Case before Chilean-American Claims Commission of 1897, No. 42.

[4] Antrey Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3672; see, also, Weil Case before same Commission, *id.*, 3671; Dresch Case, before same Commission, *id.*, 3669.

[5] Communication to Mr. Buck, Minister to Peru, No. 33, Oct. 27, 1885, For. Rel. 1885, 625, Moore, Dig., VI, 758; Same to Same, Aug. 24, 1886, MS. Inst. Peru, XVII, 231, Moore, Dig., VI, 758.

Compare Mr. Magoon, law officer, division of insular affairs, Feb. 6, 1901, Magoon's Reports, 338, Moore, Dig., VI, 758; also opinion of Gen. Davis, Judge-Advocate-General, U. S. A., and comments thereon by the French Ambassador and the Solicitor to the Department of State, concerning claim of Messrs. Laurent & Lambert *v.* The United States, for losses sustained during the Spanish-American War, For. Rel. 1907, I, 393–398.

that a government might be responsible for the misconduct of soldiers in the field, or when acting, either constructively or actually under its authority, if their acts, although forbidden by the goverment, were in contravention of the rules of civilized warfare. If by this statement he appeared to enlarge the acknowledged scope of national responsibility, he limited it by the declaration that a State was not responsible for the "collateral misconduct of individual soldiers dictated by private malice." [1] It may be doubted whether in practice such a limitation could be generally relied upon without qualification.

The circumstance that officers, though aware of the commission of unlawful acts by enlisted men, were powerless to enforce discipline, has at times been regarded as affording an excuse for the excesses of their troops.[2]

Article III of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, after announcing that a belligerent party violating the provisions of the Regulations annexed to the Convention should, if the case so demanded, be liable to pay compensation, declared that such a belligerent should be "responsible for all acts committed by persons forming part of its armed forces." [3] Tested by this provision, the commission of any acts prohibited by the Regulations, such, for example, as the pillaging of a place taken by assault,[4] would establish the liability of the belligerent, and that irrespective of the inability of an officer to enforce discipline, or of his ignorance or prohibition of the acts committed.[5] Although such be deemed to be the extent of the obligation imposed upon the United States or any other power as a belligerent, it may be doubted whether national responsibility for the wrongful acts committed by soldiers in time of peace

[1] In this connection see, also, Case of the Castelains, French-American Claims Commission, Convention of June 15, 1880, Moore, Arbitrations, III, 2999.

[2] Thornton, Umpire in Vesseron Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2975; and in Antrey Case, before same Commission, *id.*, IV, 3672.

[3] Malloy's Treaties, II, 2278; Scott, Hague Peace Conferences, II, 371.

[4] Art. XXVIII.

[5] Higgins, Hague Peace Conferences, 260; Holland, Laws of War on Land, 19. See, also, extract from Halleck, Int. Law, San Francisco, 1861, Sec. 22, p. 442, quoted in Moore, Dig., VI, 918. The same passage is contained in Sir G. Sherston Baker's 3 ed. of same work, London, 1908, II, 36–37.

The decision, in some of the earlier cases, such as that of Sir Edward Thornton in the Cooper Case, Mexican-American Commission, under Convention of July 4, 1868, Moore, Arbitrations, IV, 4039, or of Commissioner Wadsworth, in the Friery Case, before same Commission, *id.*, 4036, where no indemnity was allowed for pillaging by soldiers, was doubtless due to the belief that at that time, such acts were to be counted among the ordinary hazards of war assumed by aliens resident in belligerent territory.

would be measured by the same test.[1] It is probable that the obligation to make reparation for acts committed in such a season would be regarded as dependent upon the circumstance that the soldier was, at the time of his misconduct, engaged in the performance of his duties, and also, that his superior officers failed to use the means at their disposal to prevent what occurred or to discipline the offender.

(b)

§ 297. Acts of Private Individuals and Bandits.

A consequence of a state of war, and especially of the operations of belligerent forces, is the opportunity afforded individuals and bands of marauders unattached to any public service to perpetrate lawless acts upon defenseless persons.[2] For such acts the responsibility of a belligerent power would appear to depend upon its failure to make diligent use of the means at its disposal to deter misconduct or to punish offenders. Unless neglectful in this regard, it would be difficult to establish a legal obligation to make redress; for the actors could not be regarded as in any sense agents of the belligerent within whose domain they operated. While a belligerent must on principle exercise the same measure of diligence within any area under its control that is required, in times of peace, of a territorial sovereign, the engrossing and burdensome problem which oftentimes engages a military commander during the period when the bandit does his work doubtless has a bearing on the reasonableness of the steps taken to prevent or suppress.

(4)

War Claims against Germany under the Treaty of Versailles

(a)

§ 298. The General Theory of Reparation.

By the terms of the treaty of peace of June 28, 1919, Germany

[1] Mr. Hay, Secy. of State, to Mr. Hunter, Minister to Honduras, March 20, 1900, concerning the Case of Frank Pears, For. Rel. 1900, 685–689, also *id.*, 674–702, Moore, Dig., VI, 762–764. See, also, claim of Bernard Campbell *v.* Haiti, For. Rel. 1895, II, 811–813, *id.*, 1898, 397–398, Moore, Dig., VI, 764. *Compare* Case of Lewis L. Etzel, For. Rel. 1904, 168–176, Moore, Dig., VI, 765.

See, also, case of firing by Dominican officials in 1893 upon the schooner *Henry Crosby*, by mistake, For. Rel. 1895, I, 215–234, especially Mr. Uhl, Acting Secy. of State, to Messrs. Goodrich, Deady & Goodrich, April 10, 1894, *id.*, 229, Moore, Dig., VI, 760; also case of assault on American seamen in the course of a street brawl, at Santa Catharina, in 1894, For. Rel. 1895, I, 52–59, Moore, Dig., VI, 760.

[2] Buentello Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, IV, 3670.

accepted the responsibility of herself and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals had been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.[1] That State was thus obliged incidentally to undertake to make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in a particular Annex of the treaty.[2] The amount of the damage was to be determined by an Inter-Allied Commission to be called the

[1] Art. 251.

[2] Art. 232. It was declared in Annex I (following Art. 244) that compensation might be claimed from Germany under Art. 232 in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, or exposure at sea or of being forced to labour), wherever arising, and to the surviving dependents of such victims.

"(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

"(4) Damage caused by any kind of maltreatment of prisoners of war.

"(5) As damage caused to the peoples of the Allied and Associated Powers, all pensions and compensation in the nature of pensions to naval and military victims of war (including members of the air force), whether mutilated, wounded, sick or invalided, and to the dependents of such victims, the amount due to the Allied and Associated Governments being calculated for each of them as being the capitalised cost of such pensions and compensation at the date of the coming into force of the present Treaty on the basis of the scales in force in France at such date.

"(6) The cost of assistance by the Governments of the Allied and Associated Powers to prisoners of war and to their families and dependents.

"(7) Allowances by the Governments of the Allied and Associated Powers to the families and dependents of mobilised persons or persons serving with the forces, the amount due to them for each calendar year in which hostilities occurred being calculated for each Government on the basis of the average scale for such payments in force in France during that year.

"(8) Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

"(10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population."

Reparation Commission, for the constitution and powers of which elaborate provision was made.[1] The function of that body (which was not to be dissolved until all the amounts due from Germany and her allies, under the treaty or the decisions of the Commission, should have been discharged, and all sums received, or their equivalents, should have been distributed to the Powers interested) was not only to determine the amount of damage chargeable to Germany, but also to fix, according to the resources and capacity of that State, the time and form of payment.[2] It was recognized that the resources of Germany were not adequate, after taking into account permanent diminutions which would result from certain provisions of the treaty, to furnish complete reparation for the loss and damage for which that State was burdened with responsibility.[3] It was perceived that complete satisfaction of the obligation would necessarily consume much time, and require a degree of flexibility of treatment of the obligor which could best be applied through the instrumentality of the Commission. Upon that body were, therefore, conferred vast discretionary powers. It was declared also that the insufficiency of the resources of German territory rendered it imperative that the German Government should be called upon to exercise its functions to place within reach of the Allied and Associated Powers assets of various kinds outside of its domain and which that Government might assert the right to control and utilize for its own benefit.[4]

In establishing a plan of compensation for losses, it was insisted that Germany should make restitution of tangible things which had been seized when it was possible to identify them in territory belonging to Germany or her allies, and that without allowing

[1] Art. 233. The provisions for the Reparation Commission referred to therein were set forth in Annex II (between Arts. 244 and 245). It may be noted that according to Section 10 of this Annex the Commission is to consider the claims and to give to the German Government a just opportunity to be heard, but not to take any part whatever in the decision of the Commission. A similar opportunity is to be afforded the allies of Germany, when the Commission considers that their interests are in question.

Paragraph 11 of the Annex declares that the Commission shall not be bound by any particular code or rules of law or by any particular rule of evidence or of procedure, but shall be guided by justice, equity and good faith. It is said that its decisions must follow the same principles and rules in all cases where they are applicable. It is, moreover, to establish rules relating to methods of proof of claims. It is empowered to act on any trustworthy modes of computation.

[2] Arts. 233 and 234.

[3] Art. 232.

[4] See Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace (accompanying letter of M. Clemenceau, President of the Peace Conference, to Count Brockdorff-Rantzau, President of the German Delegation, June 16, 1919), Misc. No. 4, 1919 [Cmd. 258], pp. 32–36, 47–49.

credit for so doing on account of the general reparation due.[1] This principle operating as a check upon credits otherwise to be claimed was given numerous specific applications. These appeared to lack uniformity, by reason of the variety of the modes by which reparation was to be made.[2]

In fixing broadly the methods by which reparation should be effected and available assets utilized to that end, the Allied and Associated Powers compelled Germany to agree to pursue primarily the following courses: to pay at an early date, in gold (or in such other manner as the Reparation Commission might determine) a specified sum,[3] to be followed from time to time by other payments, with a view to satisfying the entire fiscal obligation within thirty years from May 1, 1921;[4] as a measure of partial reparation, to make direct application of her economic resources to replace merchant shipping and fishing boats lost or

[1] Thus according to Art. 238, Germany was obliged to effect "restitution in cash of cash taken away, seized or sequestrated, and also restitution of animals, objects of every nature and securities taken away, seized or sequestrated, in the cases in which it proves possible to identify them in territory belonging to Germany or her allies." The procedure for so doing was to be laid down by the Reparation Commission. See, also, Art. 243.

[2] Art. 243 announced certain credits to be allowed to Germany in respect of her reparation obligations.

The terms on which the numerous and varied transfers of property as such were to be made, commonly indicated whether credit was to result on account of reparation. Cessions of territory do not appear generally to have been regarded as furnishing a basis of credit.

See, in this connection, J. R. Clark, Jr., "Data on German Peace Treaty", presented to the Committee on Foreign Relations, United States Senate, 66 Cong., 1 Sess., in which that author has pointed out the design as to credit, with respect to each relevant Article of the treaty.

[3] Art. 235. It should be observed that out of such sum the expenses of the armies of occupation subsequent to the Armistice of November 11, 1918, were first to be met. It was provided also that such supplies of food and raw material as might be judged by the Governments of the Principal Allied and Associated Powers to be essential to enable Germany to meet her obligations for reparation might also, with the approval of those Governments, be paid out of the same sum. The balance was to be reckoned towards liquidation of the amounts due for reparation. In the same Article it was agreed that Germany should deposit further bonds as prescribed in paragraph 12(c) of Annex II of Part VIII of the treaty.

[4] Art. 233. It was here announced that the findings of the Commission as to the amount of damage should be notified to the German Government on or before May 1, 1921, as representing the extent of that Government's obligations.

Agreement was made in the same Article for the issuance of bonds by Germany to cover by way of guarantee and acknowledgment such part of its debt due on account of proved claims, as might not be paid in gold, or in ships, securities and commodities, or otherwise. See paragraph 12 of Annex II, Part VIII. This Annex contained elaborate provision for the plan by which Germany should, from time to time, under the direction of the Reparation Commission, issue further bonds by way of acknowledgment and security.

See Art. 237 with reference to the division by the Allied and Associated Governments of successive installments of moneys paid by Germany.

damaged through the war,[1] to make physical restoration of invaded areas,[2] to furnish coal and derivatives of coal,[3] to deliver, if required, dyestuffs and chemical drugs;[4] to possess itself, upon demand of the Reparation Commission within a fixed time, of rights and interests of German nationals in public utility undertakings or concessions operating in the territories of specified countries, and transfer the same, if acquired, to the Reparation Commission;[5] to deliver sums of gold deposited in Germany by Turkish authorities for purposes defined, embracing any title of Germany therein, and to transfer any sums in gold transferred to the German Government as a pledge or collateral security for loans to the Austro-Hungarian Government;[6] to transfer any claims which Germany might have to certain payments or repayments by the Governments of Austria, Hungary, Bulgaria or Turkey;[7] and to acquiesce generally in the utilization of the

[1] Art. 236, and also Annex III of Part VIII. In this Annex Germany recognized the right of the Allied and Associated Powers to the replacement, ton for ton (gross tonnage) and class for class, of all merchant ships and fishing boats lost or damaged owing to the war. The German Government undertook "on behalf of themselves and so as to bind all other persons interested", to cede to the Allied and Associated Governments the property in all German merchant ships of 1600 tons gross and upwards, as reckoned in a specified manner of division. Germany undertook also, among other things, to cause to be built in German yards for the account of the Allied and Associated Governments an amount of tonnage to be laid down within a specified period of years and under the direction of the Reparation Commission.

[2] Annex IV of Part VIII, in which the plan of physical restoration of invaded areas was elaborated.

[3] Annex V, Part VIII.

[4] Annex VI, Part VIII. See, also, so-called Special Provisions embraced in Arts. 245, 246 and 247, with reference to the restoration to the French Government, to the King of the Hedjaz, and to Belgium, respectively, of certain tangible articles. By Art. 247, Germany undertook also to furnish to the University of Louvain manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain.

[5] Art. 260. The countries specified were Russia, China, Turkey, Austria, Hungary and Bulgaria, as well as their possessions or dependencies, and also any territory formerly belonging to Germany or her allies, to be ceded by Germany or her allies to any Power, or to be administered by a Mandatory under the treaty.

It should be noted that Germany agreed to assume responsibility for indemnifying her nationals so dispossessed.

[6] Art. 259. In the same Article Germany undertook to transfer, either to Roumania or to the Principal Allied and Associated Powers, as the case might be, all monetary instruments, specie, securities and negotiable instruments, or goods, which she had received under the treaties of Bucharest and of Brest-Litovsk. According to this Article Germany recognized an obligation to make annually for the period of twelve years the payments in gold "for which provision is made in the German Treasury Bonds deposited by her from time to time in the name of the Council of the Administration of the Ottoman Public Debt as security for the second and subsequent issues of Turkish Government currency notes."

[7] Art. 261. Particular reference was here made to "any claims which may

property of German nationals in territories of the Allied and Associated Powers, in satisfaction of claims of their nationals.[1]

The foregoing requirements, which were supplemented by numerous others providing for special undertakings in relation to particular matters,[2] indicate the scope of the general obligation assumed and the plan of its fulfillment. The treaty established the theory of liabilities, leaving for solution questions respecting the amount of damage sustained by the Allied and Associated Powers. In performing the task of estimating the extent of that damage, and of regulating the times and modes of making compensation for it, the Reparation Commission appears to have been designed to exercise an administrative rather than a judicial function.

(b)

§ 299. Adjustment of Claims of Nationals of Allied and Associated Powers.

The treaty made provision that the nationals of Allied and Associated Powers should be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they were interested, in German territory as it existed August 1, 1914, by the application of exceptional war measures or measures of transfer.[3] It was declared that such claims should be investigated and the amount of compensation determined by the Mixed Arbitral Tribunal (provided for in Section VI of Part X), or by an arbitrator appointed by the Tribunal. It seems important to observe that while such compensation was to be borne by Germany, it was agreed that it might be charged upon the property of German nationals within the territory or under the control of the claimant's State,[4] and that such property might be constituted as a pledge

arise, now or hereafter, from the fulfillment of undertakings made by Germany during the war to those Governments."

[1] Art. 297 (*b*), (*e*) and (*i*). By this Article Germany undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States. See, also, Art. 252.

[2] See, for example, the provisions of Art. 232, whereby Germany, in accordance with pledges previously given, as to the complete restoration of Belgium, in addition to compensation for damage elsewhere provided for, as a consequence of a violation of the Treaty of 1839, undertook "to make reimbursement of all sums which Belgium has borrowed from the Allied and Associated Governments up to November 11, 1918, together with interest at the rate of five per cent. (5%) per annum on such sums."

[3] Such measures were defined in paragraphs 1 and 3 of the Annex following Art. 298.

[4] Art. 297 (*b*) and (*e*).

for enemy liabilities under conditions fixed by a later paragraph.[1] No distinction based upon the place of residence of German nationals whose property might be utilized in satisfaction of claims against Germany was here recognized. The treaty appeared to permit the same uses of the property of such nationals dwelling within the territory of an Allied or Associated Power as of that owned by such individuals residing in German territory, provided the property were in the control of a claimant State. Any rule of restraint was thus left to the domestic policy of the latter.

As a means of satisfying the claims of the owners of property who were nationals of Allied or Associated Powers "within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice", and whose property had been subjected to a measure of transfer in German territory, special provision was made. It was agreed that in such a case (following the arbitral procedure prescribed in other cases) the claimant expressing a desire for restitution, should have his claim satisfied by the restitution of his property if it should still exist in specie.[2] If restitution could not be so effected, it was declared that private

[1] See paragraph 4 of Annex following Art. 298, containing the following important provision: "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy powers, in so far as those claims are otherwise unsatisfied."

From the Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, accompanying M. Clemenceau's letter of June 16, 1919, Misc. No. 4 (1919) [Cmd. 258], p. 54, it appears that the foregoing provision respecting the assessment of claims by an arbitrator to be appointed by Mr. Gustave Ador or otherwise, had reference to the treatment of claims growing out of acts committed by the German Government between July 31, 1914, and the date at which the particular claimant State became a belligerent.

[2] Art. 297 (*f*). It was declared in this connection, that in such case Germany should take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it might have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

agreements arranged by the intermediation of the Powers concerned or the Clearing Offices (provided for in the Annex to Section III of Part X) might be made, in order that the claimant might secure compensation for his injury by the grant of advantages or equivalents which he could agree to accept in the place of the property, rights or interests of which he had been deprived.[1]

It seems to have been the design of the contracting parties that the establishing of the nature and amount of a claim of a national of an Allied or Associated Power against Germany should, in the absence of agreement, require, as a condition precedent to its satisfaction, and regardless of the particular assets to be utilized for that purpose, a recourse to arbitration.[2]

i

The Relation of a State to Acts of Insurgents

(1)

§ 300. Acts of Unsuccessful Insurgents.

Unsuccessful insurgents are not the agents of the State which suppresses them. For their acts, which it is unable to control, the territorial sovereign is not, therefore, responsible. This principle has received the definite sanction of courts of arbitration.[3] Notwithstanding some diversity of opinion expressed in

[1] Art. 297 (*f*).

According to Art. 297 (*h*), it was provided that except in cases where restitutions in specie should have been made, the net proceeds of sales of enemy property, rights or interests wherever situated, carried out either by virtue of war legislation, or by application of this Article, and in general, all cash assets of enemies should be dealt with as follows:

"(1) As regards Powers adopting Section III [of Part X], and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

"(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243." That Article dealt with the reckoning of credits to Germany in respect to her reparation obligations.

[2] Art. 297 (*e*), (*f*).

[3] See, generally, cases and publicists cited in Ralston, Arbitral Procedure,

the past, it appears now to be accepted also by the Department of State.[1] Thus in 1911, it announced "that where an armed insurrection has gone beyond the control of the parent government,

233–245, but especially opinion of Ralston, Umpire in Sambiaggio Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 666; Guastini Case before same Commission, *id.*, 730; Revesno Case, before same Commission, *id.*, 753; Guerrieri Case, before same Commission, *id.*, 753; Plumley, Umpire, in Aroa Mines Case, British-Venezuelan Commission, 1903, *id.*, 344, 350; same Umpire in Henriquez Case, Netherlands-Venezuelan Commission, 1903, *id.*, 896; opinion of Paúl, Commissioner, in Acquatella Case, Netherlands-Venezuelan Commission, 1903, *id.*, 487; opinion of Gutierrez-Otero, Umpire in Padrón Case, Spanish-Venezuelan Commission, 1903, *id.*, 923; Duffield, Umpire in Van Dissel Case, German-Venezuelan Commission, 1903, *id.*, 565, 573; Bainbridge, Commissioner in Jarvis Case, American-Venezuelan Commission, 1903, *id.*, 145, where it was said that the Government was not liable to the legatees of certain bonds issued by the unsuccessful insurgents in payment of services rendered by the testator. The opinion of Duffield, Umpire in the Kummerow Case, German-Venezuelan Commission, 1903, *id.*, 526, was based upon the interpretation of the protocol under which he acted, by which in his opinion, Venezuela assumed liability for the acts of revolutionists.

See, also, Schultz Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2973; Walsh Case, before same Commission, *id.*, 2978; Thornton, Umpire in Wyman Case, before same Commission, *id.*, 2978; same Umpire in Silva Case, before same Commission, *id.*, 2979; McGrady Case, Spanish Commission, Agreement of Feb. 12, 1871, *id.*, 2981; Hanna Case, British-American Claims Commission, treaty of May 8, 1871, *id.*, 2982, especially opinion of Frazer, Commissioner, *id.*, 2986; Laurie Case, before same Commission, *id.*, 2987; Stewart Case, before same Commission, *id.*, 2989; also Confederate Debt Cases of Barrett and Walker, before same Commission, *id.*, 2900 and 2901; Edgerton Case, British-Chilean Claims Commission, quoted in Ralston, Arbitral Procedure, 242; Case of Rosa Gelbtrunk, Arbitration between the United States and Salvador, 1902, For. Rel. 1902, 877, 878.

Compare Venezuelan Steam Transportation Company Case, Convention between the United States and Venezuela, of Jan. 12, 1892, Moore, Arbitrations, 1693, 1723; but see *dissenting* opinion of Andrade, Commissioner, *id.*, 1724; Case of the *Montijo*, Agreement between the United States and Colombia of Aug. 17, 1874, *id.*, 1421, 1427.

[1] Mr. Seward, Secy. of State, to Mr. Smith, July 9, 1868, 79 MS. Dom. Let. 69, Moore, Dig., VI, 956; Same to Baron Gerolt, Prussian Minister, Jan. 9, 1866, MS. Notes to Prussian Legation, VII, 430, Moore, Dig., VI, 957; Mr. Davis, Acting Secy. of State, to Mr. Markbreit, Minister to Bolivia, No. 55, July 7, 1871, MS. Inst. Bolivia, I, 145, Moore, Dig., VI, 959; Mr. Bayard, Secy. of State, to Messrs. Busche, Clark & Lynde, April 9, 1885, S. Doc. 264, 57 Cong., 1 Sess., 10, Moore, Dig., VI, 961; Same to Mr. Sutphen, Jan. 6, 1888, 166 MS. Dom. Let. 509, Moore, Dig., VI, 961; Mr. Olney, Secy. of State, to Mr. Thompson, Minister to Brazil, No. 315, Jan. 29, 1896, MS. Inst. Brazil, XVIII, 171, Moore, Dig., VI, 966; Mr. Hay, Secy. of State, to Mr. Rush, May 18, 1899, 237, MS. Dom. Let. 171, Moore, Dig., VI, 960.

Compare statement of Mr. Brent, Chargé at Lima, to Mr. Fish, Secy. of State, No. 252, March 14, 1871, MS. Despatches from Peru, Moore, Dig., VI, 973; Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mexico, XIX, 18, Moore, Dig., VI, 974; Same to Same, No. 54, Dec. 16, 1873, MS. Inst. Mexico, XIX, 48, Moore, Dig., VI, 975; Same to Same, No. 241, July 15, 1875, MS. Inst. Mexico, XIX, 210, Moore, Dig., VI, 980.

See, also, Mr. Scruggs, Minister to Colombia, to Mr. Fish, Secy. of State, No. 166, May 18, 1876, concerning attitude of Colombia in accepting responsibility for certain acts of insurgents in 1875, MS. Despatches from Colombia, Moore, Dig., VI, 981.

the general rule is that such government is not responsible for damages done to foreigners by the insurgents." [1]

If the government which is successful in its work of repression is burdened with responsibility, it must be because (*a*) it "has failed to use promptly and with appropriate force its constituted authority" to oppose the revolutionists; [2] or (*b*) because it has condoned by some process their internationally illegal acts; or (*c*) because it has entered into a relationship whereby it has become the legal successor to those whose conduct it previously opposed.

It should be observed that the Government of the United States in 1912 declared that it could not admit "the existence of any such unqualified rule as that stated by the Mexican Government" to the effect that "when a government finds itself temporarily unable to repress within its territory all the punishable acts resulting from insurrection or civil war, it is not responsible for the damages which foreigners may suffer in person or property during the course of the campaign as a consequence of the measures that the government may find it necessary to take in order to recover its dominion." [3]

The foreign State whose nationals are subjected to improper treatment by insurgents may, during the course of the conflict, justly urge the government to bend every effort to accord adequate protection; [4] and vigorous protest will be forthcoming if that government fails to render such protection as it is known to

[1] Mr. Adee, Acting Secy. of State, to Mr. Wilson, Ambassador to Mexico, Nov. 7, 1911, For. Rel. 1912, 946–947, in which attention was called to Moore, Dig., VI, 949 *et seq.* Also Mr. Wilson, Acting Secy. of State, to Mr. Wilson, American Ambassador to Mexico, April 8, 1912, For. Rel. 1912, 961.

[2] Ralston, Umpire in the Sambiaggio Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 666, 680.

A State may, as a matter of grace, undertake to indemnify foreigners for losses caused by revolutionists. Its mere declaration as to the motive for payment, is not, however, decisive of the absence of any duty to make redress. See claim of J. H. Hayball *v.* Peru, For. Rel. 1901, 427–430, Moore, Dig., VI, 990. When a State remunerates its own citizens, it may anticipate a demand that resident aliens be given similar treatment. Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 62, March 24, 1879, MS. Inst. Haiti, No. 188, Moore, Dig., VI, 960. A State may by treaty assume a special responsibility for acts committed within a given area, whosoever may be the actors. Report of Mr. Bayard, Secy. of State, to the President, Feb. 19, 1887, respecting the special obligation of Colombia towards the United States, arising from Art. XXXV of the treaty of 1846. H. Ex. Doc. 183, 49 Cong., 2 Sess., Moore, Dig., VI, 960.

[3] Mr. Knox, Secy. of State, to the American Chargé d'Affaires in Mexico, Dec. 19, 1912, For. Rel. 1912, 984; also communication of Mr. Lascurain, Mexican Minister of Foreign Affairs, to same, Nov. 23, 1912, *id.*, 982.

[4] Mr. Olney, Secy. of State, to Mr. Taylor, Minister to Spain, Dec. 15, 1896, For. Rel. 1896, 704, Moore, Dig., VI, 968; Same to Messrs. Lauman & Kemp, Jan. 13, 1896, 207 MS. Dom. Let. 146, Moore, Dig., VI, 967.

possess the ability to afford.[1] If after the suppression of the revolt, claims for indemnity are referred to a court of arbitration, the claimant State has the burden of proving neglect on the part of the respondent.[2]

While the freedom of the successful government from responsibility on account of acts of insurgents which it has been unable to control is due to the fact of belligerency rather than to the relation of the claimant State thereto, the latter may, by its conduct, admit that at the time of the commission of wrongful acts by insurgents, the government lacked the power of prevention or suppression.[3] This is true not only when the claimant State recognizes the insurgents as belligerents,[4] but also when it recognizes the existence of a status of insurgency.[5]

[1] Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, July 6, 1897, For. Rel. 1897, 516, Moore, Dig., VI, 969; Mr. Adee, Acting Secy. of State, to same, July 29, 1897, For. Rel. 1897, 519, Moore, Dig., VI. 970; Mr. Olney, Secy. of State, to Mr. Terrell, Minister to Turkey, Oct. 17, and Oct. 28, 1896, For. Rel. 1896, 892, 893. Moore, Dig., VI, 965.

[2] Ralston, Umpire in Revesno Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 753; Henriquez Case, Netherlands-Venezuelan Commission, 1903, *id.*, 896. See. also, Mr. Uhl, Acting Secy. of State, to Mr. Springer, United States Vice-Consul-General at Havana July 1, 1895, For. Rel. 1895, II, 1216, Moore, Dig., VI, 967.

In the Special Report of William E. Fuller, Assist. Atty-Gen., with respect to principles laid down by the Spanish Treaty Claims Commission, it is said that the Commission made it clear to the claimants: "That in order to recover for damages done by insurgents it was necessary for them to allege and prove that at the time and place when and where the injury was done the Spanish authorities could, by due diligence, and should have prevented such injury." Fuller's Report, 25.

[3] Declared Commissioner Wadsworth, in Prats Case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2886, 2888, "Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that Government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign. It resulted from the fact of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and so to speak, an *estoppel* as to that government."

[4] Dana's Wheaton, Note No. 15, *citing* Mr. Adams to Mr. Seward, June 11, 1861, Dip. Cor. 105, Moore, Dig., I, 165, 166. Concerning the conditions and effects of Recognition of Belligerency, *supra*, § 47.

[5] Statement in Moore, Dig., I, 242–243, concerning the recognition of the state of insurgency or revolt as a distinctive condition by the United States in the case of the Cuban Insurrection of 1895–1898, and documents there cited, especially The Three Friends, 166 U. S. 63–64, 65–66.

"The United States recognized a state of insurgency as existing in Cuba at an early date. . . . The recognition of insurgency implied that in American opinion at least the insurgents were not *de facto* under the control of Spain, could not be held liable to neutral citizens for their Acts." Elbert J. Benton, International Law and Diplomacy of the Spanish-American War, 34–37.

"2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents. 3. But where an armed

The effect of amnesty for acts of unsuccessful revolutionists upon the liability of the grantor State appears to depend upon the scope of the pardon given. The purpose of such a grant is to pardon the commission of acts incidental to revolution and directed against the grantor, and also to render the actors harmless from prosecution. It may naturally embrace internationally illegal acts incidental to the conflict and committed for a public rather than a private end and against whomsoever directed.[1] The pardon of insurgents on account of acts of revolution does not necessarily condone the method by which they were accomplished; nor does it necessarily deprive the alien victim, if there be one, of any valuable right, inasmuch as the actors could not, even in the absence of a grant of amnesty, be held accountable to private suitors in the local courts for the commission of acts of a belligerent character incidental to the conflict.[2]

insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents. 4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain, and so continued until such intervention and war took place. If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case." Statement of Mr. Wm. E. Chandler, President of Spanish Treaty Claims Commission, Nov. 24, 1902, concurred in by Commissioners Diekema and Wood, Fuller's Report, 153, Moore, Dig., VI, 971.

[1] Clause 4 of the Terms of Surrender of the Boer Forces in the Field (see Parliamentary Papers, South Africa, 1902, Cd. 1096, quoted in Oppenheim, 2 ed., II, 334, Note 2) excludes from the amnesty "certain acts, contrary to usages of war, which have been notified by the Commander-in-chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities."

See, also, Mr. Fish, Secy. of State, to Mr. Foster, Minister to Mexico, No. 241, July 15, 1875, regarding a reservation in favor of the claims of injured parties, in the pardon granted by Mexico to rebels whose conduct in forcing loans from American citizens at Monterey had become the subject of diplomatic discussion. MS. Inst. Mexico, XIX, 210, Moore, Dig., VI, 980.

[2] Declared Sir E. Thornton, Umpire, Mexican-American Commission, Convention of July 4, 1868, in the Devine Case: "It is urged that the Mexican government granted an amnesty to Carvajal and, therefore, made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by these rebels." Moore, Arbitrations, III, 2981.

It is said in Ralston, Arbitral Procedure, 244: "It is to be noted that, before the various commissions sitting to determine the liability of the United States growing out of the acts in connection with the Civil War, it seems never to have been urged that this country had assumed responsibility for the acts of the Confederacy because of having pardoned its leaders."

In the Case of the *Montijo*, agreement between the United States and Colombia of Aug. 17, 1874, Moore, Arbitrations, II, 1421, 1438, Mr. Bunch, Umpire, was of opinion that the effect of the amnesty took from the claimants a legal right to adjudicate their claim against the actors within the domestic

On the other hand, if the amnesty should embrace the commission of internationally illegal acts, shown to be of a private rather than a public character, and not fairly to be regarded as incidental to the conflict in the course of which they were committed, condonation would be apparent. In such case the State, by shielding the actors from prosecution, might be said to approve of the wrong done, and by failing to prosecute the actors, would itself become neglectful of a duty of jurisdiction. From such condonation responsibility would arise.[1]

Should the *de jure* government enter into an agreement with the revolutionists to coöperate in establishing a new government as the representative of the two opposing forces, it might be urged by a foreign claimant State, that that government as the resultant of both parties, would be the legal successor of each, and hence responsible for the illegal acts attributable to the authorities of each. Such was substantially the position of Mr. Buck, American Minister to Peru, in claiming an indemnity in behalf of one Victor H. MacCord, an American citizen who had sustained ill treatment at the hands of the revolutionary forces of General Caceres in 1885.[2]

(2)

§ 301. Payment of Duties and Taxes to Insurgents.

The payment of customs duties or taxes by foreigners to insurgents controlling the territory where payment is demanded

courts. It may be observed that in this case the seizure of the *Montijo* was accomplished by certain persons allied with the revolutionary cause and for a public purpose. See, also, Mr. Fish, Secy. of State, to Mr. Hurlburt, June 21, 1871, For. Rel. 1871, 230, Moore, Arbitrations, II, 1423, note 1.

[1] In Ralston, Arbitral Procedure, 244, it is said: "No case seems to have discussed a possible difference which might arise between the effects of an amnesty granted for the political offense of rebellion and one covering as well private offenses against individuals, engaged in when the person charged was pursuing a rebellious course." See, also, Oppenheim, 2 ed., II, 335.

[2] Communication to Mr. Alzamora, Peruvian Minister of For. Rel., Sept. 3, 1888, For. Rel. 1888, II, 1373, Moore, Dig., VI, 985–987. See, also, concerning the same case, Mr. Rives, Acting Secy. of State, to Mr. Buck, Minister to Peru, Oct. 8, 1888, For. Rel. 1888, II, 1377, Moore, Dig., VI, 987; and Mr. Olney, Secy. of State, to Mr. McKenzie, Minister to Peru, June 27, 1896, S. Doc. 7, 55 Cong., 1 Sess., 4–7, Moore, Dig., VI, 989; also further documents concerning same case, *id.*, 990.

In his message to Congress, Aug. 27, 1913, concerning relations with Mexico, President Wilson stated that he had instructed Mr. Lind, his personal representative, to urge the agreement of all parties in Mexico to abide by the results of a contemplated election and to coöperate in the most loyal way in organizing and supporting the administration to be chosen. (*Am. J.*, VII, Supp., 279.) It is believed that if the revolutionary forces had agreed with the provisional government of that country in the way suggested, the resultant government might have been regarded as the successor of the several factions, and responsible for the internationally illegal acts of each.

and collection made, renders unreasonable the subsequent exaction of payment by the titular government.[1] This is due to the fact that obedience to the command of the insurgent party in a place subject to its control cannot be regarded as unlawful.[2]

(3)

§ 302. Acts of Successful Revolutionists.

A State is responsible for the acts of successful revolutionists, as their acts must be regarded as those of the government which they have established. This principle has met with general recognition.[3]

j

Contractual Claims against Foreign Governments

(1)

§ 303. The Practice of Withholding Interposition.

Ever since the days of Madison the United States has been reluctant to interpose in behalf of a citizen seeking redress from a foreign State on account of its disregard of the terms of a contract

[1] Mr. Black, Secy. of State, to Lord Lyons, British Minister, Jan. 10, 1861, MS. Notes to Great Britain, VIII. 383, Moore, Dig., VI. 995. Following the foregoing communication in response to an inquiry made by the British Minister as to what position the United States would take regarding the action of the authorities of South Carolina in exacting duties during the Civil War, Mr. Moore adds: "It may be superfluous to say that no claim for the repayment of duties thus exacted was ever made by the United States." *Id.*, VI. 995. See, also, McLeod *v.* United States, 229 U. S. 416.

Mr. Hunter, Acting Secy. of State, to Mr. Scruggs, Minister to Colombia, Sept. 11, 1875, MS. Inst. Colombia, XVII. 2, Moore, Dig., VI. 995; Santa Clara Estates Company Case, British-Venezuelan Commission, 1903, Ralston's Report, 397; Guastini Case, Italian-Venezuelan Commission, 1903, *id.*, 730; case at Bluefields, For. Rel. 1900, 803–824, Moore, Dig., VI. 684–688.

In correspondence with the Colombian Minister in 1885, Mr. Bayard, Secy. of State, pointed out the unreasonableness of imposing upon foreigners who had paid imposts to rebel forces, the burden of proof that positive coercion was resorted to against them. Communication of Dec. 11, 1885, For. Rel. 1885, 281, Moore, Dig., VI. 997.

[2] Mr. Fish, Secy. of State, to Mr. Nelson, Minister to Mexico, Feb. 11, 1873, For. Rel. 1873, I. 654, Moore, Dig., I. 49; Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, June 1, 1885, For. Rel. 1885, 269, Moore, Dig., VI. 995; Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, Oct. 2, 1899, For. Rel. 1900, 810, 811; de Forge Case, French-American Claims Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, 2781, where the payment of duties was not deemed to be an act to aid and comfort the Confederate forces.

[3] Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, No. 615, April 5, 1879, MS. Inst. Mexico, XIX, 556, Moore, Dig., VI. 991; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 84, Aug. 13, 1886, MS. Inst. Peru, XVII. 228, Moore, Dig., VI. 992; Mr. Hay, Secy. of State, to Mr.

concluded with him. It has frequently been declared that unless the conduct of the contracting State was tortious, the citizen should be left to his own devices, save for the possible assistance derived from the good offices of his country lent for the purpose of encouraging the foreign State to give careful attention in a domestic sense to the equities of the case.[1] This practice has encouraged belief that the United States has developed a rule of procedure, peculiar to contractual claims and not applied by itself to those of different origin.[2] It has been contended also that national reluctance to interpose is based solely upon grounds of expediency.[3] It may be doubted whether either suggestion explains fully what has taken place. If cases in which interposition is commonly withheld possess also an element which, whenever present in claims of different origin, serves also to produce a like result, the treatment accorded the former would merely emphasize the existence of a principle of general applicability. Moreover, habitual unwillingness on the part of a State under well-defined circumstances to lend its aid to its own nationals burdened with contractual issues with foreign governments, might encourage the inference that a sense of justice rather than one of expediency impels restraint.

It has been seen that the propriety of interposition depends pri-

Dudley, Minister to Peru, Nov. 21, 1898, For. Rel. 1901, 430; Moore, Dig., VI, 993.

See, also, Dix Case, American-Venezuelan Commission, 1903, Ralston's Report, 7, 8; Heny Case, before same Commission, *id.*, 14, 22.

In the Bolívar Railway Company Case, British-Venezuelan Commission, 1903, Ralston's Report, 388, 394, it was said by Mr. Plumley, Umpire: "The nation is responsible for the obligations of a successful revolution from its beginning, because, in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result. . . . Success demonstrates that from the beginning it was registering the national will."

[1] Mr. Madison, Secy. of State, to Mr. Livingston, Minister to France, Oct. 27, 1803, MS. Inst. U. S. Ministers, VI, 155, Moore, Dig., VI, 707; Collection of documents cited, *id.*, VI, 705–707; Mr. J. Q. Adams, Secy. of State, to Mr. Salmon, April 29, 1823, Am. State Pap., For. Rel., V, 403, Moore, Dig., VI, 708; Mr. Buchanan, Secy. of State, to Mr. Ten Eyck, Commissioner to Hawaii, Aug. 28, 1848, MS. Inst. Hawaii, II, 1, Moore, Dig., VI, 708; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 709; Mr. Fish, Secy. of State, to Mr. Miller, May 16, 1871, 89 Dom. Let. 348, Moore, Dig., VI, 710; Mr. Bayard, Secy. of State, to Mr. Bispham, June 24, 1885, 156 MS. Dom. Let. 88, Moore, Dig. VI, 716.

[2] E. M. Borchard, "International Contractual Claims and their Settlement", *Society for Judicial Settlement of International Disputes, No. 13*, Baltimore, 1913, 4–6, 7–9, 10–11; same author, Diplomatic Protection, § 112; Memorandum of Law Officer of Department of State, Dec. 8, 1906, concerning wrongs done to American citizens by the Government of Venezuela, Senate Doc. No. 413, 60 Cong., 1 Sess., 109; R. Floyd Clarke, *Proceedings*, Am. Soc. of Int. Law, IV, 149.

[3] Clement L. Bouvé, *Proceedings*, Am. Soc. Int. Law, IV, 174, 181.

marily upon a denial of justice by the foreign territorial sovereign, and secondarily, upon its failure to offer a means of redress for its own delinquency. Whenever States make adequate provision for the adjudication of contractual claims against them before domestic tribunals, as they frequently do,[1] the latter requirement is wanting,[2] and, howsoever the breach of contract is regarded, the situation merely affords an illustration of the general principle respecting the duty of a claimant to exhaust his local remedies.[3]

It may be doubted, however, whether the mere breach of a promise by a contracting State with respect to an alien is generally looked upon as amounting to internationally illegal conduct. Nor does the motive which impels such action appear to suffice

[1] "Local Remedies are provided generally in foreign countries for the settlement of contract claims founded upon contracts with the Government or its agencies." Department of State, Claims Circular of 1919, Section 8.

[2] § 145 of the Judicial Code, 36 Stat. 1136, U. S. Comp. Stat. 1918, § 1136, conferred upon the Court of Claims a limited jurisdiction over contractual claims against the United States. That jurisdiction appears to have been somewhat restricted also by the Act of March 4, 1915, § 5, 38 Stat. 996, U. S. Comp. Stat. 1918, § 1136a.

According to § 153 of the Judicial Code, 36 Stat. 1138, U. S. Comp. Stat. 1918, § 1144, the jurisdiction of the Court of Claims is not permitted to extend to any claim against the Government, growing out of or dependent upon any treaty stipulation "entered into with foreign nations or with the Indian tribes."

According to § 155 of the Judicial Code, 36 Stat. 1139, U. S. Comp. Stat. 1918, § 1146: "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

See, also, par. 20, § 24, of the Judicial Code, 36 Stat. 1093, U. S. Comp. Stat. 1918, § 991 (20), giving concurrent jurisdiction, in certain classes of cases, to the United States District Courts.

In the case of Eastern Extension Telegraph Co. *v.* United States, 231 U. S. 326, it was held that while the Act of March 3, 1887 (the Tucker Act), broadened the then existing jurisdiction of the Court of Claims, the Act was not necessarily repugnant to or inconsistent with the statutory limitations excluding from the jurisdiction of the Court claims arising from treaty. See, also, Eastern Extension Telegraph Co. *v.* United States, 251 U. S. 355, 357, 362.

Concerning the right of a British subject to sue in the Court of Claims by reason of the reciprocal treatment accorded American citizens in Great Britain, by a petition of right, see United States *v.* O'Keefe, 11 Wall. 178. See, also, documents cited in Moore, Dig., VI, 676–677, relative to the rights of Turkish and Russian subjects to sue in the Court of Claims; E. M. Borchard, Diplomatic Protection, § 70.

[3] Declared Mr. Bayard, Secy. of State, to Mr. Bispham, June 24, 1885: 'When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the Government of the United States remands all claims held abroad, as well as at home, to the action of that Court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary." 156 MS. Dom. Let. 88, Moore, Dig., VI, 715. Obviously, the duty to withhold interposition until local remedies have been exhausted is always based on the assumption that the courts of the territorial sovereign have done nothing to forfeit the confidence of the outside world in their integrity or ability.

to attach to it a lawless character which it would otherwise not possess.[1] In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until at least there has been a refusal either to adjudicate locally the claim arising from the breach, or, following an adjudication, to heed the adverse decision of a domestic court. Upon the happening of either of these events the denial of justice is regarded as first apparent. There is then seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time.

(2)

§ 304. Instances of Interposition.

Instances are numerous where the foreign State commits an act which not only violates its agreement, but also presents a tortious aspect, in evincing, for example, a wanton disregard of the duty to protect the person or property of the claimant. In such a situation, if justice is not obtainable through domestic channels, interposition finds justification because the conduct of the contracting State partakes of a character which is generally denounced as illegal, irrespective of the fact that it is also inconsistent with the contractual duty towards the claimant.[2] This is seen when the contracting State, contrary to the terms of its agreement, forfeits a concession without judicial procedure,[3] or when it ar-

[1] The presence or absence of bad faith on the part of a State in disregarding the terms of a contract with an alien is unimportant except as a circumstance to be considered in determining whether the conduct of the State with respect to the alien constitutes, irrespective of the breach of contract, a denial of justice.

[2] See, for example, Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 724–725; Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, relative to the claim of the New York & Bermudez Co. against Venezuela, For. Rel. 1908, 774, 793.

[3] See, for example, Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, No 9, July 25, 1858, Moore, Dig., VI, 723; Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 724; Same to Same, No. 122, Aug. 12, 1887, MS. Inst. Venezuela, III, 578, Moore, Dig., VI, 725; Ozama Bridge Claim (Henry W. Thurston) against the Dominican Government, For. Rel. 1898, 274–291, Moore, Dig., VI, 729; Memorandum of W. L. Penfield, Solicitor to the Dept. of State, concerning claims of Salvador Commercial Company against Salvador, For. Rel. 1902, 839, 843; opinion of a majority of the arbitrators in the same case under agreement with Salvador of Dec. 19, 1901, *id.*, 862, 871; Mr. Blaine, Secy. of State, to Mr. Loring, American Minister, Oct. 12, 1889, concerning the Delagoa Bay Railway Concession, For. Rel. 1902, 849, Moore, Dig., VI, 727–728; Mr. Olney, Secy. of State, to Mr. Gana, Chilean Minister, June 28, 1895, For. Rel. 1895, I, 83, Moore, Dig., VI, 728; Mr. Hay, Secy. of State, to Mr. Hunter, Nov. 4, 1898, concerning

bitrarily, and without regard for the decisions of its own courts grants away to others rights lawfully vested by contract in the concessionaire, thereby impairing or destroying the value of the concession.[1] Again, if the territorial sovereign does not hold itself amenable to suit in its own courts,[2] or unreasonably discriminates against the alien claimant in seeking access thereto,[3] or perverts its judicial system for purposes of oppression or for the purpose of obtaining a decision in its favor,[4] the gross failure to perform an obvious duty of jurisdiction explains the action of the State of the claimant. No principle peculiar to contractual claims is involved.

If redress is demanded on account of a denial of justice apart from the breach of contract, the damages attributable to the foreign territorial sovereign ought logically to be measured by a delictual rather than by a contractual standard, that is, by the extent of the harm suffered by the claimant through the commission of internationally illegal conduct, rather than by the prospective benefits lost through the breach of the agreement.[5] It is to be observed, however, that when the United

Claim of R. H. May *v.* Guatemala, For. Rel. 1900, 648, Moore, Dig., VI, 730, also award of the arbitrators in this case, under protocol with Guatemala, of Feb. 23, 1900, For. Rel. 1900, 659. See, also, telegram of Mr. Root, Secy. of State, to Mr. Fox, American Minister to Ecuador, June 15, 1907, concerning the difficulty between the Ecuadorean Government and the Guayaquil and Quito Ry. Company, an American Corporation, For. Rel. 1907, I, 385.

[1] Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning the claim of the Orinoco Corporation against Venezuela, For. Rel. 1907, 774, 780. Although the Government of Venezuela agreed, Feb. 13, 1909, to adjust this claim by arbitration unless an amicable settlement were made with the company with the consent of the United States, an agreement for settlement was finally reached by diplomacy whereby the Venezuelan Government undertook to pay the sum of $385,000, one eighth in cash, and the balance in seven equal installments. *Am. J.*, III, 985, 987; *id.*, Supp., III, 224.

See, also, the so-called Critchfield Claim (United States & Venezuela Co.) against Venezuela, arising from the destruction by increased taxation of the vested rights of the claimant contrary to the terms of its concession. For. Rel. 1908, 793–796. Respecting the agreement of Feb. 13, 1909, to adjust this claim by arbitration, and its ultimate settlement by diplomacy, see *Am. J.*, III, Supp., 224; *Am. J.*, III, 985–987.

[2] Mr. Evarts, Secy. of State, to Mr. Gibbs, Minister to Peru, Oct. 31, 1877, For. Rel. 1895, II, 1036, Moore, Dig., VI, 720.

[3] Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, Dec. 13, 1877, MS. Inst. Haiti, II, 121, Moore. Dig., VI, 724. See, also, Mr. Bayard, Secy. of State, to Mr. Hall. Minister to Central America, Sept. 11, 1888, For. Rel. 1888, I, 165. Moore, Dig., VI. 727.

[4] Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning claim of New York & Bermudez Co. against Venezuela, For. Rel. 1908, 774, 793; Same to Same, June 21, 1907, *id.*, 800, 803.

[5] "A purely delictual action is based upon detriment suffered by the plaintiff, and that detriment is the measure of damages. A purely contractual action, on the other hand, is based on breach of promise, whether accompanied by

States interposes in behalf of a claimant who is able to show a breach of contract as well as a denial of justice, the Department of State is disposed to seek adjustment of the entire controversy by arbitration,[1] and to clothe the arbitral tribunal with jurisdiction

detriment or not, and the measure of damages is the benefit that would have resulted to the plaintiff from performance." John William Salmond, "The History of Contract", Essays in Anglo-American Legal History, III, 320–327.

[1] The history of express assumpsit in private law affords an interesting parallel. In his masterly essay upon the subject (originally published in 1888, in *Harvard Law Review*, II, 1–18, 53–69, 377–380, reprinted in 1909, in Select Essays in Anglo-American Legal History, III, 259, and in 1913, in Ames, Essays on Legal History, 129), Professor Ames showed that the earliest cases of assumpsit were those where the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant, and that it was necessary to allege an undertaking by the latter which had been violated. Thus an assumpsit was laid in the declaration where the case was "against a ferryman who undertook to carry the plaintiff's horse over the river but who overloaded the boat, whereby the horse was drowned." *Citing* Y. B., 22 Ass. 94, pl. 41. It is said that for centuries the statement of the assumpsit was deemed essential in the count. "But the actions were not originally," declared the learned writer, "and are not to-day, regarded as actions of contract. They have always sounded in tort." The significance of the assumpsit is shown to be due to the primitive conception of legal liability. "The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. . . . If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill." It is shown also that an express assumpsit was originally an essential part of the plaintiff's case in actions on the case against bailees for negligence in the custody of what was entrusted to them, but that with the lapse of time it was gradually dispensed with. Actions for deceit against the vendor of a chattel upon a false warranty likewise called for the allegation of an undertaking by the defendant, although in its origin the action was one of tort. The early struggle to maintain actions on the case for deceit both served the purpose of emphasizing the unimportance of proof of a misfeasance by the defendant where the plaintiff through the deceit of the defendant had been induced to part with his property, and also paved the way for the maintenance of actions for the breach of a parol promise, that is, for a pure non-feasance. Professor Ames pointed out that both in equity and at law "a remedial breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was," he added, "in several instances distinguished from contract. By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*. Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised."

The requirement of the United States to-day that a breach of contract must constitute also a tort in order to be regarded as internationally illegal conduct and as furnishing just cause for interposition resembles the attitude of the early English judges respecting the remedial breach of a parol promise. The tendency to devise means for the obtaining of redress for something more than the harm suffered through the tortious conduct of the foreign State, and to enable the claimant to secure compensation for the loss of the thing promised, suggests the struggles of jurists of the sixteenth century. It is as true of public contracts to which a State is a party as of those between private individuals, that a pure non-feasance shown by the breach of the agreement may deprive the promisee of a substantial benefit which cannot be measured by damages

to award damages both for the failure of the claimant to obtain the thing promised, and for the harm suffered through the internationally illegal conduct of the foreign State.[1]

Although courts of arbitration exercising jurisdiction with respect to contractual claims pursuant to appropriate conventions have not hesitated to assess damages on a contractual basis,[2] they have been unwilling to allow compensation for benefits of which the claimants were unable to prove that the breach of the obligation had served to deprive them.[3]

fixed according to a delictual standard. Thus, as is observed in the text, effort is made to obtain by arbitration, adjudication of the contractual as well as delictual delinquency of a foreign State whenever the conduct of the latter is deemed to justify interposition, and to empower the tribunal to award damages for the direct consequences of the failure to fulfill the agreement. From this practice it would take but a single step to maintain that the breach of a contract concluded with an alien is capable of being regarded as itself a denial of justice. What probably restrains the United States from so doing, is recognition of the fact that in well-ordered countries opportunities for redress through judicial channels render more and more infrequent the necessity for the plea that justice cannot be obtained through the exhaustion of local remedies, rather than a belief that a breach of contract is not reprehensible or beyond the reasonable cognizance of the State of the promisee.

[1] In the case of R. H. May *v.* Guatemala, submitted to arbitration under protocol of Feb. 23, 1900, it was agreed that the issues were in part whether the claimant was entitled to moneys under certain contracts between himself and the Government of Guatemala, as well as for damages alleged to have been caused him by military and civil authorities of that State. The learned Umpire, Mr. G. Jenner, allowed the claimant as a portion of his award, $41,588.83 gold, "being the estimated amount of profits he would have earned if he had been allowed to carry on the contract of April 5, 1898, until the conclusion of the term fixed by that instrument." For. Rel. 1900, 659, 674.

See position of the United States in 1897, concerning Ozama Bridge Claim *v.* The Dominican Republic and the report and decision of Mr. Alfred Noble, an engineer, to whom the question as to the value of the structure was referred, For. Rel. 1898, 274–291, Moore, Dig., VI, 729–730; Claim of John D. Metzger & Co. *v.* Haiti, protocol of agreement for arbitration, and award of Hon. William R. Day, Arbitrator, For. Rel. 1901, 262–276; Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning pending claims *v.* Venezuela, For. Rel. 1908, 774; agreement with Venezuela of Feb. 13, 1909, for adjustment by arbitration of certain claims of American citizens against that country, *Am. J.*, III, Supp., 224, Malloy's Treaties, II, 1881; Delagoa Bay Railway Arbitration, especially protocol of June 13, 1891, Malloy's Treaties, II, 1460, and opinion of MM. Lyon-Caen and Renault in behalf of the claimants, Moore, Arbitrations, II, 1895–1896; Award of the Arbitrators, For. Rel., 1900, 903.

Cf. Mr. Knox, Secy. of State, to Mr. Russell, Minister to Persia, Dec. 1, 1911, respecting the contractual claims of Mr. W. Morgan Shuster and his associates, against Persia, For. Rel. 1911, 685. See, also, Clement L. Bouvé, "Russia's Liability in Tort for Persia's Breach of Contract", *Am. J.*, VI, 389.

[2] Ralston, Umpire, in Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 819, 843–845; Bainbridge, Commissioner, in de Garmendía Case, American-Venezuelan Commission, 1903, *id.*, 10, 12; also Memorandum of Sir N. J. Hannen, Arbitrator in the Cheek Case (Estate of Marion A. Cheek, deceased), against Siam, March 21, 1898, Moore, Arbitrations, V, 5069, 5071–5072.

[3] Opinion of Sir Henry Strong and Hon. Don M. Dickinson in Salvador Commercial Company Case *v.* Salvador, For. Rel. 1902, 862, 872; Bain-

When a denial of justice accompanies the breach of a contract the duty to withhold interposition is not necessarily to be disregarded. The cases oftentimes indicate, however, that the act deemed to be internationally illegal is itself either an abuse of the local judicial system, or a sure token that redress is not obtainable through domestic channels.[1] In such instances the propriety of interposition is not influenced by the contractual relationship between the aggrieved citizen and the foreign State; and justification is to be found in the applicability of those general principles of procedure which always project themselves whenever a State is called upon to espouse the cause of its nationals and to demand redress in their behalf.

(3)

§ 305. The Calvo Clause.

The presence in a contract between an American citizen and a Latin-American State, of the so-called Calvo clause,[2] providing in substance that any controversy arising from or connected with the agreement shall be decided by the local courts, and shall in no event be the cause of international reclamation, has not deterred the United States from interposition when such action has been deemed by it to be justifiable and necessary.[3] If the territorial sovereign commits an internationally illegal act indicating thereby a denial of justice, as well as a breach of promise not so regarded, the provisions of the clause in question are obviously indecisive of the propriety of interposition.[4] Considering, however, the mere contractual delinquency as a source of con-

bridge, Commissioner, in Rudloff Case, American-Venezuelan Commission, 1903, Ralston's Report, 183, 198; Ralston, Umpire, in Oliva Case, Italian-Venezuelan Commission, *id.*, 779–781.

[1] See, for example, Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, concerning the claims, respectively, of the New York & Bermudez Co., and of the Orinoco Corporation against Venezuela, For. Rel. 1908, 774, 793, 796.

[2] Charles Calvo, Int. Law, 5 ed., I, § 205. See, also, A. S. Hershey, "The Calvo and Drago Doctrines", *Am. J.*, I, 26; discussion in E. M. Borchard, Diplomatic Protection, §§ 371–373; Memorandum of the Solicitor of the Dept. of State, concerning wrongs done American citizens by the Government of Venezuela, Senate Doc. No. 413, 60 Cong., 1 Sess., 116.

[3] See, for example, Mr. Root, Secy. of State, to Mr. Russell, American Minister, concerning the Critchfield Claim (United States & Venezuela Co.), against Venezuela, Feb. 28, 1907, For. Rel. 1908, 774, 796.

[4] Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 118, June 23, 1887, MS. Inst. Venezuela, III, 574, Moore, Dig., VI, 725. Note the application of this principle by Plumley, Umpire, in Selwyn's Case, British-Venezuelan Commission, 1903, Ralston's Report, 322, Moore, Dig., VI, 308.

troversy, it is submitted that a State cannot with reason pronounce void a contract with an alien, and simultaneously demand that a question as to its interpretation or performance be adjusted according to provisions derived from the agreement itself.[1] Nor is it believed that by voluntary agreement with a foreign State a national can deprive his own country of any right to protect him which it may otherwise possess.[2]

Possibly a contract providing that nothing relating to the agreement shall be made the subject of international reclamation until after the exhaustion of local judicial remedies, may be looked upon as declaratory of a sound principle of procedure applicable to the case of a purely contractual wrong where no denial of justice is apparent. Such an adjustment expresses no attempt to oust a foreign State of its right of interposition if the contracting sovereign fails to perform its acknowledged duty of jurisdiction. Such an agreement could not, however, prevent the State of the contracting citizen from including any claim arising from the contract, even though not based upon a denial of justice, within the scope of the operation of a claims convention. Notwithstanding some divergence of views, the weight of judicial opinion sanctioned by the decision in the case of the Orinoco Steamship Company before the Tribunal assembled at the Hague, under the convention between the United States and Venezuela, of February 13, 1909, appears with reason to regard an agreement to arbitrate as a renunciation of any clause in the contract restricting or forbidding diplomatic reclamation.[3]

[1] Opinion of Little, American Commissioner, in case of Day and Garrison, executors, No. 38, American-Venezuelan Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 3564; Moore, Dig., VI, 301; Mr. Blaine, Secy. of State, to Mr. Loring, Minister to Portugal, Nov. 30, 1889, Moore, Arbitrations, II, 1870, Moore, Dig., VI, 297; Case of North and South American Construction Company *v.* Chile, No. 7, American-Chilean Commission, Convention of Aug. 7, 1892, Moore, Arbitrations, III, 2318, Moore, Dig., VI, 302; Mr. Root, Secy. of State, to Mr. Russell, American Minister, Feb. 28, 1907, For. Rel. 1908, 774, 784–785, 796.

[2] Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 188, Feb. 15, 1888, MS. Inst. Peru, XVII, 323, Moore, Dig., VI. 294; Same to Mr. Hall, Minister to Central America, March 27, 1888, For. Rel. 1888, I, 134–137, Moore, Dig., VI, 295; Mr. Adee, Acting Secy. of State, to Mr. Partridge, Minister to Venezuela, July 26, 1893, For. Rel. 1893, 734, Moore, Dig., VI, 299. See, also, *dissenting* opinion of Little, American Commissioner in Case of Henry Woodruff and that of Flannagan, Bradley & Co., No. 20 and No. 25, American-Venezuelan Commission, Dec. 5, 1885, Moore, Arbitrations, 3536, Moore, Dig., VI, 303; Ralston, Umpire, in the Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 840–841, Moore, Dig., VI, 308; Senate Doc. No. 413, 60 Cong., 1 Sess., 116.

[3] J. B. Scott, Hague Court Reports, 228, *Am. J.*, V, 230, 233. Concerning the decision in its relation to the Calvo clause, see W. C. Dennis, "The Orinoco Steamship Company Case before The Hague Tribunal", *id.*, V, 35, 50–51.

(4)

§ 306. The Scope of Claims Conventions to Which the United States Has Been a Party.

The earliest agreements of the United States for the adjustment by arbitration of claims of American citizens did not embrace those arising from contracts with foreign governments. Art. VII of the Jay Treaty with Great Britain of November 19, 1794, provided for cases arising from the "irregular or illegal captures or condemnations of vessels and other property." [1] Art. XXI of the treaty with Spain of October, 27, 1795, provided for the arbitration likewise of differences arising from losses sustained by American citizens in consequence of the taking of their vessels and cargoes by Spanish authorities during the war

Also opinion of Ralston, Umpire, in the Martini Case, Italian-Venezuelan Commission, 1903, Ralston's Report, 840–841; opinion of Plumley, Umpire, in Selwyn's Case, British-Venezuelan Commission, 1903, *id.*, 322; Coro and La Vela Railway and Improvement Company Case, American-Venezuelan Commission, 1903, Morris' Report, 69; Virgilio del Genovese Case, before same Commission, *id.*, 397, Ralston's Report, 174; opinion of Barge, Umpire, in Case of the Rudloffs, before same Commission, Morris' Report, 431, Ralston's Report, 182.

Compare opinions of Barge, Umpire, in the following cases before the American-Venezuelan Commission, 1903; Henry Woodruff, Ralston's Report, 151, 158; Orinoco Steamship Company, *id.*, 83, 90–91; Geo. Turnbull, *id.*, 200, 239.

For an excellent discussion of the foregoing and other decisions, see Moore, Dig., VI, 301–309; also Ralston, Arbitral Law, 34–44.

[1] Malloy's Treaties, I, 596. The instructions of Mr. Randolph, Secy. of State, to Mr. Jay, show that the United States sought merely a means of redress respecting claims arising from acts deemed to have been internationally illegal because committed by British authorities pursuant to certain Orders in Council of 1793, in disregard of what were believed to have been the rights of the United States as a neutral during the war between France and England. Communication of May 6, 1794, Am. State Pap., For. Rel. I, 472; see, also, Mr. Jay's representation to Lord Grenville, July 30, 1794, *id.*, 481; and the reply thereto of the latter, Aug. 1, 1794, *id.* It may be observed that the Article agreed upon contained the interesting provision that adjustment by arbitration should embrace "all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice." In his report to the Secretary of State of Nov. 19, 1794, accompanying the treaty, Mr. Jay declared that it was "very much to be regretted that a more summary method than the one indicated in the seventh Article could not have been devised and agreed upon for settling the capture cases." *Id.*, I, 503. Concerning the arbitration pursuant to this Article, see Moore, Arbitrations, I, 299-349.

See, also, Art. VI of the Jay Treaty, with reference to the provision made for the adjustment of claims of British subjects arising from the "operation of various lawful impediments since the peace", interfering with the recovery and lessening of the value of debts contracted with American citizens. Malloy's Treaties, I. 594. Concerning the failure of the arbitration, and the final adjustment pursuant to the Convention of Jan. 8, 1802, see Moore, Arbitrations, I, 271–298.

between France and Spain.[1] The claims convention with Spain of August 11, 1802, provided for the adjustment of claims arising from the "excesses committed during the late war by individuals, of either nation, contrary to the law of nations or the treaty existing between the two countries." [2] By Art. IX of the treaty with Spain of February 22, 1819, known as the Florida Treaty, there was a mutual renunciation of claims, embracing those mentioned in the Convention of 1802, as well as others based upon alleged denials of justice, and including also claims in which interposition had been solicited by aggrieved citizens of either State, and a demand for redress duly preferred upon the other subsequent to the date of the convention of 1802.[3] The United States undertook by Art. XI to make satisfaction to its own citizens for their claims so renounced to the amount of $5,000,000. The commission established for the purpose of passing upon the validity and amount of American claims, regarded those of contractual origin within the scope of its jurisdiction.[4] Art. I of the claims convention with Mexico of April 11, 1839, provided for the arbitration of "all claims of citizens of the United States upon the Mexican Government", wherein the interposition of the United States had been solicited prior to the signature of the convention.[5]

The Mexican claims commission established under the Act of Congress of March 3, 1849, to pass upon claims of American

[1] Malloy's Treaties, II, 1648. Concerning the Arbitration, see Moore, Arbitrations, II, 991–1005.

Mr. Pickering, Secy. of State, in instructions of Oct. 22, 1799, to the American plenipotentiaries to France, sought the adjustment by arbitration of pending claims embracing all those "for sums due to American citizens, by contracts with the French Government or its agents." Am. State Pap., For. Rel. II, 301, 303. By the Convention of April 30, 1803, For Payment of Sums Due by France to Citizens of the United States, arrangement was made for the payment of debts due by France before Sept. 30, 1800, to citizens of the United States. Malloy's Treaties, I, 513. Relative to this Convention, see J. C. B. Davis, "Notes", Treaty Vol. (1776–1887) 1306–1308.

[2] Malloy's Treaties, II, 1650. Concerning the failure of this convention and its annulment by Art. X of the treaty between the United States and Spain, of Feb. 22, 1819, see J. C. B. Davis, "Notes", Treaty Vol. (1776–1887) 1384–1385.

[3] Malloy's Treaties, II, 1654.

[4] See treatment of the claim of R. W. Meade, following the interpretation placed upon the treaty by Mr. J. Q. Adams, Secy. of State, Moore, Arbitrations, V, 4502–4504.

The Mexican Claims Commission, under Act of Congress of March 3, 1849, relied upon the position respecting contractual claims taken by the Commission under the Florida treaty. *Id.*, 1279.

[5] Malloy's Treaties, I, 1101. The provision of Art. I was apparently broader than that of the preamble of the Convention which referred to the desire of the contracting parties to terminate discussions respecting claims "arising from injuries to the persons and property of citizens of the United States."

citizens against Mexico (which, pursuant to the Treaty of Guadalupe-Hidalgo, the United States itself undertook to pay to the amount of three and a quarter millions of dollars), was to be guided by the principles of an unratified convention of November 20, 1843.[1] Art. I of the latter embraced "all claims" of citizens of the United States. This commission, as well as that under the convention of 1839, assumed jurisdiction over contractual claims, awarding indemnities in cases where no denial of justice was apparent. The members of both commissions were evidently of opinion that in view of the jurisdiction conferred upon them, the right of a claimant to an award was not necessarily dependent upon proof that any internationally illegal act had been committed by the Mexican Government.[2]

Art. I of the claims convention with Great Britain of February 8, 1853, provided for the arbitration of "all claims on the part of corporations, companies or private individuals", who were citizens or subjects respectively of the contracting States, and which had been presented to either Government for its interposition with the other after the Treaty of Ghent.[3] No case based upon a contract was submitted for adjudication. In one case of a quasi-contractual nature, compensation was awarded.[4] Art. I of the claims convention with New Granada (now Colombia) of September 10, 1857,[5] and likewise Art. I of that with Ecuador of November 25, 1862,[6] embraced "all claims on the part of corporations, companies or individuals, citizens of the United States." Claimants obtained favorable awards in contractual claims from both commissions.[7] Art. I of the claims convention with Peru of

[1] 9 Stat. 393. For the text of the treaty of Guadalupe-Hidalgo of Feb. 2, 1848, see Malloy's Treaties, I, 1107. Concerning the work of the Commission, see Moore, Arbitrations, II, 1249–1286

[2] Among the cases decided by the Commission under the Convention of April 11, 1839, see that of the *Hermon*, Moore, Arbitrations, IV. 3425; also that of Dr. Geo. Hunter, *id.*, 3426. Among the cases decided by the Commission under the Act of Cong. of March 3, 1849, see that of Wm. S. Parrott, *id*, 3429; that of Cox and Elkins, *id.*, 3430; case of Wm. S. Underhill, *id.*, 3433

[3] Malloy's Treaties, I, 665. Concerning the work of the Commission established pursuant to the treaty, see Moore, Arbitrations, I, 391–425.

[4] Case of Hudson's Bay Co., No. 37, "for supplies furnished American volunteers raised in Oregon on the breaking out of hostilities with the Indians and expenditures incurred in the rescue of captives from the Indians prior to the organization of the Territorial Government." Moore, Arbitrations, I, 423 and IV, 3458.

[5] Malloy's Treaties, I, 319. Concerning the work of the Commission established pursuant to this convention, and that of the Commission under the Convention with Colombia of Feb. 10, 1864, *id.*, I, 321, to complete the unfinished work of the former, see Moore, Arbitrations, II, 1361–1420.

[6] Malloy's Treaties, I, 432. Concerning the work of the Commission established pursuant to this convention, see Moore, Arbitrations, II, 1569–1577.

[7] The American-New Granadian Commission allowed R. W. Gibbs $6952.60

January 12, 1863, referred to "all claims of citizens" (subject to certain limitations) of either State against the government of the other.[1] According to Art. III the commissioners were to be guided by "principles of justice and equity," as well as those of international law and treaty stipulations. In one case arising from contract and exhibiting no sign of a denial of justice, an indemnity was allowed.[2]

Art. I of the claims convention with Costa Rica, of July 2, 1860, provided for the adjustment by arbitration of "all claims of citizens of the United States upon the Government of Costa Rica arising from injuries to their persons or damages to their property under any form whatsoever, through the action of the authorities" of that Republic.[3] It is understood that the commission established pursuant to the convention allowed compensation in cases of contractual origin.[4]

Art. I of the claims conventions with Venezuela, of April 25, 1866,[5] and with Peru of December 4, 1868,[6] followed the broader language of the earlier conventions with New Granada and Ecuador; and both were similarly construed as embracing contractual claims.[7]

Art. I of the claims convention with Mexico, of July 4, 1868, provided for the arbitration of "claims on the part of corporations, companies, or private individuals, citizens" of either State "arising from injuries to their persons or property by authorities"

on a Colombian bond or instrument. Report of the American Commissioner, Moore, Arbitrations, II 1384, 1385. The American-Ecuadorean Commission awarded compensation to Abraham Johnson for balance due on shoes sold to the *de facto* government of General Franco in 1860. Report of Mr Hassaurek, American Commissioner, *id.*, 1575.

[1] Malloy's Treaties, II, 1408. Concerning the work of the Commission established pursuant to the Convention, see Moore, Arbitrations, II, 1615–1638.

[2] Case of Thomas R. Eldredge, Moore, Arbitrations, IV, 3460.

[3] Malloy's Treaties, I, 346. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1551–1568.

[4] As authority for this statement reliance is placed upon the Brief of Mr. J. Hubley Ashton, American Agent, in the Case of the State Bank of Hartford, before the Mexican-American Commission, Convention of July 4, 1868, and mentioned by E. M. Borchard, in "International Contractual Claims and Their Settlement", 1913, note No. 42.

[5] Malloy's Treaties, II, 1856. The same language was employed in Art. II of the Convention of Dec. 5, 1885, which superseded that of April 25, 1866. *Id.*, II, 1860. Concerning the work of the commissions under these conventions, see Moore, Arbitrations, II, 1659–1692.

[6] Malloy's Treaties, II, 1411. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1639–1657.

[7] See the Case of Thomas J. Clark before the American-Peruvian Commission, Convention of Dec. 4, 1868, Moore, Arbitrations, II, 1651–1652. Also Case of Jacob Idler, before the American-Venezuelan Commission, Convention of Dec. 5, 1885, superseding that of April 25, 1866, Moore, Arbitrations, IV, 3491.

of the other.[1] Dr. Francis Lieber, the first umpire of the commission, awarded compensation in various claims of contractual origin.[2] His successor, as umpire, Sir Edward Thornton, agreed that the terms of the convention sufficed to give jurisdiction in such cases.[3] He expressed the opinion, however, that where a contract was voluntarily concluded between the claimant and a government authority, it should be shown that "gross injustice has been done by the defendant" in order to justify an award against it.[4]

Art. XII of the Treaty of Washington with Great Britain of May 8, 1871, provided for the arbitration of "all claims . . . arising out of acts committed against the persons or property" of citizens or subjects of the contracting States within a specified period of time, and exclusive of the so-called Alabama Claims.[5] One contractual claim against Great Britain was, on demurrer, unanimously disallowed.[6]

According to paragraph 5 of the agreement with Spain of February 11–12, 1872, for the adjustment by arbitration of certain claims of American citizens, it was expressly declared that the arbitrators should "not have jurisdiction of any demands growing out of contracts." [7]

Art. I of the claims convention with France of Jan. 15, 1880, for the adjustment by arbitration of claims of citizens of either country against the government of the other, referred to "all claims on the part of corporations, companies or private individuals, citizens of the United States [and conversely of France], arising out of acts committed against the persons or property" of such individuals, and subject to certain limitations.[8] The

[1] Malloy's Treaties, I, 1128. Concerning the important and successful work of the Commission under this Convention, see Moore, Arbitrations, II, 1287–1359.

[2] See, for example, Case of Manasse & Co., Moore, Arbitrations, IV, 3462; Case of Iturria, *id.*, 3464. *Compare* case of Thore de Lespes, *id.*, 3466.

[3] Case of Heirs of John M. De Witt, *id.*, 3466.

[4] Chas. H. Pond Case, *id.*, 3467.

[5] Malloy's Treaties, I, 700, 705. Concerning the work of the Commission under this treaty, see Moore, Arbitrations, I, 682–702. The Report of Robert S. Hale, Agent and Counsel of the United States, forms Vol. III of For. Rel. 1873.

[6] Case of W. W. Hubbell against Great Britain, No. 17, Hale's Report, For. Rel. 1873, III, 40, Moore, Arbitrations, IV, 3484. Among the grounds for demurrer it was alleged, first, that contractual claims were outside of the scope of the treaty, and secondly, that if they were within its scope, "the claimant could have no standing before the commission as an international tribunal until he had exhausted the remedies in all the courts of Great Britain, and until justice had been denied him by such tribunals *in re minime dubia.*"

[7] Malloy's Treaties, II, 1663.

[8] Malloy's Treaties, I, 535, 536. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1133–1184.

commission established under this convention exercised jurisdiction over contractual claims; in two cases of that character, the claims were disallowed following an adjudication on their merits.[1]

Art. II of the claims convention with Venezuela, of Dec. 5, 1885, like Art. I of that of April 25, 1866, which it superseded, referred to "all claims . . . of citizens of the United States," subject to certain limitations.[2] Jurisdiction over contractual claims was assumed by the commission.[3] Art. I of the claims convention with Chile of August 7, 1892, like Art. I of that with France, of January 15, 1880, referred, subject to certain limitations, to "all claims . . . of citizens, arising out of acts committed against the persons or property" of such individuals,[4] and the commission established pursuant to the convention likewise exercised jurisdiction over contractual claims.[5] Art. I of the claims convention with Venezuela, of February 17, 1903, made provision for the arbitration (subject to certain limitations) of "all claims" of American citizens.[6] The commission established thereunder was not reluctant to accept jurisdiction over contractual claims.[7]

[1] Case of S. L. M. Barlow, assignee, No. 18, Moore, Arbitrations, IV, 3486; and case of William H. Frear, No. 9, *id.*, 3488.

[2] Malloy's Treaties, II, 1860 and 1856. Concerning the work of the Commission under Convention of 1885, and as interpreted and extended in operation by Conventions of March 15, 1888, and Oct. 5, 1888, respectively, see Moore, Arbitrations, II, 1674–1692.

[3] In the important case of Jacob Idler, although growing out of contract, the Commission found a denial of justice, in the effect of certain judicial decisions of the Venezuelan Courts, which the Government had invoked. See Moore, Arbitrations, IV, 3491, 3515–3524.

See, also, the Case of John Donnell's Executor, *id.*, 3545; Case of Beales, Nobles and Garrison, *id.*, 3548–3564 (disallowed); Case of Flannagan, Bradley, Clark & Co., *id.*, 3564 (disallowing claim because of failure of claimant to observe terms of agreement providing for the adjudication of issues respecting the contract before Venezuelan courts, and expressly declaring that no matter connected with the contract should be made the subject of international reclamation). See dissenting opinion of Little, Commissioner, in the last-named case, *id.*, 3566; Case of Thomas U. Walter, *id.*, 3567. *Compare* quasi-contractual claim of Richard O'Dwyer, which was disallowed, *id.*, 3568.

[4] Malloy's Treaties, I, 185. Concerning the work of the Commission under this Convention, see Moore, Arbitrations, II, 1469–1484, and documents there cited.

[5] See decision on the demurrer of the United States in the case of R. L. Trumbull, No. 27, Moore, Arbitrations, IV, 3569, 3570.

[6] Malloy's Treaties, II, 1870.

[7] Case of Boulton, Bliss & Dallett, Morris' Report, 105, Ralston's Report, 26.

"Many cases of contract between foreigners and the government of Venezuela were received by the Venezuelan commissions of 1903 and acted upon without any objection being raised to their nature, and without any hesitancy on the part of the commissions, and this where such contracts were voluntarily entered into, and, even as we shall see, where they were merely implied." Ralston, Arbitral Law, 29.

The Special Agreement between the United States and Great Britain of August 18, 1910, for the submission to arbitration of outstanding pecuniary claims, made provision in Class IV of the schedule of claims appended thereto, for the reference of "claims based on contracts between the authorities of either government and the nationals of the other government." [1]

From the language of the foregoing agreements of the United States, it must be apparent that it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of the jurisdiction conferred upon them. When jurisdiction has been accepted in a contractual case, the issue has usually been deemed to be whether a contractual obligation was violated by the respondent, and also whether, on the merits of the case, the contracting citizen was entitled to compensation. Thus commissions and umpires have rarely deemed the issue to be whether a breach of contract constituted a denial of justice. Apart from any question as to the correctness of the interpretation placed by Sir Edward Thornton upon the claims convention with Mexico of July 4, 1868, the unwillingness of that umpire to award compensation in contractual cases except upon evidence of "flagrant injustice" is indicative of an opinion entitled to respect, that the mere breach of a contractual duty was not necessarily decisive of the commission of internationally illegal conduct.

(5)

§ 307. Public Bonds.

A State which validly issues a bond formally agrees to pay a fixed sum in the shape of principal and interest at specified times to whatsoever person comes within the tenor of the contract. An alien may come therein by the purchase of such an instrument.[2]

[1] Charles' Treaties, 50, 55. According to paragraph III of the "Terms of Submission" it was provided that: "The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimants to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim."

[2] If the principles of private law applied by American Courts in the cases respecting bonds of municipal corporations afford guidance when the obligor is a State and the obligee an alien, the agreement signifies also that the obligor

The formality of the undertaking, the precision of its terms, the absence of any duty on the part of the obligee to take any steps to secure payment other than to present the bond itself or its coupons, appear to place the obligee in a unique position with respect to the contracting State.

Dr. Luis M. Drago of the Argentine Republic, the distinguished author of the doctrine that bears his name,[1] has urged that bonds constitute an exceptional class of obligations; first, because they are issued by the sovereign power of the State pursuant to legislation; secondly, because they are made payable to bearer; thirdly, because the purchaser buying the bonds in the open market acquires his rights as obligee without other formality or relation with the debtor government; and fourthly, because when payment is for any reason suspended, there is no means of appeal by judicial action or otherwise to the debtor State, inasmuch as the suspension of payment occurs by virtue of the sovereign authority of the State manifested *jure imperii*.[2]

It is not perceived how the process by which a State validly issues a bond, or the functions of government exercised in order to accomplish that end, affect the rights of the obligee or of his State in case of default. Nor does the broad tenor of the agreement, or the method whereby an alien lawfully enters into the contractual relationship with the obligor, offer a solid basis of distinction.

§ 308. The Same.

On principle, the failure of a debtor State to perform its promise with respect to a bond-holder — the bare nonfeasance — differs nowise from the failure to observe an agreement with a promisee expressed in any other form or concluded by any other process. If a mere contractual delinquency is not regarded as internationally illegal conduct, the propriety of interposition would in such case appear to depend solely upon whether, apart from the breach of contract, the obligor has committed a denial of justice manifest in an act generally regarded as such. When, therefore, the de-

will set up no equitable defense against a purchaser for value and without notice, prior to any default in payment of the instrument. See John F. Dillon, Municipal Corporations, 5 ed., §§ 871 and 931, and authorities there cited, especially Mercer County *v.* Hackett, 1 Wall. 82.

[1] The so-called Drago Doctrine was expressed in a note of Dr. Drago, Minister of Foreign Relations of the Argentine Republic, to Señor Mérou, Argentine Minister at Washington, Dec. 29, 1902, For. Rel. 1903, 1–5.

[2] Luis M. Drago, "State Loans in Their Relation to International Policy", *Am. J.*, I, 692.

fault is not the result of an act depriving the obligee of an adequate remedy in the local courts, the opportunity for an adjudication before a domestic tribunal to which the obligor, as in any other contractual controversy, is amenable, should serve to retard interposition until after the exhaustion of local remedies. In the United States the alien obligee is, in such cases, not necessarily without a remedy in the Court of Claims.[1]

Oftentimes, however, the default of the obligor is accomplished through the exercise of sovereign power expressed by legislation, which serves to suspend payment or to modify the agreement with the bondholder, and also operates directly as a repudiation of the contract.[2] The act of repudiation appears to differ sharply from the mere non-performance of the obligor's promise, as it places the State beyond the jurisdiction of its own courts, inasmuch as the sovereign acting as such does not permit the propriety of its conduct to be questioned by any domestic authority or according to any test.[3] This fact renders any issue raised by an

[1] "The fact is that the right to sue on the bonds issued by States is generally allowed. Action in contract to recover principal or interest, due and unpaid, may be brought on the United States bonds in the Court of Claims, or a mandamus may issue to the Secretary of the Treasury, under existing law, to compel him to pay the interest on United States bonds due and unpaid." G. W. Scott, *Am. J.*, II, 78, 91.

See § 145 of the Judicial Code, 36 Stat. 1136, U. S. Comp. Stat. 1918, § 1136, indicating the scope of the jurisdiction of the Court of Claims.

[2] That this power is exercised more frequently to lighten the burden undertaken with respect to alien bondholders than with respect to alien promisees under private contracts with the State is common knowledge. Nevertheless, whenever the power is exercised, the alien promisee, whatsoever be the form of the obligation, finds himself impotent to obtain an adjudication against the State on the merits of the claim. The United States Court of Claims is committed to the doctrine that in a suit on a contract against the United States, the court cannot pass upon the lawfulness of sovereign acts tending to change the contractual duty towards the promisee. Deming *v.* United States, 1 Ct. Cl. 190; Jones *v.* United States, 1 Ct. Cl. 383; Wilson *v.* United States, 11 Ct. Cl. 513. See, also, concerning these cases, G. W. Scott in *Am. J.*, II, 78, 91–92; also Edwin M. Borchard, "International Contractual Claims and Their Settlement", Baltimore, 1913, 52.

[3] Dr. Drago asserts that where the obligor State by virtue of its sovereign authority suspends payment or modifies its agreement "there is not and cannot be any 'denial of justice' because not only does there not exist a tribunal competent to bring action against the debtor State, but it is impossible even hypothetically to conceive of such a tribunal." *Am. J.*, I, 692, 697. If the distinguished statesman intends to convey the idea that a denial of justice must be confined to the acts of the judicial department he fails to recognize the practice that commonly regards a State as capable of committing internationally illegal conduct through any agency of government. If in a particular case the exercise of sovereign power causing the repudiation of a contract is not to be regarded as a denial of justice, it is not because the judicial department of the obligor State is freed from the possibility of itself committing an internationally illegal act.

The substance of Dr. Drago's argument is that the repudiation of the contract of the obligor (although it is not said that the contract is repudiated)

alien obligee or by his State, justiciable solely before an international court.[1] Under such circumstances interposition does not lack justification, because the alien obligee, or his State in his behalf, has the right to demand an adjudication of the controversy before a competent tribunal, and hence the right also to challenge the propriety of any act whereby the obligor attempts to place itself beyond the reach of any court.[2] This must be true irrespective of the contention that the commission of the act of sovereignty is not in bad faith. However influential may be the honesty of the obligor with respect to the policy of the State of the obligee, it has no bearing upon the existence or scope of the right of interposition possessed by the latter.[3]

The treatment accorded the obligee by the obligor may amount to a denial of justice. It is doubtless of such a kind when, by any process, the debtor State injures or destroys or appropriates property sought to be mortgaged as security for the payment of the debt. Such impairment of the value of the right acquired

by the exercise of sovereign power removes from the State of the obligee the right to take steps that it might reasonably take if the obligor had not seen fit to make use of its sovereign power. It ought to be clear that the rights of the obligee and of his State depend upon the consequences of the conduct of the obligor, rather than upon the method which it employs to rid itself of the burdens of its undertaking, and that the very exercise of sovereign power, by reason of the consequences which it entails, necessarily produces an international issue, the solution of which the State of the obligee is entitled to demand.

[1] The following were bond claims against Venezuela which were submitted to mixed commissions under conventions of 1902 and 1903: Compagnie Générale des Eaux de Caracas (where jurisdiction accepted), Belgian-Venezuelan Commission, 1903, Ralston's Report, 271; Ballistini Case (where claim disallowed for want of proof of ownership of bonds), French-Venezuelan Commission, 1902, *id.*, 503; Jarvis Case (where claim disallowed, because the bonds were issued in compensation of services in support of an unsuccessful revolution against the constituted government with which the United States was at peace), American-Venezuelan Commission, 1903, *id.*, 145. In a note attached to the Ballistini Case, *id.*, 505, the compiler says: "In the Italian Commission [Boccardo Case, not reported] judgment was given on internal bonds on authority of Aspinwall Case, Moore, p. 3610." Concerning the foregoing cases, see G. W. Scott, in *Am. J.*, II, 83–84.

[2] In this connection see address of Mr. Ruy Barbosa, a Delegate of Brazil, before the First Sub-Commission of the First Commission at the Second Hague Peace Conference, July 23, 1907, *La Deuxième Conférence Internationale de la Paix*, II, 276–285. An abstract is contained in J. B. Scott, Hague Peace Conferences, I, 411–412.

Mr. Sherman, Secy. of State, to Mr. Powell, Minister to Haiti, No. 43, Oct. 26, 1897, MS. Inst. Haiti, III, 582, Moore, Dig., VI, 729.

[3] As the defaulting State is generally ready to aver that, for reasons beyond its control, it has become insolvent, or at least unable to pay its indebtedness, any yielding to the plea that even the policy of the State of the obligee should depend upon the good faith of the obligor, offers opportunity and temptation to the dishonest debtor to escape the reasonable burden of its contract through false representations, the true nature of which it may become impossible to establish.

by the obligee in the thing hypothecated for his benefit is essentially wrongful and may be justly regarded as internationally illegal.[1] Where the security for payment is the mere agreement or pledge of the obligor that revenues to be thereafter derived from certain specified sources shall be employed for that purpose, it may be doubted whether the diversion of those revenues in violation of the agreement should be regarded as other than a further contractual delinquency,[2] as such conduct would not affect any vested right of the obligee in any asset sought to be placed beyond the control of the obligor for the benefit of the former. The breach of the agreement would not differ essentially from any other, and hence could not itself with reason be regarded as a denial of justice. If, however, the diversion of revenues were effected by an act of sovereignty serving also as a repudiation of the contract, grounds of interposition would be as apparent as in any other situation where the obligor by similar conduct produced an issue solely justiciable before an international court.

(6)

The Collection of Public Debts by Force

§ 309. The Hague Convention of 1907 Respecting the Limitation of the Employment of Force.

The propriety of the use of force for the purpose of collecting contractual claims has of late years been widely discussed.

In December, 1902, Great Britain, Germany and Italy resorted to force against Venezuela by blockading certain ports of that country in order to secure recognition and the means of payment of pending claims, contractual as well as tortious.[3] By protocols signed in May, 1903, there was submitted to the Hague Tribunal the issue whether the blockading Powers were entitled to preferential treatment in the payment of their claims against Venezuela, over the so-called non-blockading claimant Powers, among which was the United States. The Tribunal decided the issue

[1] Marquis of Salisbury, British Foreign Secretary, to Señor Pividal, Peruvian Minister, Nov. 26, 1879, Parl. Pap. Peru, No. 1 (1882), 16–17, Moore, Dig., VI, 724; Opinion of Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 130.

[2] Memorandum of American Peace Commission, Paris, Nov. 21, 1898, respecting the Cuban Debt, S. Doc. 62, 55 Cong., 3 Sess., II, 198–201, Moore, Dig., I, 381, 384.

[3] Concerning the claims of Germany, see Promemoria of the Imperial German Embassy, Dec. 11, 1901, For. Rel. 1901, 192, Moore, Dig., VI, 586; also For. Rel. 1903, 429–431, Moore, Dig., VI, 589. Relative to the blockade, see *id.*, 424, 457–458, 801.

in favor of the blockading Powers.[1] On December 29, 1902, shortly after the employment of force, Dr. Drago, Minister of Foreign Affairs of the Argentine Republic, in a note to Mr. Mérou, the Argentine Minister at Washington, for transmission to the Department of State, declared that

> the principle which she [the Argentine Republic] would like to see recognized is: that the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.[2]

Later, as has been observed, Dr. Drago sought to point out a distinction between the public loans of a State and other forms of its contractual obligations, for the purpose of securing approval of the idea that force should never be employed in behalf of foreign obligees against an obligor State.[3]

At the Second Hague Peace Conference, in 1907, General Horace Porter, a delegate of the United States, offered a proposition which became known as the Porter plan and which was, after amendment, accepted by the Conference and embodied in the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, in the following form:

[1] For the text of the Award, see For. Rel. 1904, 506; J. B. Scott, Hague Court Reports, 56. See, also, Final Report of W. L. Penfield, Agent of the United States, For. Rel. 1904, 509.

[2] For. Rel. 1903, 1–5. See, also, Memorandum by way of response accompanying a note from Mr. Hay, Secy. of State, to Mr. Mérou, the Argentine Minister at Washington, Feb. 17, 1903, *id.*, 5.

Concerning the Drago Doctrine, see Luis M. Drago, "State Loans in Their Relation to International Policy", *Am. J.*, I, 692; Amos S. Hershey, "The Calvo and Drago Doctrines", *id.*, I, 26; G. W. Scott, "International Law and the Drago Doctrine", *North Am. Rev.*, CLXXXVIII, 602 (1906); "The Hague Convention Restricting the Use of Force to Recover on Contract Claims", *Am. J.*, II, 78; Edwin M. Borchard, Diplomatic Protection, § 119; H. A. Moulin, *La Doctrine de Drago*, Paris (1908); S. Pérez Triana, *La Doctrina Drago, Colección de Documentos*, London, 1908; Alfredo N. Vivot, *La Doctrina Drago*, Buenos Aires, 1911; Bibliography in Oppenheim, 2 ed., I, 192; J. B. Scott, Hague Peace Conferences, I, 386, 392–400; A. Pearce Higgins, The Hague Peace Conferences (1909), 184–188, and bibliography.

"It may be noted that Drago protests only against the use of armed force on the collection of public debts and not directly against diplomatic interposition. Most of the writers who have discussed the question have failed to note this distinction, possibly because a denial of forcible measures deprives interposition of its most effective sanction." Edwin M. Borchard, Diplomatic Protection, p. 309.

[3] Luis M. Drago, "State Loans in Their Relation to International Policy", *Am. J.*, I, 692; also address of Dr. Drago before the First Sub-Commission of the First Commission of the Second Hague Peace Conference, July 18, 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 246–251, an abstract of which is contained in J. B. Scott, Hague Peace Conferences, I, 405–411.

> The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.
>
> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any "Compromis" from being agreed on, or, after the arbitration, fails to submit to the award.[1]

While this language restricts the use of armed force to the occasions specified, it is significant as a declaration that the employment of such means of obtaining justice may not be improper when the obligor State refuses to arbitrate, or prevents recourse to arbitration, or fails to submit to an award. The provision, on the other hand, that an offer of arbitration must precede such action on the part of the obligee State is token of the general recognition of the principle that an international judicial remedy which is always available should be exhausted before an appeal to armed force becomes justifiable. The convention simply takes into account the remediless condition of the obligee, and by faciliating if not pressing arbitration, attempts to substitute amicable adjustment by judicial means for non-amicable adjustment based upon the use of force. Moreover, "A debtor State is protected by the law until it puts itself outside the law — that is, outside of the three reasonable reservations." [2]

Thus it would appear that in the event of a controversy, a debtor State would, under the convention, have the right to demand that the State of the obligee enter into a reasonable agreement to arbitrate,[3] before the latter could justly resort to force, and having so agreed, to follow the procedure (as Art. II provides) expressed

[1] Malloy's Treaties, II, 2254, J. B. Scott, Hague Peace Conferences, II, 357. See, also, address of General Porter, before the First Sub-Commission of the First Commission of the Second Hague Peace Conference, July 16, 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 229. For the text of the Porter plan as first presented, *id.*, II, 916, J. B. Scott, Hague Peace Conferences, II, 400. See, also, Instructions to the American Delegates to the Second Hague Conference of 1907, May 31, 1907, For. Rel. 1907, II. 1128, 1133.

[2] G. W. Scott, "The Hague Convention Restricting the Use of Force to Recover on Contract Claims", *Am. J.*, II, 78, 80.

[3] Resolution by the Senate declaring "that the United States approves this Convention with the understanding that recourse to the permanent court for the settlement of the differences referred to in said Convention can be had only by agreement thereto through general or special treaties of Arbitration heretofore or hereafter concluded between the parties in dispute." Malloy's Treaties, II, 2259.

in Part IV, Chapter III of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, especially in the matter of arranging the *compromis*.[1]

In making provision for the treatment of "contractual debts" it is believed that the convention gave expression to an agreement applicable to all forms of indebtedness of a State to an alien, embracing without distinction public loans evidenced by bonds; and that there was contemplated the adjustment of any issue arising from non-payment, whether or not resulting from a repudiation of its contract by an obligor State through the exercise of sovereign power.[2]

4

EXTRADITION

a

§ 310. Preliminary.

Extradition was defined by Chief Justice Fuller in the case of Terlinden *v.* Ames to be:

> The surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him demands the surrender.[3]

[1] See, especially, Art. LIII of this convention, Malloy's Treaties, II, 2238. Also J. B. Scott, Hague Peace Conferences, I, 418–420.

[2] G. W. Scott, "The Hague Convention Restricting the Use of Force to Recover on Contract Claims", *Am. J.*, II, 78, 90–94; J. B. Scott, The Hague Peace Conferences, I, 416–418; A. Pearce Higgins, The Hague Conferences, 194–196; Edwin M. Borchard, International Contractual Claims and Their Settlement, Baltimore, 1913, 52–53. See, also, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 553–561, especially the views expressed by General Porter, 558.

[3] 184 U. S. 270, 289; also, Moore, Extradition, I, § 1, *citing* Billot, *Traité de l'Extradition*, 1.

See, generally, John Bassett Moore, Third Assistant Secretary of State, Report on Extradition, with returns of all cases from August 9, 1842, to January 1, 1890, Washington, 1890; same author, Extradition and Interstate Rendition, 2 vols., Boston, 1891; Moore, Dig., IV, 239–424; same author, The Difficulties of Extradition (reprinted from publications of Academy of Political Science, I, No. 4), New York, 1911; Samuel Thayer Spear, Law of Extradition, International and Interstate, 2 ed., Albany, 1884; John G. Hawley, Law and Practice of International Extradition, Chicago, 1893; Extradition of Fugitives from the United States in Foreign Jurisdiction (Extract from book of instructions to court officials), issued by the Attorney-General, June 1, 1916.

See, also, Biron and Chalmers, Law and Practice of Extradition, London, 1903; A. Billot, *Traité de l'Extradition*, Paris, 1874; Ludovic Beauchet, *Traité de l'Extradition*, Paris, 1899; Paul Bernard, *Traité Théorique et Pratique de l'Extradition*, 2 vols., Paris, 1890; Sir Edward Clarke, Law of Extradition,

The extradition of a fugitive from justice signifies that the State within whose domain he is found, believes it to be preferable that he should be prosecuted by the country where the offense was committed than remain unpunished or even be prosecuted under the laws of the place of asylum.[1] Inasmuch as in the United States and England crime is regarded as territorial, and the wrongdoer punishable solely in the place where his offense occurred, failure on the part of either of them to surrender a fugitive to the foreign country within whose territory he committed a crime, would result in his immunity from prosecution.[2] Where the laws of the State of asylum permit the prosecution of its own nationals, who may have committed offenses on foreign soil, the surrender of such an individual indicates even stronger preference for the prosecution of the wrongdoer at the place where his criminal acts took place. Such preference on the part of the State of asylum always indicates that it regards with respect the administration of justice of the country demanding the fugitive, and also that it itself denounces as illegal and punishable the commission within its own domain of acts such as are laid at the door of the fugitive. Respect for the administration of justice in foreign countries sufficient to encourage States to conclude treaties of extradition is the result of a highly organized society of nations, the intercourse between whose members has become intimate and friendly. The habit of extradition marks the abatement of distrust which long retarded the surrender of fugitives and oftentimes served to thwart the operation of existing treaties.[3]

As a reasonable exercise of its exclusive right of jurisdiction within its own domain, a State is believed to violate no legal duty, in declining, in the absence of treaty, to surrender a fugitive found within its territory to any foreign demanding Govern-

4 ed. (Prepared by that author and E. Percival Clarke), London, 1903; Pasquale Fiore, *Traité de Droit Pénal International et de l'Extradition*, French translation by Antoine, 2 vols., Paris, 1880; Sir Francis T. Piggott, Extradition, London, 1910; J. Saint-Aubin, *L'Extradition et le Droit Extraditionnel Théorique et Appliqué*, 2 vols., Paris, 1913; Maurice Violet, *La Procédure d'Extradition Spécialement dans le Pays de Refuge*, Paris, 1898.

Proceedings, American Society of International Law, III, 95–165; Draft on Extradition prepared by Delegates to the International Commission of Jurists at Rio de Janeiro, For. Rel. 1912, 37–39; Resolutions adopted by the Institute of International Law in 1880, *Annuaire*, V, 127, J. B. Scott, Resolutions, 42; Resolutions adopted by the same body in 1892, *Annuaire*, XII, 182, J. B. Scott, Resolutions, 102.

[1] Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890, For. Rel. 1890, 559, 566, Moore, Dig., IV, 290, 296.

[2] Statement in Moore, Dig., IV, 287.

See also in this connection, For. Rel. 1913, 38.

[3] Moore, Extradition, I, § 8; also Biron & Chalmers, Extradition, 1–14.

ment. Such is the position taken by the judicial and political departments of the United States.[1] Nevertheless the necessity for extradition among civilized States is so evident, and the conclusion of treaties to that end so habitual, that the persistent refusal of a member of the family of nations to enter into any extradition convention with any other member might be looked upon as betokening unfriendly conduct.[2]

b

Extradition without Treaty

(1)

§ 311. Refusal by the United States.

The almost unvarying practice of the United States has been to decline to surrender fugitive criminals save in pursuance of treaty.[3] It has been frequently declared that the Executive lacks the power under such circumstances to cause the arrest and surrender of the individual.[4]

[1] United States *v.* Rauscher, 119 U. S. 407, 411–412; also the learned opinion of Tilghman, C. J., in Commonwealth *v.* Deacon, 10 S. & R., 125; In the Matter of Metzger, 5 How. 176, 188.

Mr. Webster, Secy of State, to Mr. d'Argaïz, June 21, 1842, Webster's Works, VI, 399, 405, quoted in Moore, Dig., IV, 246; Mr. Buchanan, Secy. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. to Brazil, XV, 119, Moore, Dig., IV, 246; Memorandum of Instructions of Mr. Jefferson, Secy. of State, March 22, 1792, entitled "Heads of Consideration on the Establishment of Conventions between the United States and their Neighbors for the Mutual Delivery of Fugitives from Justice", Am. State Pap., For. Rel., I, 258.

[2] Moore, Extradition, I, § 14.

[3] Mr. Bayard, Secy. of State, to Mr. Davie, May 29, 1886, 160 MS. Dom. Let. 354, Moore, Dig., IV, 252; Terlinden *v.* Ames, 184 U. S. 270, 289, *citing* Moore, Extradition, I, 21; United States *v.* Rauscher, 119 U. S. 407.

[4] Mr. Jefferson, Secy. of State, to the President, Nov. 7, 1791, MSS. Department of State, Moore, Extradition, I, 22; Wirt, Atty.-Gen., 1 Ops. Attys.-Gen., 509, 521; Legaré, Atty.-Gen., 3 Ops. Attys.-Gen., 661; Report of Mr. Frelinghuysen, Secy. of State, to the President, Feb. 13, 1884, S. Ex. Doc. 98, 48 Cong., 1 Sess., Moore, Dig., IV, 251; Mr. Gresham, Secy. of State, to Mr. Sousa Roza, June 5, 1895, MS. Notes to Portugal, VII, 171, Moore, Dig., IV, 252; Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico, Dec 13, 1895, For. Rel. 1895, II. 1008 Moore, Dig., IV, 252; Mr. Day, Secy. of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Legation, VII, 29, Moore, Dig., IV, 252.

See Case of Arguelles, who was surrendered in 1864 to Spain by executive order. Moore, Extradition, I, § 27.

The immigration laws of the United States, providing for the deportation of fugitives who have been convicted of crime, are regarded as inapplicable in cases where the individual is merely charged with the commission of an offense. Mr. Bacon, Acting Secy. of State to the Swiss Minister, March 16, 1907, For. Rel. 1907, II, 1044. See, also, Moore, Dig., IV, 259.

Compare case of the extradition and deportation of an individual from Costa Rica to the United States as an act of courtesy in 1913, For. Rel. 1913, 330–332.

(2)

§ 312. Requests on Grounds of Courtesy.

In view of its practice in refusing to surrender fugitives to foreign States with which extradition treaties have not been concluded, the United States does not demand from such countries the surrender of persons who there seek asylum after having escaped from places under American control.[1] Not infrequently, however, the United States has, under such circumstances, requested the surrender of a fugitive, on grounds of courtesy, making clear at the same time its own inability to reciprocate in granting similar favors.[2]

c

Treaties of the United States

(1)

§ 313. Policy.

The extradition conventions of the United States, from the Jay Treaty concluded with Great Britain November 19, 1794, down to the present time have, in almost every case, contained the requirement that the surrender of a fugitive should be conditioned upon the production and presentation to the country

[1] Mr. Fish, Secy. of State, to Mr. Adee, Chargé, Nov. 3, 1876, MS. Inst. Spain, XVIII, 17, Moore, Dig., IV, 255; Report of Mr. Bayard, Secy. of State, to the President, on McGarigle's Case, Sept. 14, 1887, 17 MS. Rept. Book, 13, Moore, Dig., IV, 256; Mr. Hay, Secy. of State, to the Governor of Porto Rico, June 19, 1900, 245 MS. Dom. Let. 649, Moore, Dig., IV, 257.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Gosling, Dec. 18, 1884, 153 MS. Dom. Let. 459, Moore, Dig., IV, 255; Mr. Olney, Secy. of State, to Mr. Moody, March 7, 1896, 208 MS. Dom. Let. 386, Moore, Dig., IV, 256; also documents relating to extradition of Horace G. McKinley, granted by China in 1907, For. Rel. 1908, 129; documents relating to extradition of William Adler et al., from Honduras in 1908, For. Rel. 1908, 470; documents relating to the detention of the *Goldsboro* and extradition of Francis G. Bailey et al., from Honduras in 1908, For. Rel. 1908, 474.

In connection with the extradition of Paul Stensland from Morocco in 1906 as an act of grace, it is to be observed that the Government of that country declared that it regarded the authority of the American Minister over his own countrymen, "as supreme and unquestionable." Mr. Gummeré, American Minister to the Secretary of State, Sept. 6, 1906, For. Rel. 1906, II, 1161, 1163.

Opposing the policy of requesting the extradition of fugitives as a favor, see Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 85, Moore, Dig., IV, 254; Mr. Hill, Acting Secy. of State, to Mr. Warner, Oct. 6, 1899, 240 Dom. Let. 407, Moore, Dig., IV, 257.

Among recent cases where extradition has been granted as an act of grace, may be noted that of V. Nalbandian (Bulgaria), For. Rel. 1910, 122–128; C. Vandenberg (Honduras), *id.*, 646; Joseph and Jacob Goldberg (Austria-Hungary), For. Rel. 1911, 10–11.

of asylum of such evidence of criminality as would, according to the law of the place where the accused might be found, justify his apprehension and commitment for trial.[1] This implies, therefore, that the conduct of the accused must have been such as to violate the criminal laws of the country of asylum. Only upon such a theory could he be there held for commitment and trial.[2]

The general requirement respecting evidence of criminality necessitates, furthermore, a decision by some authority in the country of asylum as to whether the evidence presented justifies the apprehension and commitment of the accused for trial according to the local law. This involves the exercise of an essentially judicial function.

Although the early treaties of the United States made no provision respecting procedure, and although no Act of Congress offered guidance, the weight of opinion sanctioned the view that judicial rather than executive authority should, in the first instance, pass upon the sufficiency of the evidence presented.[3] An Act of Congress of 1848, supplemented by later legislation, has since that time provided for the performance of the judicial function by the judicial rather than the executive branch of the Government of the United States. All extradition treaties subsequent

[1] An exception is noted in the convention with Uruguay, March 11, 1905, Malloy's Treaties, II, 1825. Notwithstanding the singular omission, it is not believed that the contracting parties contemplated any departure from the existing practice, or a lessening of the requirement respecting the sufficiency of evidence to be presented by a demanding government. Arts. IV and V justify this conclusion.

In his work on extradition, § 77, Professor Moore adverts to the fact that Thomas Pinckney, in his negotiations that resulted in the treaty with Spain of October 27, 1795 (which contained no provisions relative to extradition), declined to accede to the Spanish suggestion that transgressors should be surrendered "upon a single demand"; and that he proposed, on the other hand, that any demand should be "supported by testimony of the commission of the crime which should be sufficient in the country to which the fugitive has flown to cause him to be arrested and brought before the tribunals of justice if the crime had there been committed," *citing* despatches from Madrid, Vol. VI, MSS. Department of State.

[2] "The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 with Great Britain embodies that principle in terms. The offence must be 'made criminal by the laws of both countries.'" Fuller, C. J., in Wright *v.* Henkel, 190 U. S. 40, 58.

[3] Matter of Metzger, 5 How. 176, 188–189, where the Supreme Court of the United States in 1847 approved the action of the President in referring to the judgment of a judicial representative the evidence offered by the French diplomatic officer to secure the extradition of an individual charged with forgery under treaty with France of November 9, 1843. Also case of Nash under Art. XXVII of the Jay Treaty, November 19, 1794, Wharton's State Trials, 392.

thereto have been regarded as having been concluded with reference to and in harmony with the statutory law.[1]

(2)

§ 314. Offenses Generally.

Since the earliest agreements with England of 1794 and 1842, and with France of 1843 and 1845, there has been a constant and natural increase in the number of offenses made extraditable. Numerous treaties of the twentieth century, such as those with France of 1909, and with Salvador of 1911, are fully responsive to the elaborate and intricate needs of the present time. Thus, for example, among the offenses specified are "the willful and unlawful destruction or obstruction of railroads, which endangers human life", and under certain circumstances, the "breach of trust by a bailee, banker, agent, factor, executor, administrator, guardian, trustee or other person acting in a fiduciary capacity." [2] In the more recent treaties the offenses set forth are described with greater precision and comprehensiveness than in the earlier agreements.[3]

(3)

Political Offenses

(a)

§ 315. Development of the Rule.

Long before the establishment of international law or of any system of extradition, fugitives were frequently surrendered to the monarchs from whose control they had fled. Surrender was usually induced by the power of the sovereign making the demand. The treatment that might await the fugitive was no deterrent. Hence the return of political offenders bore no resemblance to the modern practice of extradition and was based on a different theory.[4] Consistently with the growth of the idea that no fugi-

[1] Mr. Bayard, Secy. of State, to Mr. Romero, Mexican Minister, Feb. 19, 1889, For. Rel. 1889, 620–621, Moore, Dig., IV, 273.

[2] See Convention with France, Jan. 6, 1909, Arts. II, secs. 12 and 7, Charles' Treaties, 34. See, also, editorial comment, *Am. J.*, V, 1060; convention with Honduras, Jan. 15, 1909, Charles' Treaties, 71.

[3] In the index to Malloy's Treaties, II, 2448–2449, will be found a list of extraditable crimes contained in treaties of the United States, and references to the conventions in which they are respectively to be found.

[4] Albéric Rolin, *Les infractions politiques*, *Rev. Droit Int.*, 1 ser., XV, 417; Moore, Extradition, Chap. VIII, also *id.*, §§ 5 and 6; Oppenheim, 2 ed., I, 389–392; W. B. Lawrence, *Albany Law J.*, XIV, 85; Biron & Chalmers, 7–12; Bibliography in Clunet, *Tables Générales*, I, 790–792, 978.

tive should be surrendered unless his acts were regarded as criminal at the place of asylum as well as in the country from which he had fled, and with a reluctance to surrender a fugitive who might be exposed to summary and arbitrary treatment if restored to the clutches of the demanding government, the principle of granting asylum to political offenders became general. In the more enlightened States enjoying liberal laws and constitutional government, the acts of an individual participating in and incidental to a revolutionary movement abroad could not always be regarded as morally wrongful, notwithstanding local laws respecting treason. It seemed inequitable that the fate of a revolutionist, who had sought refuge in a foreign land, should hang upon the success or failure of the uprising in which he had been a participant.[1]

Thus the very circumstances which rendered the modern practice of extradition practicable and habitual, served likewise to check and discourage the surrender of the political fugitive. The municipal laws of certain States, such as Belgium, Switzerland and Great Britain, emphasized the principle involved and weakened the efforts of Russia to disregard it.[2]

(b)

§ 316. Reservation in Treaties of the United States. Assassination of the Head of a State.

In almost all of the extradition treaties to which the United States has been a party there is a provision expressly declaring that persons charged with the commission of political offenses shall not be surrendered. With respect to those very few conventions containing no such provision, it is not believed that the contracting parties contemplated the extradition of political offenders.[3]

[1] Oppenheim, 2 ed., I, § 338. [2] *Id.*, I, §§ 333–340.

Although Art. IV of the extradition treaty between Russia and Spain of March 9, 1877, contained a reservation respecting political offenses, that of April 24, 1888, between the same States, made no similar provision, and added to the list of extraditable offenses in Art. II that of *lése majesté* with respect to the sovereign or members of his family. *Tratados de España*, VII, 221; *id.*, IX, 329.

[3] Declared Mr. Fish, Secretary of State, in a communication to Mr. Hoffman, May 22, 1876: "Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more

Without attempting to define the term "political offense", or to enumerate all of the occasions when an act may be said to possess such a character, the effort is made to observe the circumstances when a fugitive within the United States, whose surrender has been sought by a foreign government, has been regarded by the executive or judicial department of the former as a political offender within the meaning of a treaty provision, and therefore discharged from custody. In every case the following elements have been present:[1]

(1) There has been an uprising of revolutionary origin and purpose against the demanding government. In some cases the uprising has been of vast dimensions, such as that which swept over the Baltic provinces of Russia in 1906;[2] in others it has been of insignificant proportions, as in the case of Cazo,[3] and in that of

than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." For. Rel. 1876, 233, 237, Moore, Dig., IV, 334.

See message of President Tyler, Aug. 11, 1842, submitting treaty with Great Britain of that year to the Senate, Senate Ex. Docs., 27 Cong., 3 Sess., Vol. I, Doc. 2, p. 22, quoted in Moore, Extradition, I, § 152; *id.*, I, § 206. Also Mr. Wilson, Acting Secy. of State, to the American Ambassador to Mexico, Oct. 3, 1912, For. Rel. 1912, 850.

[1] The American cases considered are the following: The Mexican revolutionists of 1880, For. Rel. 1880, 787–788, Moore, Extradition, I, § 216; Case of Francisco J. Cazo, Mexico, Moore, Extradition, I, § 217, and MSS. there cited not contained in published documents of the United States; the Salvadorean Refugees, *In re* Ezeta, 62 Fed. 972; J. B. Moore, in *Am. Law R.*, XXIX, 1; For. Rel. 1894, 563–576; the San Ignacio raid, Mexico, Ornelas *v.* Ruiz, 161 U. S. 502; For. Rel. 1897, 405–416, Moore, Dig., IV, 336–349; Case of James Lynchehoun, Great Britain, proceedings in the Case of James Lynchehoun containing text of decision by Commissioner Charles W. Moores, Indianapolis, 1903; Case of Christian Rudovitz, Russia, 1909, Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, Dept. of State, file 16649/9, Serial No. 121; printed Statement and Argument, and Abstract of testimony submitted to the Secretary of State in behalf of the accused, January, 1909; Case of Pouren, Russia (Case of Jan Janoff Pouren, New York, 1909), 1909.

See, also, Case of McKenzie, Moore, Extradition, I, § 211, whose extradition was sought by Canada in 1837 from the authorities of the State of New York, and refused by the latter because, as the acts charged against the accused were regarded as political, they were embraced within the provisions of the New York statute excepting treason from the crimes on account of the commission of which a fugitive might be surrendered by the governor to a foreign State. Also the St. Albans raid case in 1864, in which a Canadian court ordered the discharge of certain prisoners whose extradition was sought by the United States. Moore, Extradition, I, § 215, and documents there cited.

An English case frequently cited by American authorities is that of *re* Castioni, 1891, 1 Q. B. 149. See, also, *re* Meunier, 1894, 2 Q. B. 415; *re* Arton, 1896, 1 Q. B. 108; the Swiss Case of Wassilieff, 1908, *Entscheidungen des Schweizerischen Bundesgerichtes*, XXXIV, pt. I, 533, and comments thereon by Julian W. Mack, 1909, *Proceedings*, Am. Soc. of Int. Law, III, 144, 153.

[2] Abstract of testimony in the Rudovitz case submitted to the Secretary of State in behalf of the accused, January, 1909.

[3] Moore, Extradition, I, § 217.

the San Ignacio raid.[1] In one case, that of Lynchehoun, the act of the accused was incidental to a popular movement to "overthrow landlordism" in Ireland, as a means of securing reform in legislation, a change in the governing classes, and possibly independence from English parliamentary rule.[2] It has been regarded as sufficient if there were in fact a party seeking governmental control, however lacking in military or civil organization.[3]

(2) The accused has been connected with the movement. In no case has there been serious question as to his relation to the uprising.[4]

(3) Either the acts charged against the accused have been deemed incidental to the movement;[5] or the evidence has failed

[1] Statement of facts in Ornelas *v.* Ruiz, 161 U. S. 502, 510–511. See, also, J. Reuben Clark, Jr., *Proceedings*, Am. Soc. of Int. Law, III, 95, 120.

[2] Opinion of Commissioner Moores, Proceedings in Case of James Lynchehoun, 124–130.

[3] Declared J. R. Clark, Jr., 1909, *Proceedings*, Am. Soc. of Int. Law, III, 95, 120: "It would also appear from these Russian cases that the party to which the fugitive belongs need not, in order to be considered revolutionary, be warlike, that is, it need not at the moment have an armed force in the field or be engaged in military operations.

"And it would seem, further, that such a party need not have control of any of the actual governmental machinery even in the district in which the acts complained of occurred. It would appear to be sufficient if it were an actual party, its operations as well as its organization being secret. It should, however, be noted that in the Russian cases it appeared that although the Russian Government was in actual control of the governmental offices of the revolutionary provinces, the revolutionists maintained among themselves a more or less effective organization and attempted, at least, to govern the members of their own party and to punish those inimical to it."

It seems clear that in the absence of an uprising, acts of violence, whether for the purpose of inciting revolution, or spreading anarchy, would not be regarded as political offenses under the treaties of the United States. J. B. Moore in *Am. Law Rev.*, XXIX, 16–17, *citing re* Meunier, 1894, 2 Q. B. 415, 419. As the anarchistic theory precludes the idea of government, an avowed anarchist would find difficulty in shielding himself from the consequences of his acts by asserting a connection with any movement, the object of which was to gain control of a government for the purpose of exercising governmental functions.

[4] Declared Denman, J., in *Re* Castioni, (1891) 1 Q. B. 149, 159: "The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part." Cited with approval by Morrow, J., In re Ezeta, 62 Fed. 972, 999; also by Secretary Sherman in the Guerra Case (San Ignacio raid), and by Secretary Root in the Rudovitz Case.

[5] With respect to the Rudovitz Case Mr. Root, Secy. of State, declared in a communication to Baron Rosen, Russian Ambassador, Jan. 26, 1909:

"In reply I have the honor to say that an attentive reading of the evidence offered at the hearing before the extradition magistrate goes to show, — that on the night of January 3, 1906, a party of some sixteen armed men, masked and disguised, came to the little village of Benen on the estate of Benen and, having gained entrance into certain houses of the village, killed a man (Christian Leshinsky), his wife (Trina Leshinsky), and their married daughter (Wilhelmina Kinze); that they also robbed the Kinze woman and her husband (Theodor Kinze) before killing her; and that some time during the

to show that acts committed in the course of the uprising which might possibly not be justly regarded as incidental thereto, were in fact committed by the accused.

While the connection between certain acts, however much to be deplored, such as the killing of spies or the burning of houses, with a political disturbance has oftentimes been apparent, the relation thereto of other acts such as robbery committed simultaneously has been less easy to determine.[1] When the political purpose and nature of an expedition have been recognized, there has been a tendency on the part of the United States, in the absence of conclusive evidence to the contrary, to regard acts of plunder as incidental to the contest. Such an inference has been reasonable when the evidence has failed to disclose that an expedition had a twofold purpose, namely, the private enrichment of the participants, as well as the accomplishment of an essentially public purpose. It has been admitted, however, that in the course of an uprising, wanton acts of robbery might be committed for purely private ends, and so render the actors extraditable on such a

occurrence they set fire to the house in which they had found and killed the mother, Trina. It does not appear that the men implicated in the affair gave at the time any reason for the killing of Christian and Trina Leshinsky, though they are said to have declared that they killed the Kinze woman because she was a 'spy.'

"The testimony of the accused given before the extradition commissioner goes to establish that the accused was a member of the Benen group of the Social Democratic Labor party, one of the several revolutionary parties in Russia; that later he joined the Zhagarn group of that party; that at a regular meeting of the Zhagarn group, the death of the Leshinskys and Mrs. Kinze and the burning of the premises, were voted as revolutionary acts and measures; and that the accused participated in the business before this meeting. Other witnesses corroborated his testimony that the aim, purpose, and work of the Social Democratic Labor party were revolutionary and that the death of the persons above named was ordered by one of the organizations of that party. Although there was some discrepancy in the evidence as to just which local organization passed the original death decree, this has appeared to be immaterial in view of the evidence to the fundamental fact that some organization of this revolutionary party did actually decree that the persons named should be put to death. The witnesses testifying to these matters were not impeached and the demanding Government introduced no evidence to controvert their testimony.

"In view of these facts and circumstances the Department after a mature and careful consideration of the evidence so adduced in this case, finds itself forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature." File No. 16649/9, Serial No. 121.

[1] Thus in the Rudovitz Case it was urged by counsel for the demanding government in argument before the committing magistrate, that the prisoner should be held to answer to the charge of robbery, in case he could not be held on any other, on the ground that the acts of robbery were not, in the judgment of counsel, connected with or incidental to the uprising in the Baltic provinces. See printed Statement and Argument in behalf of the accused, p. 10. See, also, Mr. Romero, Mexican Minister, to Mr. Sherman, Secy. of State, Nov. 15, 1897, For. Rel. 1897, 406, Moore, Dig., IV, 337.

charge.[1] In certain cases, the evidence has failed to show that the accused himself committed such acts, and the United States has declined, under those circumstances, to impute to the prisoner, himself a participant in a political uprising, responsibility for an extraditable offense committed by a comrade.[2]

When the political nature of an uprising has been recognized, the connection of the accused therewith established, and the conduct charged against him regarded as incidental thereto, it has been deemed immaterial whether the act committed was such as might under normal circumstances be looked upon as a common crime, such as murder or arson;[3] whether the accused bore malice towards his victim;[4] whether the individual against whose person or property the act was directed, was a member of the civil or military branch of the government sought to be overthrown.[5]

§ 317. The Same.

As the assassination of an individual may occur under circumstances such as to render the actor immune from extradition as a political offender, numerous treaties of the United States have

[1] Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 414, Moore, Dig., IV, 340, 347.

[2] *Id.*; also Mr. Root, Secy. of State, to Baron Rosen, Russian Ambassador, Jan. 26, 1909, in which it was said: "The robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and can not be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia." File 16649/9, Serial No. 121.

[3] The decisive point has always been the nature of the expedition and the relation thereto of the actor and of the acts chargeable to him, rather than the nature of what was done. This has been true even when the case arose under the treaty with Mexico of 1861, reserving from its application offenses of a "purely political character." Mr. Sherman, Secy. of State, to Mr. Romero, Dec. 17, 1897, For. Rel. 1897, 408, Moore, Dig., IV, 340. *Compare*, in this connection, articles adopted by the Institute of International Law, Sept. 8, 1892, *Annuaire*, XII, 182; report of Albéric Rolin relative thereto, *id.*, 156; Frederic R. Coudert, 1909, *Proceedings*, Am. Soc. of Int. Law, III, 124, 143.

[4] Towards Mrs. Kinze, a victim of the expedition in the Rudovitz Case, there was felt the deepest malice by those who brought about her death. See, also, J. B. Moore, in *Am. Law Rev.*, XXIX, 1, 17.

[5] J. R. Clark, Jr., 1909, *Proceedings*, Am. Soc. of Int. Law, III, 95, 120, who, after stating that this point is settled by the recent Russian cases (of Rudovitz and Pouren), declared that: "Moreover, it would appear from the cases that it is not necessary that the uprising, if it actually exists, should be of any considerable extent or that it give particular promise of being successful. This seems to be established by the case of Guerra, in which, if the transactions in which Guerra took part be divorced from the attending circumstances, the expedition in which he was engaged resembles raids of a marauding band rather than an armed expedition of a warlike party, and this same observation applies with equal force to the activities of Cazo, the defendant in an earlier case."

in varying form provided that an act of such a kind, directed against the life of the sovereign or head of a foreign State, or a member of his family, should not be deemed to be of a political character.[1] No cases have yet arisen where pursuant to such a provision the United States has been called upon to surrender an assassin whose victim has belonged to one of the classes enumerated.[2]

(c)

§ 318. Burden of Proof.

American authority indicates clearly that when evidence offered before a committing magistrate tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary.[3] Furthermore, it becomes the duty of the magistrate to pass upon the evidence presented as to the political character of the acts committed.[4] From his decision there is no appeal save to the Secretary of State.[5] In all cases, whatsoever be the nature of the defense, he exercises the right to review the decision of a magistrate committing the prisoner to await extradition.[6]

[1] See, for example, Art. III, treaty with Russia, March 16, 1887, Malloy's Treaties, II, 1528; Art. IV, treaty with Belgium, Oct. 26, 1901, *id.*, I, 106; Art. IV, treaty with Guatemala, Feb. 27, 1903, *id.*, I, 881; Art. III, treaty with Spain, June 15, 1904, *id.*, II, 1714; Art. III, treaty with El Salvador, April 11, 1911, Charles' Treaties, 108.

Concerning the so-called *attentat* clause in the Belgian Law of 1856, see Oppenheim, 2 ed., I, § 335.

See, also, Julian W. Mack, 1909, *Proceedings*, Am. Soc. of Int. Law, III, 144, 151–152, *citing* the Swiss cases of Jaffai, *Entscheidungen des Schweizerischen Bundesgerichtes*, XXVII, 52, and of Malatesta, *id.*, XVII, 450; also § 852 (2) of the Russian Law on Extradition, sanctioned by the Czar Dec. 15, 1911, *Rev. Droit Int.*, 2 ser., XIV, 187, 188.

[2] Concerning correspondence with Great Britain in 1865, and the Papal States in 1866, respecting the surrender to the United States of persons involved in the assassination of President Lincoln, see Moore, Extradition, I, § 208, p. 308, note No. 4, *citing* Dip. Cor. 1865, Part I, 386; *id.*, Part II, 142; *id.*, 1866, Part II, 121–125. See also Moore, Dig., IV, 352–353.

[3] Morrow, J., In re Ezeta, 62 Fed. 972, 999, quoting with approval recommendation of International American Congress of 1890; Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, For. Rel. 1897, 408, 413, 414, Moore, Dig., IV, 340, 346; Commissioner Moores, Proceedings, Lynchehoun Case, 124–125. *See*, also, Julian W. Mack, 1909, *Proceedings*, Am. Soc. of Int. Law, III, 144, 153–155; and *compare* J. R. Clark, Jr., *id.*, 96–102.

[4] Such was the position taken by Judge Morrow, in the Ezeta Case, and by Commissioners Moores and Foote, respectively, in the Lynchehoun and Rudovitz cases.

[5] Ornelas *v.* Ruiz, 161 U. S. 502. The situation would be otherwise, however, in the fanciful case where, irrespective of the testimony offered, it should appear from the allegations of the complaint that extradition of the accused was sought in order to prosecute him for a political offense, and the decision of the committing magistrate was adverse to the contentions of the prisoner.

[6] J. R. Clark, Jr., 1909, *Proceedings*, Am. Soc. of Int. Law, III, 95, 114–118.

(4)

Nationals

(a)

§ 319. Of the Country of Refuge.

In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own nationals.[1] The attempt has, however, rarely been successful; in most instances the United States has been obliged to accept the restriction.[2] With respect to treaties containing no restriction, such as those with Switzerland of November 25, 1850, and with Italy of March 23, 1868, the United States has uniformly contended that by reason of the general terms employed, the contracting

[1] Mr. Fish, Secy. of State, to Mr. Delfosse, Belgian Minister, Aug. 11, 1873, For. Rel. 1873, I, 84; Mr. Gresham, Secy. of State, to Mr. Bartleman, No. 110, June 11, 1894, MS. Inst. Venezuela, IV, 304, Moore, Dig., IV, 288; Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico, Dec. 13, 1895, For. Rel. 1895, II, 1008, 1009, Moore, Dig., IV, 289.

Declared Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890: "But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition." For. Rel. 1890, 559, 566, Moore, Dig., IV, 290, 296. See, also, admirable statement in Moore, Dig., IV, 287.

[2] The existing treaties with Great Britain and Italy contain no restriction. The convention with France of Nov. 9, 1843, was similarly free, and likewise that with Switzerland of Nov. 25, 1850. Later conventions, however, with France of Jan. 6, 1909, and with Switzerland of May 14, 1900, expressly removed any obligation to surrender citizens. According to Art. III of the treaty with the Argentine Republic of Sept. 26, 1896, Art. VII of that with Japan of April 29, 1886, and Art. IV of that with Mexico of Feb. 22, 1899, it is provided in differing form that while the contracting parties are not bound to surrender their respective citizens, each party ("the executive authority of each", in the Mexican treaty) shall have the power to deliver them up, if in its discretion it should be deemed proper to do so.

See Case of Mattie D. Rich, an American citizen, arising under the Mexican treaty, For. Rel. 1899, 497–501, Moore, Dig., IV, 303; also Case of Yoshitaro Abe, a Japanese subject extradited from Japan to Hawaii, For. Rel. 1908, 512–515.

parties undertook to surrender their respective nationals.[1] The highest court of Switzerland acquiesced in 1891 in the American interpretation of a treaty with that State, as it appeared that such was the clear understanding of the parties when the agreement was concluded.[2] Italy, however, has always asserted that its treaty with the United States imposed no duty on the former to surrender its own subjects. It has emphasized the fact that by the Italian penal code in force at the time of the negotiation of the treaty, and ever since in force, "the extradition of a citizen is not admissible."[3] The United States, on the other hand, has contended that the circumstances attending the negotiation indicate a different understanding by both parties. Notwithstanding the divergence of views, the United States has not treated the Italian practice as a breach of the contractual obligation requiring abrogation of the treaty. While it has ceased generally to make requisition for Italian subjects, it has not regarded itself as free from the obligation of surrendering its own citizens. On the theory, therefore, that in such matters extradition treaties need not be reciprocal in their operation, Mr. Knox, Secretary of State, in 1910 decided that the United States should surrender to Italy one Charlton, an American citizen, charged with the commission of murder in the territory of that State,[4] and the Supreme Court of the United States, in consequence thereof, declared it to be its duty to recognize the obligation to surrender the accused "as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition."[5]

(b)

§ 320. Of a Third Country.

According to the treaties of the United States, the fact that a fugitive whose surrender is demanded by a contracting party is a national of a third State is not made an obstacle to extradition. The common provision respecting the situation where the sur-

[1] See Mr. Blaine, Secy. of State, to Baron Fava, Italian Minister, June 23, 1890, For. Rel. 1890, 559, Moore, Dig., IV, 290.

[2] Case of Piguet, 1891, *Entscheidungen des Schweizerischen Bundesgerichtes*, XVII, 85–91. A translation of the major portion of the opinion is contained in Moore, Dig., IV, 298–300.

[3] Baron Fava, Italian Minister, to Mr. Blaine, Secy. of State, April 20, 1890, For. Rel. 1890, 555.

[4] Memorandum of Mr. Knox, Secy. of State, Dec. 9, 1910, *re* Porter Charlton, For. Rel. 1910, 654. See, also, *Ex parte* Charlton, 185 Fed. 880, 886–887.

[5] Charlton *v.* Kelly, 229 U. S. 447, 476.

render of one person is sought by several states simultaneously, never creates a preference in favor of a demanding country to which the fugitive may owe allegiance.[1] This emphasizes the unimportance of his nationality except in so far as he may be a citizen of the State of refuge.[2]

The United States does not question the right of a foreign State to surrender to another an American citizen whose extradition from the former has been demanded.[3] This is true even where the State of refuge, according to its own laws, habitually surrenders fugitives in the absence of extradition treaties, upon a stipulation of reciprocity to a demanding government.[4] The energies of the Department of State appear to be confined to the effort to secure for the accused the enjoyment of all rights which are applicable to extradition cases in the country where the fugitive is apprehended, and upon which the demand for surrender is made.[5]

(5)

§ 321. Irregular Recovery of Fugitive.

Oftentimes by processes bearing no resemblance to extradition, the fugitive is returned to the country from which he has fled and

[1] It is usually provided that extradition shall be granted to the State whose demand is first received, provided that the government from which extradition is sought is not bound by treaty to give preference otherwise. See, for example, Art. XI of the treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448. According to Art. VIII of the treaty with Uruguay, March 11, 1905, the fugitive is to be surrendered to that State in which he shall have committed the gravest crime, Malloy's Treaties, II, 1828. *Compare* Art. X treaty with France, Jan. 6, 1909, Charles' Treaties, 36.

See, also, Mr. Marcy, Secy. of State, to Mr. Gadsden, Minister to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII, 54, Moore, Dig., IV, 305.

[2] As the existing treaty with Mexico (Feb. 22, 1899) contemplates the surrender of American citizens, under circumstances specified in Art. IV, and also provides in Art. XII for the subsequent surrender to a third Power, of a person who has been given up, an American citizen surrendered by the United States to Mexico, might, under the conditions specified, be later surrendered by Mexico to a third State.

[3] Moore, Extradition, I, § 143; Mr. Uhl, Acting Secy. of State, to Mrs. Jewitt, April 13, 1894, 196 MS. Dom. Let. 350, Moore, Dig., IV, 306.

Declared Mr. Bacon, Acting Secy. of State, to Ambassador White, April 3, 1907: "Precisely the same rule obtains in the United States where the surrender of citizens or subjects of a third government is demanded. The diplomatic representative of such government has sometimes made representations to this department with a view to the protection of its national; but the department has always considered that his legitimate functions are limited to safeguarding the fugitive's rights by observing the course of the proceedings so as to satisfy himself that all the forms of law have been complied with before extradition is granted." For. Rel. 1907, I, 425.

[4] See documents relative to the extradition of F. L. Jacobs, an American citizen, to the Argentine Republic from France. For. Rel. 1907, I, 411–430.

[5] Mr. Wilson, Third Assist. Secy. of State, to Mr. Jacobs, May 25, 1907, For. Rel. 1907, I, 428.

is there sought to be prosecuted criminally. Thus he may be abducted from foreign territory by agents of the State of prosecution. In such event the State whose territory has been invaded may demand the return of the individual, or the extradition of those who removed him from its domain.[1] When the fugitive is taken from the State of refuge by its own citizens or by persons under its control, and by them placed within the territory of the State from which he has fled, there is no reason for interposition on the part of the former.[2] In an important case, that of the British Indian Savarkar, which became the subject of adjudication before a Tribunal assembled at the Hague, it was held that the arrest and restoration to the British mail steamer *Morea* at Marseilles July 7, 1910, by a French police officer, of the fugitive who had escaped from that vessel where he was in custody while en route to India for prosecution on account of political offenses, did not impose upon the British Government a duty to restore him to France. It was declared that while it appeared that the French officer was not aware of the nature of the charges against the prisoner, and so made a mistake in giving him up, there was, nevertheless, no bad faith on the part of the British authorities who participated in the matter, and no violation of the sovereignty of France; and that under the circumstances there was no rule of international law imposing a duty upon Great Britain to surrender Savarkar.[3]

Whatever be the right of the State from which he has been withdrawn, the prisoner is not entitled to his release from custody

[1] Moore, Dig. IV, 330, *citing* Instructions of the Department of State to the American Minister at Madrid, Aug. 18, Sept. 12, Sept. 16, and Dec. 8, 1891, and March 24, 1892, MS. Inst. Spain, XXI, 54, 65, 91; also despatch No. 216, of March 5, 1892, from the American legation at Madrid, 124 MS. Despatches, from Spain; also Mr. Foster, Secy. of State, to Mr. Washburn, Minister to Switzerland, July 27, 1892, For. Rel. 1894, 649, 650, Moore, Dig., IV, 330. *Compare* Mr. Seward, Secy. of State, to Lord Lyons, British Minister, June 6, 1863, MS. Notes to Great Britain, X, 67, Moore, Dig., IV, 329.

[2] Mr. Adams, Secy. of State, to Mr. Jackson, Jan. 24, 1822, 19 MS. Dom. Let. 248, Moore, Dig., IV, 328; also facts in *Ex parte* Wilson, 140 S. W. 98.

In the Case of Antonio Martinez, kidnaped in Mexico by a Mexican, brought into the United States and prosecuted in California, the Department of State was of the opinion that after having surrendered to Mexico one Felix, the kidnaper, the United States was under no obligation to comply with the demand of Mexico for the surrender of Martinez as well. It was observed that as the latter was being prosecuted by the State of California, the Federal Government felt itself unable to secure his release from custody. For. Rel. 1906, II, 1121–1122.

[3] Award of the Court of Arbitration, Feb. 24, 1911, in J. B. Scott, Hague Court Reports, 276, also in *Am. J.*, V, 520. See also editorial comment, *id.*, V, 208; Oppenheim, 2 ed., I, § 332, and periodical literature there cited.

merely by reason of the irregular process by which he was brought into the State of prosecution.[1]

(6)

Limitations as to Trial

(a)

§ 322. Offenses Other Than Those for Which Accused Was Extradited

The Supreme Court of the United States, in 1886, announced the principle that:

> A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he has been forcibly taken under those proceedings.[2]

The decision was based primarily upon existing statutes of the United States. These the Court declared might be regarded as a "Congressional construction of the purpose and meaning of extradition treaties", such as the one under consideration; but whether so or not, the Acts of Congress were said to be conclusive upon the judiciary as to the rights conferred upon persons brought from a foreign country into the United States, under extradition proceedings.[3] The Court also expressed its own view as to the

[1] Ker *v.* Illinois, 119 U. S. 436; *Ex parte* Wilson, 140 S. W. 98; Mr. Bacon, Acting Secy. of State, to the Mexican Chargé, June 22, 1906, For. Rel. 1906, II, 1121.

[2] United States *v.* Rauscher, 119 U. S. 407, 430. The prisoner having been surrendered by Great Britain on a charge of the murder of one Janssen on the high seas, pursuant to the treaty of 1842, was indicted and tried under § 5347 Rev. Stat. charging him with cruel and unusual punishment of the same man. This offense was not embraced in those made extraditable by the treaty, which, moreover, contained no express provision relative to the prosecution of a person surrendered for any offense other than one specified in the agreement. The case came before the Supreme Court of the United States on a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York, arising after verdict of guilty and before judgment, on a motion in arrest of judgment.

Concerning the Rauscher Case and for a summary of the judicial history of the subject in the United States, see Moore, Dig., IV, 310–311; also Moore, Extradition, I, § 187, pp. 276–280.

[3] 119 U. S. 407, 423–424. See, also, opinion of Gray, J., concurring, *id.*, 433.

interpretation of the treaty of 1842 with Great Britain, declaring it to be "very clear" that it was not intended that the agreement was to be used for any purpose other than to secure the trial of the person extradited for one of the offenses enumerated in the treaty.[1]

The decision was contrary to the position taken by Mr. Fish, Secretary of State, in the Winslow case in 1876.[2] It not only confirmed British opinion as to the interpretation of the treaty of 1842, but also served, in the minds of English judges, to meet the requirements of the British Extradition Act of 1870.[3]

The treaties of the United States commonly provide for the protection of the accused against prosecution for an offense committed prior to his surrender and other than that for which he was extradited. Such provisions lack uniformity in scope and in form. Some seem to prohibit the prosecution of the accused for any offense other than that for which he was surrendered.[4] Frequently the restriction is limited. Thus the fugitive, according to some conventions, may still be prosecuted if he has had an opportunity to return to the country from which he was surrendered,[5] or if he has been given a month's grace after trial, con-

[1] 119 U. S. 407, 423–424. See, also, opinion of Gray, J., concurring, *id.*, 433.

[2] Mr. Fish, Secy. of State, to Mr. Hoffman, Mar. 31, 1876, For. Rel. 1876, 210, 215. Concerning the Winslow case, see For. Rel. 1876, 204–309, Appendix A, 615–633, Moore, Extradition, I, § 150; Moore, Dig., IV, 306–309, and documents there cited. Concerning case of one Lawrence, see Moore, Extradition, I, § 151.

[3] Report of proceedings in England in Case of Alice Woodhall, Moore, Extradition, I, § 166.

Respecting the application of the principle announced in the Rauscher Case, in relation to certain treaties, see Cosgrove *v.* Winney, 174 U. S. 64; In re Rowe, 77 Fed. 161; Cohn *v.* Jones, 100 Fed. 639; Johnson *v.* Browne, 205 U. S. 309; Collins *v.* O'Neil, 214 U. S. 113; also Moore, Dig. IV, 312–318, and documents there cited; Frederick Van Dyne, in Cyc. of Law and Procedure, XIX, 81–82.

Civil Suits. Relative to the question whether a fugitive surrendered pursuant to the terms of an extradition treaty may, prior to a reasonable opportunity to leave the country after his discharge from custody, be arrested in, or otherwise be made answerable to a civil action, see Moore, Extradition, I, §§ 178–187, and cases there discussed; documents cited in Moore, Dig., IV, 327–328; cases cited by Frederick Van Dyne in Cyc. of Law & Proc., XIX, 82. See, also, express provision in Art. VII, treaty with France, Jan. 6, 1909, Charles' Treaties, 36.

[4] See, for example, Art. IV, treaty with Portugal, May 7, 1908, Malloy's Treaties, II, 1472.

In the case of Kelly *v.* Griffin, 241 U. S. 6, 15, it was declared that the Court assumed that the Government of Canada, upon the surrender of the accused to that country, would respect the treaty invoked, and would not try him upon charges other than those upon which extradition was allowed.

[5] Art. III treaty with Great Britain, July 12, 1889, Malloy's Treaties, I, 741; Art. VIII treaty with the Argentine Republic, Sept. 26, 1896, *id.*, I, 27. Relative to the application of the British treaty, see Cosgrove *v.* Winney,

viction or pardon, in which to leave the country to which he was surrendered.[1] Sometimes the consent of the accused "freely granted and publicly declared by him" suffices.[2] Oftentimes the consent is reserved to the surrendering State,[3] which, in some instances, is given the right to require the production of documents.[4] There is a tendency manifest in the more recent treaties to make a distinction between offenses enumerated in the agreement to extradite and those not contained therein. Thus, according to Art. IV of the treaty with the Netherlands of June 2, 1887, the restriction against punishing the accused for an offense other than that for which he was surrendered is removed in case the offense charged is one of those embraced in the convention.[5] Some treaties go further, and make express provision that the accused may be prosecuted for an offense mentioned in the agreement other than that for which he was surrendered, subject to notice to the surrendering State, to which is reserved the right to demand the production of documents.[6]

The treaties of the United States do not purport to limit in any way the prosecution of the accused at any time after his surrender for any offense whatsoever committed subsequent to extradition, against the laws of the State to which he has been given up. The Supreme Court of the United States has declared that nothing

174 U. S. 64; Bryant *v.* United States, 167 U. S. 104; Johnson *v.* Browne, 205 U. S. 309; Cohn *v.* Jones, 100 Fed. 639; correspondence with Great Britain in 1891, *re* Leda Lamontagne, Moore, Dig., IV, 314–315, and documents there cited.

[1] Art. VII treaty with France of Jan. 6, 1909, U. S. Treaty Series, No. 561, Charles' Treaties, 36. See, also, correspondence between Mr. Root, Secretary of State, and Mr. Sternburg, German Ambassador, in 1907, with respect to the operation of the existing extradition treaty with Germany, containing no provision as to the circumstances when a person extradited thereunder might be prosecuted and punished for an offense committed prior to extradition. For. Rel. 1907, I, 517–519.

[2] See, for example, Art. VIII treaty with Norway, June 7, 1893, Malloy's Treaties, II, 1303; Art. VIII treaty with Denmark, Jan. 6, 1902, *id.*, I, 393. According to Art. IX of the treaty with Switzerland, May 14, 1900, the consent of the accused is to be expressed in open court and entered upon the record, *id.*, II, 1774.

[3] Art. IX treaty with Peru, Nov. 28, 1899, Malloy's Treaties, II, 1448; Art. III treaty with Uruguay, March 11, 1905, *id.*, II, 1826. See correspondence, 1894–1895, with the German Embassy at Washington relative to the consent of Jacob David to trial in Illinois for an offense other than that for which he was extradited from Prussia, pursuant to the treaty of June 16, 1852, which contained no provision relative to the matter. For. Rel. 1895, I, 488–497, contained in part in Moore, Dig., IV, 320–326. See, also, documents, *id.*, IV, 319 and 326.

[4] This provision frequently appears. See, for example, Art. IV treaty with Salvador, April 11, 1911, Charles' Treaties, 109.

[5] Malloy's Treaties, II, 1268.

[6] Art. III treaty with Luxemburg, Oct. 29, 1883, Malloy's Treaties, I, 1055; Arts. XII and XIII treaty with Mexico, Feb. 22, 1899, *id.*, I, 1189.

in the Rauscher Case is authority for the contention that any duty rests upon the State to which surrender has been made, to afford the accused opportunity after his trial or other termination of his case, to return to the country from which he was extradited.[1]

(b)

§ 323. Limitation of Trial by Prescription.

Provision is frequently made in the more recent treaties of the United States that extradition shall not be granted if the enforcement of the penalty for the act committed by the accused has been barred by limitation according to the laws of the country to which the requisition is addressed.[2] According to a very few conventions, there is a similar reservation, if from lapse of time (or other lawful cause) the accused is exempt from prosecution according to the law of the place where the offense was committed.[3] By at least one treaty extradition is precluded when by the law of either the demanding country, or that upon which extradition is made, "the criminal prosecution or penalty imposed is barred by limitation." [4]

[1] Collins *v.* O'Neil, 214 U. S. 113; *affirming* In re Collins, 151 California, 340. Declared Peckham, J., in the course of the opinion of the court: "It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if subsequently to his surrender he is guilty of murder or treason or other crime is, nevertheless, to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender or any country as willing to accept it." *Id.*, 122–123. See, also, Collins *v.* Johnston, 237 U. S. 502.

Obviously extradition should not be used as a means for obtaining jurisdiction of the person of the accused for civil proceedings. Smith *v.* Government of Canal Zone, 249 Fed. 273, 279.

[2] See, for example, Art. VIII treaty with France, Jan. 6, 1909, Charles' Treaties, 36. Concerning this treaty see editorial comment, *Am. J.*, V, 1060.

[3] Art. V treaty with the Dominican Republic, June 19, 1909, Charles' Treaties, 27; Art. V treaty with El Salvador, April 18, 1911, *id.*, 109; Art. V treaty with Spain, June 15, 1904, Malloy's Treaties, II, 1715.

[4] Art. VIII treaty with Switzerland, May 14, 1900, Malloy's Treaties, II, 1773. See, also, Art. II convention concluded by Central American States at Central American Peace Conference, Washington, Dec. 20, 1907, For. Rel. 1907, II, 702.

Miscellaneous Provisions. It may be observed that the more recent treaties of the United States make provision for the deferring of extradition where the accused is being prosecuted in the State upon which requisition is made, for an offense there committed, until he is entitled to liberation. See, for example, Art. VI treaty with Guatemala, Feb. 27, 1903, Malloy's Treaties, I, 881.

Provision is sometimes made that articles found in the possession of the accused at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof thereof, shall,

(7)

§ 324. Requisition. Mandate.

The formal demand for the extradition of a fugitive is known as the requisition and must emanate from the executive authority of the demanding State.[1] The treaties of the United States commonly provide that requisition shall be made by the diplomatic agents of the contracting parties, or in their absence, by superior consular officers.[2] While a formal requisition is always a condition precedent to the final surrender of the fugitive, it bears no such relation to his arrest or to the judicial proceedings in the United States preliminary to commitment.[3] Requisition is always to be made upon the foreign offices of the contracting parties, and hence, when the demand is made upon the United States, it must be addressed to the Secretary of State.[4]

so far as practicable, according to the laws of either of the contracting parties be delivered up with his person at the time of his surrender, due respect being had, however, for the rights of a third party with regard to such articles. See, for example, Art. X, of treaty with Spain of June 15, 1904, Malloy's Treaties, II, 1715. Also documents in Moore, Dig., IV, 405–406, especially opinion of Mr. Knox, Atty.-Gen., 23 Ops. Attys.-Gen., 440.

[1] Mr. Cushing, Atty.-Gen., 7 Ops. Atty.-Gen., 6; see. also, Moore, Extradition, § 219.

[2] See, for example, Art. III convention with France, Jan. 6, 1909, Charles' Treaties, 35.

According to Art. IX of the treaty with Mexico of Feb. 22, 1899, it is provided that: "In the case of crimes or offenses committed or charged to have been committed in the frontier States or Territories of the two contracting parties, requisitions may be made, either through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective State or Territory, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory, and such respective competent authority shall thereupon cause the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination." Malloy's Treaties, I, 1188.

See, also, Art. III of convention with the Netherlands, Jan. 18, 1904, extending to the island possessions and colonies of the contracting parties the extradition treaty of June 2, 1887, Malloy's Treaties, II, 1272; also Art. XIII of treaty with France of January 6, 1909, respecting the requisition for the surrender of a fugitive criminal who has taken refuge in a colony or foreign possession of either contracting party, Charles' Treaties, 37.

[3] Provision is frequently made, as in Art. IX of the treaty with Nicaragua of March 1, 1905, Malloy's Treaties, II, 1296, for the provisional detention of the fugitive prior to the presentation of a formal demand for his surrender. See, also, Benson *v.* McMahon, 127 U. S. 457; In re Adutt, 55 Fed. 376; In re Orpen, 86 Fed. 760; In re Schlippenbach, 164 Fed. 783.

[4] Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 40; also Mr. Bonaparte, Attv.-Gen., July 10, 1908, For. Rel. 1908, 595.

Relative to applications by the United States for the extradition from foreign countries of fugitives from justice, see general circular of the Department of State, October, 1892, Moore, Dig., IV, 356; circular relative to the

The Federal Courts and the Department of State seem at the present time to be agreed that the provisions of the statutory law render unnecessary the issuance of a mandate or a certificate of requisition by the Secretary of State as a foundation for proceedings in the United States with a view to the arrest or commitment of a fugitive.[1] Hence, it is believed that the provisions of certain treaties indicating that judicial proceedings shall be dependent upon the exhibition of a mandate or certificate of requisition are rendered unimportant.[2]

(8)

§ 325. Provisional Detention.

Numerous treaties provide for the detention of a fugitive on proper application prior to the formal requisition for surrender. Such provision is commonly followed by the declaration that the fugitive shall be released from custody, unless formal requisition together with the documentary proofs be made within a specified period after the date of arrest.[3] As the Act of Congress

extradition of fugitives from the United States in British jurisdiction, May, 1890, Moore, Dig., IV, 359; documents contained and cited in Moore, Dig., IV, 362-368, relative to extradition of fugitives from Mexico.

[1] Benson *v.* McMahon, 127 U. S. 457; In re Adutt, 55 Fed. 376; In re Orpen, 86 Fed. 760; In re Schlippenbach, 164 Fed. 783; Ex parte Charlton, 185 Fed. 880; also Mr. Bayard, Secy. of State, to Mr. West, Feb. 16, 1886, MS. Notes to Great Britain, XX, 189, Moore, Dig., IV, 371.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Barca, May 3, 1882, MS. Notes to Spain, X, 204, Moore, Dig., IV, 370; Mr. Gresham, Secy. of State, to Prince Cantacuzene, Russian Minister, Dec. 13, 1893, MS. Notes to Russia, VIII, 32, Moore, Dig., IV, 372.

It is to be observed that Art. VIII of the treaty with Mexico of Feb. 22, 1899, provides that after the demanding country has fulfilled specified requirements relative to requisition and documentary proofs, "the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive." Malloy's Treaties, I, 1187.

[3] The conventions of the United States providing for the provisional detention of fugitives are not uniform. Thus, for example, Art. IV of that with Chile of April 17, 1900, declares that the proper course in the United States shall be "to apply to a judge or other magistrate authorized to issue warrants of arrest in extradition cases and present a complaint on oath, as provided by the statutes of the United States." Malloy's Treaties, I, 194. Others, such as Art. IV of the treaty with Cuba of April 6, 1904, provide that a complaint "shall be made by an agent" of the demanding government "before a judge or magistrate etc." Malloy's Treaties, I, 369. In certain other conventions, such as Art. IX of convention with Guatemala of February 27, 1903, it is declared that "each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody" for a specified period of time to await the production of documents upon which the claim for extradition is founded. Malloy's Treaties, I, 882. It is not believed that this provision is intended to contemplate the arrest of a fugitive in the United States save on a complaint under oath. Nevertheless, it is significant of what the political department believes to be a sufficient

is considered applicable to such cases, it is the practice in the United States to make provisional arrests irrespective of the existence of appropriate treaty provisions with demanding countries.[1] While, therefore, a demanding State which had caused the provisional detention of a fugitive would lack the right to complain that its treaty was violated, if, upon its own failure to produce the requisition and necessary documentary proofs within the time agreed upon after the date of arrest, the fugitive were released, it is not believed that the fugitive himself would, under similar circumstances, be necessarily entitled to his discharge from custody, if it appeared that the effort to secure his extradition was still being prosecuted in good faith by the State from whose territory he had fled.[2]

(9)

Interpretation

(a)

§ 326. The General Principle.

Treaties of extradition are to be interpreted by the same processes that are applicable to other international agreements. There is always involved a twofold inquiry: first, respecting

compliance with the existing law. When the United States agrees to procure the arrest of a fugitive, it would seem to undertake that its own officers shall, under certain contingencies, become the agents of the demanding government for the purpose of swearing to complaints.

According to Art. XIII of the treaty with Paraguay of March 26, 1913, Treaty Series, No. 584, it is agreed that upon a request for the arrest, detention or extradition of a fugitive, the legal officers of the country where the proceedings are had, "shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power."

See case arising in 1911, where the Spanish Consul General at New York was unable to secure the provisional arrest and detention by a United States Commissioner of certain fugitives, under Art. XI of the existing extradition treaty, because of the inability of the complainant to file a sufficient complaint. For. Rel. 1911, 716–722. It may be observed that the Department of State inclined to the opinion that the United States was not to be regarded as having failed in its contractual obligations towards Spain by reason of the inability of the Consul General to make a complaint containing allegations declared by the courts of the United States to be essential.

[1] Mr. Bayard, Secy. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53, Moore, Dig., IV, 382; Mr. Moore, Assist. Secy. of State, to the Attorney-General, May 26, 1898, 227 MS. Dom. Let. 651, Moore, Dig., IV, 383. See, also, Moore, Extradition, I, pp. 395–407.

[2] See comment of Prof. Moore, relative to a communication of Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 174, May 14, 1901, MS. Notes to Mexican Legation, X, 585, Moore, Dig., IV, 384; case of extradition of one H. Garcia, from Mexico to the United States, in 1910, involving the re-arrest of the accused after the expiration of the forty-day detention period, For. Rel. 1910, 723–729.

the standard of interpretation; secondly, concerning the sources of interpretation.[1] Thus, in case of a dispute, proof that at the time of negotiation the contracting parties did in fact understand that a certain term had a particular signification, whatever that may be, should be decisive.[2] The observance by the courts of so-called rules of construction is not believed to be in defiance of this requirement. It simply indicates that, in the absence of evidence to the contrary, a single reasonable inference must be deduced from the conduct of the parties as expressed in their agreement. It does not signify that evidence showing a contrary understanding should be rejected or unheeded. When, however, under similar circumstances, there is habitual failure to offer such evidence, rules of construction become more certain of application, and their true nature is obscured by reason of the frequency with which they are observed.[3]

When the municipal laws of a contracting State establish the procedure to be followed in extradition cases, in order to facilitate the operation of its treaties, it must be inferred that the requirements of those laws were had in contemplation at the time of negotiation, and that, in the absence of evidence to the contrary, there has been no attempt to nullify them by an undertaking inconsistent therewith. Thus, it is generally believed that the extradition treaties of the United States, however differing in scope and phraseology, are always concluded with reference to the existing Acts of Congress, and are therefore to be construed in harmony therewith, and that the agreements necessarily indicate the construction placed upon the local laws by the Department of State.[4]

The Supreme Court of the United States is emphatic in its opinion that there should be imputed to the contracting parties the intention that a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of the discharge of a contractual obligation expressed in an extradition treaty.[5]

[1] Interpretation of Treaties, *infra*, § 530; also Wigmore, Evidence, IV, 3470.

[2] This is substantially the position taken by the United States as to the interpretation of its extradition treaty with Italy, of Feb. 8, 1868. See Moore, Extradition, I, § 141.

[3] It may be observed that under certain circumstances a national court, as distinguished from an international tribunal, may feel itself fettered in the task of interpretation by the position taken by the political department of its own government, even subsequent to the time of negotiation. See Charlton *v.* Kelly, 229 U. S. 447, 476. *Compare*, *Ex parte* Charlton, 185 Fed. 880, 886.

[4] Johnson *v.* Browne, 205 U. S. 309.

[5] Grin *v.* Shine, 187 U. S. 181, 184, where Brown, J., speaking for a unani-

Where a treaty lacks any specific reference to the matter, it is generally believed, as a reasonable rule of construction, that the agreement should take effect from the date of signature, and thus operate retroactively.[1]

(b)

§ 327. Conviction *Par Contumace*.

The agreement expressed in numerous conventions [2] to deliver up persons convicted of crimes is interpreted both by the political and judicial departments of the United States as applicable solely

mous Court declared: "In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign Powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, *viz.*, submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged."

See, also, Benson *v.* McMahan, 127 U. S. 457, 466–467; Wright *v.* Henkel, 190 U. S. 40, 57; Pierce *v.* Creecy, 210 U. S. 387, 405. Holmes, J., in the opinion of the Court in Glucksman *v.* Henkel, 221 U. S. 508, 512, declared: "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender." Also United States *v.* Greene, 146 Fed. 766.

[1] Moore, Extradition, I, § 86, *citing In re* Angelo de Giacomo, 12 Blatchf. 391, also Mr. Evarts, Secy. of State, to Mr. Seward, Jan. 30, 1880, MSS. Dom. Let.

See, also, Mr. Hay, Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 17, July 11, 1899, MS. Notes to Mexican Legation, X, 469, Moore, Dig., IV, 269, concerning date of taking effect of the extradition treaty with Mexico, Feb. 22, 1899.

Most-Favored-Nation Clause. It is generally believed that extradition treaties do not fall within the most-favored-nation clause. Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 148, 155; Moore, Dig., V, 311.

Expenses. "Every treaty of extradition to which the United States is a party contains a provision that the expenses of extradition shall be borne by the demanding government, and it is the practice for the demanding government to defray the expenses of the proceedings whether the fugitive is eventually surrendered or not." Frederick Van Dyne in Cyc. Law & Proc., XIX, 79.

[2] See, for example, Art. I of convention with Italy, March 23, 1868, Malloy's Treaties, I, 967; also Art. I of treaty with San Marino, Jan. 10, 1906, *id.*, II, 1598.

to a fugitive whose conviction took place while he was in the custody of the demanding government.[1] In case the trial and conviction are subsequent to the escape of the accused, so that the judicial decree is *par contumace*, he is regarded as one merely charged with the commission of the crime. Hence in the judicial proceedings following the requisition for his surrender, such evidence of criminality must be offered as is required in any case of one charged with the commission of an extraditable offense.[2]

(10)

§ 328. Scope of Treaties with Respect to Areas Covered.

The extradition treaties of the United States commonly declare that a person whose surrender may be demanded shall be either charged with or convicted of an offense committed in the "jurisdiction" of one of the contracting parties, and who seeks an asylum or who may be found within the "territories" of the other.[3]

The term jurisdiction appears to have been employed to designate any place lawfully subject to the control for purposes of jurisdiction of the demanding State at the time when the act was committed, such as a public vessel,[4] or a merchant vessel on the high seas,[5] as well as the national domain.[6] On the other hand,

[1] Mr. Blaine, Secy. of State, to the Minister of the Netherlands, May 6, 1889, relative to the Case of C. E. Plugge, Moore, Extradition, I, 133; telegram of the Acting Secretary of State, to Mr. Leishman, Ambassador to Turkey, Oct. 10, 1907, For. Rel. 1907, II, 1070. See, also, *Ex parte* Fudera, 162 Fed. 591, in which the learned judge cites Moore, Extradition, I, § 102; "Report of a Recent Extradition Case, *re* Macaluso", *Ill. Law R.*, VII, 237; *Ex parte* La Mantia, 206 Fed. 330.

[2] That this requirement has not always been appreciated by demanding governments is apparent from *Ex parte* Fudera, 162 Fed. 591, and *Ex parte* La Mantia, 206 Fed. 330.

[3] See, for example, Art. I convention with France, Jan. 6, 1909, Charles' Treaties, 33.

[4] President Adams, to Mr. Pickering, Secy. of State, May 21, 1799, relative to the case of one Nash, alias Robbins, 8 John Adams's Works, 651, Moore, Dig., IV, 281–282; Moore, Extradition, I, §§ 105 and 106, concerning cases respectively of Kent and of Markham.

[5] Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 73, 84. See, also, Mr. Buchanan, Minister to England, to Mr. Marcy, Secy. of State, Aug. 3, 1855, 67 MS. Despatches from Great Britain, Moore, Dig., IV, 282.

In a case of concurrent jurisdiction such as, for example, where an offense was committed on a merchant vessel of the demanding State on the high seas, resulting in the death of the victim after the vessel reached a port of the State on which requisition was made, the latter would doubtless be justified in asserting itself the right to prosecute the offender, and in declining to surrender him, if its authorities saw fit to take such a course. Mr. Fish, Secy. of State, to Mr. Watson, Aug. 15, 1874, MS. Notes to Great Britain, XVI, 413, Moore, Dig., IV, 281. See, also, Sternaman *v.* Peck, 83 Fed. 690. *Compare* situation in case of Peter Lynch, Moore, Extradition, I, § 107.

[6] See the decision of Lowell, J., in *In re* Taylor, 118 Fed. 196, and the comment thereon in Moore, Dig., IV, 280.

an offense perpetrated by a national of a demanding State in foreign territory not subject to its control, is not believed to have been committed within the jurisdiction of that State, even though it asserts the right to punish the offender for his misconduct as an act in defiance of its own commands.[1]

The term "territories" as descriptive of the place where a fugitive seeks asylum or is found, is regarded as referring to a place subject to the control of the State upon which requisition is made, such as its own domain, or foreign territory under its military occupation,[2] or a foreign merchant vessel within its harbors,[3] or its own public vessels. Difficulties that may arise respecting the surrender of the fugitive when he is found on a public vessel,[4] or concerning his arrest when he is on board a foreign merchant vessel in a port of the State upon which requisition is made,[5] are unrelated to the question as to whether the case falls within the scope of a particular treaty.

[1] Williams, Atty.-Gen., 14 Ops. Attys.-Gen., 281, *re* Case of Carl Vogt; *compare* In re Stupp, 11 Blatchf. 124.

"It has been announced by the Department of State that an offense committed in a country where extraterritorial jurisdiction is exercised by foreign Powers is not committed within the jurisdiction of such Powers in the sense of the extradition treaties, so as to give the government of the country of which the offender is a citizen or subject the right to demand his surrender from the territory of the United States," Moore, Extradition, I, § 108, *quoting* Mr. Cadwalader, Acting Secy. of State, to Mr. Bingham, American Minister to Japan, Aug. 18, 1875, For. Rel. 1875, II, 821.

[2] Report of Jan. 9, 1900, Magoon's Reports, 523, Moore, Dig., IV, 285; letter of the Secy. of War, Aug. 17, 1900, quoted in Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 101, Sept. 4, 1900, MS. Notes to Mexican Legation, X, 537, Moore, Dig., IV, 285.

It is not believed that the term "territories" has reference to a foreign country where rights of extraterritorial jurisdiction are exercised by the State on which requisition is made. Mr. Hunter, Second Assist. Secy. of State, to Mr. G. F. Seward, Consul-General, Aug. 31, 1874, For. Rel. 1874, 338; Mr. Cadwalader, Assist. Secy. of State, to same, Oct. 23, 1874, *id.*, 347; Moore, Extradition, I, § 109.

[3] *In re* Newman, 79 Fed. 622.

[4] Mr. Blaine, Secy. of State, to Mr. Denby, Minister to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74, Moore, Dig., IV, 283.

[5] Mr. Lincoln, Minister to England, to Mr. Blaine, Secy. of State, No. 480, June 24, 1891, MS. Despatches from England, Moore, Dig., IV, 284.

Domestic Legislation for Extradition to Foreign Territory under Military Occupation. The enactment by a State of a law (such as the amendment by the Act of Congress of June 6, 1900, 31 Stat. 656, of Rev. Stat. § 5270) providing for the arrest within its territory of persons found therein after having violated certain criminal laws within foreign territory occupied by or under the control of the State, and establishing appropriate procedure for the surrender of such persons to the military governor of such territory, is merely an assertion of a right of jurisdiction by the sovereign in actual control of the place of refuge, and that also where the crime was committed. It is not based upon treaty. Nor is it responsive to any international obligation. Such legislation is essentially domestic in character. See Neely *v.* Henkel, 180 U. S. 109, in which the Act of June 6, 1900, was applied

(11)

§ 329. Fugitives from Justice.

The treaties of the United States are deemed to apply "not only to persons seeking an asylum here professedly, but to such as may be found in the country." [1] The reasons which may induce offenders to enter are unimportant.[2] There is, however, a disposition on the part of the United States to make the requirement that the person found within its territories shall have entered therein after having been himself within the "jurisdiction" of the State demanding his surrender. Consequently, a person who while in the United States and without leaving its domain, participated in a conspiracy to commit murder in that of a foreign State, within whose territory the conspiracy was carried into effect, would not be regarded as liable to extradition upon the demand of that State.[3]

d

Some Aspects of Procedure in the United States

(1)

§ 330. In General.

The design of the statutory law of the United States in relation to extradition has been to facilitate rather than hinder the operation of treaties which might be concluded.[4] The procedure estab-

to Cuba, while occupied by the United States. See, also, Mr. Hay to Mr. von Mumm, Oct. 25, 1899, For. Rel. 1899, 318–319, Moore, Dig., IV, 265–266.

The Panama Canal Act of August, 1912, extends the operation of the extradition treaties of the United States to the territory embraced within the Isthmian Canal Zone. Session Laws, 62 Cong., 2 Sess., 1912, p. 569.

[1] The language in the text is that employed in the caption of the opinion by Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 306, cited in Moore, Dig., IV, 286.

[2] See *In re* Ezeta, 62 Fed. 972, 978.

[3] Mr. Hay, Secy. of State, to Baron Fava, Italian Ambassador, No. 654, March 8, 1901, MS. Notes to Italian Legation, IX, 508, Moore, Dig., IV, 286.

[4] The legislation of the United States is embraced in Rev. Stat. §§ 5270–5279, constituting title LXVI, and in the Act of Aug. 3, 1882, Chap. 378, 22 Stat. 215, in the Act of June 6, 1900, Chap. 793, 31 Stat. 656, and in that of June 28, 1902, Chap. 1301, 32 Stat. 475. An Act of Feb. 6, 1905, Chap. 454, 33 Stat. 698, made application of the provisions of the Revised Statutes for the delivery of fugitives as between a foreign country and the Philippine Islands. The existing statutory law is embraced in U. S. Comp. Stat. 1918, §§ 10110–10128.

See, also, the British Extradition Act of August 7, 1870, 33 & 34 Vict. c. 52; also Canadian Extradition Act, of 1906, chap. 152 R. S. and the amendment thereof of May 19, 1909, 8 & 9 Edw. 7. c. 14.

lished has proved to be fairly well adapted to such an end. Other contracting States have generally had little reason or disposition to make complaint.[1] Inasmuch as the surrender of fugitives found within American territory calls for a strict observance of the local law, the interpretation given it by the Department of State, as well as by the courts, deserves attention. What, therefore, they believe is required in normal situations confronting the representatives or agents of foreign demanding governments is here examined.

(2)

§ 331. Magistrates.

Any Federal judge, or commissioner authorized to do so by any of the courts of the United States, or a "judge of a court of record of general jurisdiction of any State", may upon the proper complaint made under oath, issue a warrant for arrest, and upon the apprehension of the fugitive, hear the evidence of criminality, and act as a committing magistrate.[2] Such magistrate is deemed to possess broadest powers with reference to the hearings had before him. Thus he may use his discretion with respect to the matter of adjournment;[3] and this appears in practice to be true whether the prisoner is arrested provisionally to await the arrival of a requisition and depositions,[4] or is held pursuant to a formal demand for surrender and following the receipt of documentary evidence. It is common to allow ample opportunity for the translation of depositions prepared in a foreign

[1] Declares Professor Moore: "Whether an extradition treaty requires legislation for its execution by the Government of the United States has become a speculative question, as general legislation on the subject is not provided. By the Constitution, however, treaties are supreme laws, and as such are directly binding upon the courts, as well as upon the executive; and while they may, by reason of the generality of their terms, or by reason of an express reservation, require to be supplemented by legislation, an act of the legislature is not necessary to give them legal force." Digest, IV, 270.

[2] Rev. Stat. § 5270, U. S. Comp. Stat. 1918, § 10110. The judge before whom the complaint is sworn need not make the warrant returnable to himself. Grin *v.* Shine, 187 U. S. 181, 187.

[3] Rice *v.* Ames, 180 U. S. 371; also Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 91.

[4] Mr. Bayard, Secy. of State, to Mr. Parkhurst, No. 18, Jan. 28, 1889, For. Rel. 1889, 50, 53, Moore, Dig., IV, 382; *Comment* in Moore, Dig., IV, 384, on communication of Mr. Hill, Acting Secy. of State, to Mr. Aspiroz, Mexican Minister, No. 174, May 14, 1901, MS. Notes to Mexican Legation, X, 585.

language. An English translation must be furnished by the demanding government or its agents.[1]

The proceeding before the magistrate is not to be regarded:

> as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[2]

Hence, as will be observed later, defensive testimony, by way of confession and avoidance, becomes immaterial. The inquiry before the magistrate is never whether there is justification for the conduct of the accused, but whether there is reason to believe that he has committed or has been convicted of the offense charged.[3]

While there is some authority indicating that in very excep-

[1] In re Henrich, 5 Blatchf. 414, 426; Mr. Conrad, Acting Atty.-Gen., 21 Ops. Attys.-Gen., 428; Mr. Hay, Secy. of State, to Mr. Wilde, No. 19, March 20, 1901, MS. Notes to Argentine Leg. VII, 74, cited in Moore, Dig., IV, 375.

Declared Mr. Adee, Acting Secy. of State, in a communication to Mr. Wilson, Ambassador to Mexico, Nov. 2, 1910: "The translation of papers in extradition cases is not a service which the surrendering Government should be called upon to perform. The demanding Government should furnish translations of the documents, and the cost of translation is one of the items of the expenses of extradition, to be borne by the Government seeking the extradition." For. Rel. 1910, 733.

Relative to the competency of the translation, see Ex parte Zentner, 188 Fed. 344, 347.

[2] Benson *v.* McMahon, 127 U. S. 457, 463; also Mr. Olney, Secy. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680, Moore, Dig., IV, 390.

[3] Ex parte Charleton, 185 Fed. 880, 888, where the learned judge declared: "The duty of the committing magistrate is confined to determining: First, whether such warrant or certificate has been issued; second, whether the offense charged against the accused is extraditable under the treaty; third, whether the person brought before him is the one accused of such crime; and, fourth, whether there is a probable cause for holding the accused for trial, the evidence in that respect to be such as, according to the law of the State in which the accused is apprehended, would be sufficient to commit him for trial."

COMMITMENT. § 5270 Rev. Stat. provides that if upon a hearing, the magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

tional cases, the prisoner may be released on bail,[1] the Supreme Court of the United States has declared that such release cannot be permitted after an order of commitment.[2]

(3)

Complaint

(a)

§ 332. Authority.

The complaint may be made by any one having the authority

[1] In re Mitchell, 171 Fed. 289. *Compare* well-considered editorial "Bail in Extradition Cases", *Am. J.*, IV, 422.

[2] Wright *v.* Henkel, 190 U. S. 40, 62, where Chief Justice Fuller declared: "The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarassments. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination."

WARRANT AND ARREST. — The following statement of law is taken from Moore on Extradition, I, chap. 13, supplemented by certain decisions rendered since its publication. The validity of the warrant of arrest depends upon the sufficiency of the complaint. The warrant must show the authority of the magistrate. If he is a United States Commissioner authorized to act in extradition cases, that fact must be set out. See In re Farez, 7 Blatchf. 345; In re Kelley, 25 Fed. R. 268. The warrant should set forth the offense charged in conformity with the words of the treaty relied upon; and it should in substance at least correspond with the allegations of the complaint. In re Macdonnell, 11 Blatchf. 79, 88; Castro *v.* De Uriarte, 16 Fed. R. 93. While a warrant of arrest may run throughout the United States, the accused must be taken before the proper magistrate in a State where the arrest is made, and nearest to that place. Pettit *v.* Walshe, 194 U. S. 205. Concerning the different practice prior thereto, see, particularly, Moore, Extradition, I, § 304 and cases there cited. The discharge of the prisoner by virtue of a writ of *habeas corpus* does not necessarily prevent his re-arrest pursuant to a new complaint and warrant. Opinion of Coffey, Acting Atty.-Gen., 10 Ops. Attys.-Gen., 501; nor would the discharge of the accused by reason of the insufficiency of the evidence, either by the committing magistrate or the Secretary of State operate as a bar, in case the demanding government should be able subsequently to present the necessary evidence of criminality. Opinion of Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 91; Opinion of Coffey, Acting Atty.-Gen., 10 Ops. Attys.-Gen., 501; In re Macdonnell, 11 Blatchf. 170; In re Kelly, 26 Fed. R. 852; ex parte Schorer, 195 Fed. R. 334.

Concerning the distinction between the illegality of the attempt to withdraw from the custody of the court by a second warrant of arrest, a prisoner held by a marshal after the issuance of a writ of *habeas corpus*, and the legality of the service of a second warrant issued pending the proceedings before the United States Commissioner, but served subsequent to the discharge of the prisoner by such commissioner, see In re Macdonnell, 11 Blatchf. 170, as *compared* with In re Farez, 7 Blatchf. 345; also In re Fergus, 30 Fed. R. 607.

Respecting the arrest by a United States marshal of the Salvadorean refugees on the U. S. S. *Bennington* in the harbor of San Francisco in 1894, see

of the demanding government.[1] Complaints are commonly made by consular officers, whose official character removes the necessity of affirmative proof of authority.[2] When a person other than a diplomatic or consular representative is the complainant, his authority to act in behalf of the demanding government must be shown at some stage of the judicial proceedings. It need not, however, be disclosed in the complaint itself.[3]

(b)

§ 333. Information and Belief of Complainant.

A complaint under Section 5270 of the Revised Statutes need not be, and rarely is, sworn to by a person having actual knowledge of the facts set out therein. It suffices if it is based upon information and belief.[4] It must appear to the magistrate called upon to issue the warrant of arrest that the sources of the complainant's information and belief justify much more than suspicion of the truth of what is charged.[5] The complaint itself should indicate that the complainant has been informed through a responsible governmental channel that criminal proceedings have been instituted against the accused by the demanding govern-

Moore, Dig., IV, 380, and documents there cited. As to the arrest, pursuant to the application of the British government, of a fugitive on a British vessel in an American port by American authorities, see in re Newman, 79 Fed. 622, Moore, Dig., IV, 381.

That an illegal arrest by State or municipal authorities does not necessarily affect the jurisdiction of the United States Commissioner, is emphasized in the case of Kelly *v.* Griffin, 241 U. S. 6.

[1] In re Kelly, 26 Fed. 852, 856; In re Ferrelle, 28 Fed. 878. In a *dictum* in Grin *v.* Shine, 187 U. S. 181, 193, a person qualified to make a complaint (when not "the official representative of the foreign government" such as its consular officer) is described as one "acting under the authority of the foreign government, having knowledge of the facts." It may be doubted whether, at least in practice, the possession of such knowledge is made the test of the capacity of the complainant when he is not the official representative of such government.

In view of a provision expressed in certain treaties, such as in Art. IX of that with Nicaragua of March 1, 1905, Malloy's Treaties, II, 1296, that "each government shall endeavor to procure the provisional arrest" of the fugitive under specified circumstances, it would appear to be the duty of the Government of the United States, if the treaty were properly invoked, to designate an official to make the complaint. Such an individual might be regarded as possessed of the authority of the demanding government.

[2] Grin *v.* Shine, 187 U. S. 181, 193.

[3] In re Kelly, 26 Fed. 852, 856; In re Ferrelle, 28 Fed. 878; In re Herres, 33 Fed. 165; In re Mineau, 45 Fed. 188.

[4] Rice *v.* Ames, 180 U. S. 371, 375–376; Glucksman *v.* Henkel, 221 U. S. 508; see, also, Ex parte Dinehart, 188 Fed. 858; Powell *v.* United States, 206 Fed. 400.

[5] Rice *v.* Ames, 180 U. S. 371, 375–376.

ment, and that a requisition for his surrender accompanied by the necessary depositions duly authenticated has been, or is about to be made.[1] The absence of any statement in the complaint setting out the sources of information and belief, is not, however, regarded as a fatal defect if there has previously been brought to the knowledge of the magistrate as such, in a proceeding relating to the extradition of the accused, proof that the complainant had in fact solid grounds for the allegations which he made.[2] The statement in the complaint of sufficient sources of information and belief would seem to obviate the necessity of offering simultaneously proof as to the existence or nature of those sources, or of attaching to the complaint copies of documents which were in fact the foundation of the complainant's allegations.[3]

(c)

§ 334. Form of Charge.

The complaint should set forth clearly and precisely the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused of the precise nature of the charge against him, it is sufficient.[4] The complaint should contain the allegation that the accused is a fugitive or that he is believed to be within the jurisdiction; also the allegation that the offense charged is within the treaty.[5]

[1] Ex parte Dinehart, 188 Fed. 858.

[2] Yordi *v.* Nolte, 215 U. S. 227, *affirming* Ex parte Yordi, 166 Fed. 921.

[3] Notwithstanding the *dicta* of the court in Rice *v.* Ames, 180 U. S. 371, 375–376, there is an absence of judicial authority to the effect that the Act of Congress requires the complainant to offer documentary proof of the sufficiency of the sources of his information and belief. The test of the authority of the magistrate to issue a warrant seems to be whether he himself has reason to believe that the complainant has just ground for making the complaint. The former has reason for such belief, when the complainant asserts under oath the existence of certain facts which if true would create in the mind of the complainant reasonable belief of the truth of the allegations set forth in the complaint. In numerous cases complaints have been upheld by the courts where the complainant has referred to the receipt of certain telegrams as the sources of his information and belief, without exhibiting to the magistrate such telegrams or certified copies thereof, either by attaching them to the complaint itself or by any other process. See, Castro *v.* De Uriarte, 12 Fed. 250; Yordi *v.* Nolte, 215 U. S. 227; Powell *v.* United States, 206 Fed. 400.

[4] The statement in the text is the language used by Coxe, J., in Ex parte Sternaman, 77 Fed. 595, 596, quoted with approval by Fuller, C. J., in Yordi *v.* Nolte, 215 U. S. 227, 230. See, also, Grin *v.* Shine, 187 U. S. 181, 189; Ex parte Zentner, 188 Fed. 344; For. Rel. 1911, 716–722, where a Consul General of Spain was unable to make a complaint containing the allegations commonly declared to be essential.

[5] The language of the text is that of the captions in Moore, Extradition, I, §§ 294 and 295.

(4)

Evidence

(a)

§ 335. Amount of Proof Required of Demanding Government.

According to Section 5270 of the Revised Statutes, if the committing magistrate deems the evidence sufficient to sustain the charge under the provisions of the treaty, he must certify the same; and by a common treaty provision, the amount of evidence necessary for commitment is to be tested by what the law of the place where the fugitive was found would justify for apprehension and commitment, if the crime were there committed.[1] Thus, in

[1] "The place by whose law the question is to be tested is, if the fugitive is apprehended in the United States, the State in which he is found." Moore, Dig., IV, 391, *citing* Pettit *v.* Walshe, 194 U. S. 205. See, also, Mr. Fish, Secy. of State to Mr. Westenberg, Dutch Minister, Nov. 12, 1873, For. Rel. 1874, 785, Moore, Extradition, I, § 337, p. 517, note 1.

AUTHENTICATION OF DOCUMENTARY EVIDENCE OF THE DEMANDING GOVERNMENT. The documentary evidence of the demanding government is rendered admissible if authenticated according to the requirements of the existing law of the United States. § 5 of the Act of August 3, 1882, .22 Stat. 216, U. S. Comp. Stat. 1918, § 10116, provides: "In all cases where any deposition, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies therof, so offered, are authenticated in the manner required by this act."

To understand the purport of the foregoing provisions it is desirable to examine the full and careful discussion contained in Moore, Extradition, I, chap. XIV, and also the documents cited in Moore, Dig., IV, 384–388. By such process it becomes possible to grasp the significance of the several Acts of Congress from 1848 until 1882 and of the decisions declaratory of them. With respect to what constitutes compliance with the Act of 1882, attention is called to the following cases: In re Behrendt, 22 Fed. 699; In re McPhun, 24 Blatchf. 254; In re Krojanker, 44 Fed. 482; In re Breen, 73 Fed. 458; In re Glaser, 176 Fed. 702; In re Luis Oteiza y Cortes, 136 U. S. 330; Grin *v.* Shine, 187 U. S. 181; Elias *v.* Ramirez, 215 U. S. 398; In re Lincoln, 228 Fed. 70.

Respecting the authentication of extradition papers by consular officers, see Mr. Knox, Secy. of State, to the Mexican Ambassador, April 13, 1910, For. Rel. 1910, 731, 732, where it was declared: "This department is of the opinion, however, that a consular officer of the United States, resident in a foreign country in which the United States maintains a diplomatic mission, is not authorized under this statute to authenticate extradition papers, and that were the question raised before the courts, the courts would so interpret it."

applying local requirements, it was held by Judge Morrow in the Ezeta Case, that the evidence of criminality

> need not be such as would be required at the trial of the accused, but must be such evidence as ordinarily obtains at a preliminary examination, and amount to probable cause of his guilt; probable cause being such evidence of guilt as would furnish good reason to a cautious man, and warrant him in the belief that the person accused is guilty of the offense with which he is charged.[1]

This statement is believed to be declaratory of the principle involved, particularly in view of the nature of the proceedings before the committing magistrate.[2]

It may be observed that the furnishing of requisite proof that the person arrested is in fact the fugitive charged with crime and whose extradition is sought, may prove to be a difficult task.[3] Frequently the demanding government finds it impossible to send to the United States persons capable of making proof of identification; and such individuals are not to be found at the place where the hearing is had. For that reason it is believed that there should be embraced within the depositions, whenever possible, some means of establishing the identity between the person arrested and him whose surrender is demanded. A photograph of the latter, or a specimen of his handwriting or of his finger-print, may suffice for such a purpose.

(b)

§ 336. Defensive Testimony.

Pursuant to the provision of Section Three of the Act of Congress of August 3, 1882,[4] a fugitive is regarded as entitled to call witnesses in his own behalf, and to testify himself, if he so desires.[5]

[1] In re Ezeta, 62 Fed. 972, 982, *citing* Aaron Burr's Case, 1 Burr's Trial, 11; Munns *v.* Dupont, 3 Wash. C. C. 31; In re Farez, 7 Blatchf. 345; In re Wadge, 15 Fed. 864; 16 Fed. 332; In re Macdonnell, 11 Blatchf. 170; In re Behrendt, 22 Fed. 699; Benson *v.* McMahon, 127 U. S. 457, 462. See, also, opinion of Mr. Nelson, Atty.-Gen., 4 Ops. Attys.-Gen., 201, Moore, Dig., IV, 388; Moore, Extradition, I, §§ 337–340; Mr. Olney, Secy. of State, to Mr. Townsend, Nov. 13, 1896, 213 MS. Dom. Let. 680, Moore, Dig., IV, 390; In re Piaza, 133 Fed. 998; In re Glaser, 176 Fed. 702, 704.

[2] Benson *v.* McMahon, 127 U. S. 457, 462–463.

[3] See, for example, Ex parte La Mantia, 206 Fed. 330, 332–333.

[4] 22 Stat. 215, U. S. Comp. Stat. 1918, § 10114.

[5] In re Farez, 7 Blatchf. 345; In re Kelley, 25 Fed. 268. "The magistrate is not bound to adjourn proceedings to enable the accused to obtain evidence of an alibi." Moore, Dig., IV, 391, *citing* In re Wadge, 15 Fed. 864.

On the other hand, the Supreme Court of the United States has held that Section Five of the same Act of Congress respecting the admissibility of depositions when certified in the manner prescribed, is not applicable to depositions offered on the part of the accused, and that such documents when so authenticated are not admissible.[1]

In view of the nature and purpose of the inquiry before the committing magistrate, the evidence on the part of the accused should be directed to show that he did not in fact commit the acts charged against him, or that the acts so charged did not constitute any extraditable offense. Thus, for example, he might be able to offer convincing testimony that an act of robbery laid at his door was, by reason of the attending circumstances, of a political character, thus rendering the actor outside of the scope of the treaty.[2] On the other hand, evidence to show justification or excuse for an act committed by the accused, being a matter of defense, should be reserved until the trial before the court of the demanding government, and hence excluded from the consideration of the committing magistrate.[3]

(c)

§ 337. Scope of Inquiry in *Habeas Corpus* Proceedings.

None doubt that a writ of *habeas corpus* cannot perform the function of the office of a writ of error.[4] The precise scope of the inquiry to be made by the court issuing the writ in extradition cases was well stated by Mr. Justice Blatchford, when, as a District Judge in 1875, he announced the decision of the court in the case of In re Stupp. He declared:

> In full conformity with these views, the great purposes of the writ of *habeas corpus* can be maintained, as they must be. The Court issuing the writ must inquire and adjudge whether the Commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute;

[1] In re Luis Oteiza y Cortes, 136 U. S. 330, 336–337.

[2] This was successfully shown, for example, in the Rudovitz Case.

[3] In re Cienfuegos, 62 Fed. 972, 976. In Ex parte Charlton, 185 Fed. 880, 883–884, it was held that the question of the sanity of the accused at the time of the commission of the crime charged was a matter of defense and could only be interposed when he was put on trial; also that inquiry as to the question of his sanity subsequent to the commission of the offense could only be raised immediately before the trial, and then in the forum where the trial might be pending.

[4] In re Luis Oteiza y Cortes, 136 U. S. 330; Ornelas *v.* Ruiz, 161 U. S. 502, 508.

whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But, such Court is not to inquire whether the legal evidence of facts before the Commissioner was sufficient or insufficient to warrant his conclusion. Nor, if there was legal and competent evidence of facts before the Commissioner, for him to consider in making up his decision as to the criminality of the accused, is the Court, on *habeas corpus*, to hold the proceedings illegal and to discharge the prisoner because some other evidence was introduced which was not legal or competent, but was held to be so by the Commissioner and was considered by him on the question of fact, or because the Court, on a consideration of all the evidence which the Commissioner considered, would have come to a different conclusion, or because the Court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of fact from that at which the Commissioner arrived. In other words, the proper inquiry is to be limited to ascertaining whether the Commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender, without any legal evidence.[1]

As the documentary evidence of the demanding government when authenticated according to the requirement of the Act of Congress is thereby made admissible, no question can be raised as to its competence.[2] Thus the objection that certain testimony contained in the depositions is not under oath and hence not admissible would be without force.[3] As to the oral testimony of the demanding government, the question respecting competence cannot easily arise for the reason that the rules which have been developed for the purpose of preventing certain classes of testimony from being presented to a jury, have no application to a situation where there is no jury, and the judicial proceedings are in the nature of a preliminary examination rather than a trial.

The committing magistrate must have before him some legal as well as competent evidence on which to pass judgment — evi-

12 Blatchf. 501, 519.

[2] "Where the certificate is sufficient it is conclusive as to the admissibility of the evidence." Moore, Extradition, I, § 330. See, also, Elias *v.* Ramirez, 215 U. S. 398, 409; Bingham *v.* Bradley, 241 U. S. 511, 517; Ex parte Schorer, 197 Fed. 67, 72; earlier cases cited in Moore, Extradition, I, 501, note 3; In re Lincoln, 228 Fed. 70.

[3] Elias *v.* Ramirez, 215 U. S. 398, 409.

dence both of the "criminality" of the accused, and of the fact that the offense charged against him is rendered extraditable by the treaty invoked. It thus becomes important in *habeas corpus* proceedings to observe whether the objection to the decision of the committing magistrate in holding the accused to await extradition, rests upon the contention that there was an entire absence of legal evidence, or upon the contention that the legal evidence received was in fact insufficient.

Every treaty of extradition establishes certain tests of the legality of the evidence to be furnished by the demanding government. These refer to the nature of the offense charged, and to the sufficiency of evidence to be submitted. For example, a treaty rendering extraditable the embezzlement of "public monies" by "public officers", would appear to assert, as one test of the legality of evidence essential to commitment and surrender, evidence of the fact that the funds embezzled were "public" and that the accused was a "public" official. In the absence of proof of those facts the magistrate would have before him no legal evidence on which to act.[1]

§ 338. The Same.

It has been seen that the treaties almost always make the duty to surrender the accused dependent upon the production of evidence of criminality sufficient to justify his commitment for trial according to the law of the place where he is found. If, therefore, the testimony of the demanding government should be exclusively of a kind which, according to the law of the place where accused was found, was rendered insufficient to commit a person for trial, there would be no legal evidence before the magistrate. If he should commit the accused on such testimony, the objection on *habeas corpus* proceedings would not be directed primarily against the sufficiency of evidence but rather against the nature of what was rendered illegal by the treaty.[2]

[1] Art. II of convention with Italy of March 23, 1868, Malloy's Treaties, I, 967; also Ex parte Ronchi, 164 Fed. 288. See, also, in this connection, Ex parte La Page, 216 Fed. 256.

[2] An exact application of this principle is found in Ex parte Fudera, 162 Fed. 591, where the only testimony of the demanding government relative to a murder charged against the accused was certain hearsay testimony contained in the depositions. The court issuing the writ of *habeas corpus* held that by the law of the place where the accused was found, such testimony would not suffice to commit a person to await trial, that the treaty requirement was, therefore, not complied with, and that hence the accused was entitled to be discharged. It is believed, however, that while the learned judge may have correctly stated the law of the place where the accused was found

Not until there is legal evidence before the committing magistrate can a question as to its sufficiency arise. If the order of commitment should be based upon an amount of legal evidence so slight that the decision would appear incomprehensible in the matter of reasoning, or necessarily attributable to passion or partiality, it is believed that the court issuing the writ of *habeas corpus* would be justified in discharging the prisoner. In such case the committing magistrate would not have had before him sufficient evidence on which he could justify any judgment other than one favorable to the accused. Hence, the case would resemble one where no legal evidence whatever was offered. Thus the principle frequently announced by the Supreme Court of the United States that the sufficiency of the legal and competent evidence before the committing magistrate cannot be reviewed on *habeas corpus* proceedings is believed to signify that the impropriety of review depends upon the existence of any evidence such as would warrant the commitment of the prisoner without subjecting the magistrate to the charge of partiality or mental weakness.[1]

in the case before him, such is not universally the law in the United States. Sometimes the local law does permit the commitment of a person for trial on hearsay testimony. See, for example, the case of McKinney *v.* United States, 199 Fed. 25, where there was nothing but hearsay testimony before the grand jury to support the charge of the indictment, and where a motion to quash the indictment was overruled, and the judgment of conviction affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. Where such is the law, hearsay testimony in the depositions becomes legal testimony so far as the treaty is concerned. *Compare* In re Ezeta, 62 Fed. 972, 988, respecting the case against General Bolanos.

[1] It is not believed that the Supreme Court of the United States has announced a different rule. In the case of Benson *v.* McMahon, 127 U. S. 457, 463, the Court declared that the inquiry was whether there was legal evidence before the commissioner "to justify him in exercising his power to commit the person accused to custody." After reviewing the testimony the court expressed the opinion that the commissioner "was justified." The decision was quoted with approval by Mr. Justice Blatchford in the case of In re Luis Oteiza y Cortes, 136 U. S. 330. In announcing the opinion of a unanimous court he stated that the decision of the commissioner could not be reviewed when he had before him "competent legal evidence on which to exercise his judgment." *Id.*, 334. The same language was employed by Chief Justice Fuller in the opinion of the Court in Ornelas *v.* Ruiz, 161 U. S. 502, 508, and the foregoing decisions were cited as authority. In Bryant *v.* United States, 167 U. S. 104, the opinion was delivered by Mr. Justice Brown, who declared that "the question before us is . . . whether there was any *legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition." To explain his meaning the learned Justice quoted the language of Chief Justice Fuller in Ornelas *v.* Ruiz. In the case of Terlinden *v.* Ames, 184 U. S. 270, 278, Chief Justice Fuller cited Ornelas *v.* Ruiz, and Bryant *v.* United States, and quoted as declaratory of the principle involved, the statement of the court in the case of In re Stupp, 12 Blatchf. 501, 519, which is quoted in the text above. In Elias *v.* Ramirez, 215 U. S. 398, 409, the Court was of opinion that the evidence was such as to "justify" the order of the commissioner, and for that reason reversed the decision of the Supreme Court of Arizona which

(5)

Surrender

(a)

§ 339. An Executive Function.

According to Section 5272 of the Revised Statutes, the Secretary of State is empowered to order, under his hand and seal of office, the person committed to be delivered to the duly authorized agent of the demanding government; and such agent is authorized to hold the prisoner in custody and to take him to the territory of the demanding government pursuant to the treaty.[1]

An Act of Congress of February 6, 1905, extending Sections 5270–5278 of the Revised Statutes so far as applicable, to the Philippine Islands, provided that when a person is committed therein for extradition, the order for delivery "shall be issued by the Governor of the Philippine Islands under his hand and seal of office and not by the Secretary of State."[2]

had declared that there was no competent legal evidence of the crime charged upon which the commissioner might have exercised his judgment. Likewise in McNamara *v.* Henkel, 226 U. S. 520, 524, the Supreme Court expressed the opinion that there was evidence before the Commissioner upon which he "was entitled to exercise his judgment." In Bingham *v.* Bradley, 241 U. S. 511, 516–517, Mr. Justice Pitney declared in the opinion of the Court, that the decision of the Commissioner, deeming the evidence sufficient to sustain the charge against the accused, could not be reversed on *habeas corpus* "if he acted on competent and legal evidence." McNamara *v.* Henkel, 226 U. S. 520, was cited. He added that the evidence was "abundantly sufficient" to furnish reasonable ground for belief that the accused had committed an extraditable offense within the terms of the treaty.

[1] See, also, statement in Moore, Extradition, I, § 359; Moore, Dig., IV, 397. Concerning the nature of the power to surrender, see Terlinden *v.* Ames, 184 U. S. 270, 289, where it was declared by Chief Justice Fuller: "The warrant of surrender is issued by the Secretary of State as the representative of the President in Foreign Affairs."

§ 5272 R. S. makes provision also for the recapture of the accused in case of his escape. See case of G. D. Reed where, following an exceptional procedure, the accused was, at the request of the Mexican Government, delivered to its agents, not at the place of detention in New Jersey, but in Texas, to which State he was transferred by American authorities. For. Rel. 1908, 597–601.

[2] 33 Stat. 698, U. S. Comp. Stat. 1918, § 10124.

According to the terms of a convention between the United States and the Netherlands of January 18, 1904, the provisions of the existing extradition treaty of June 2, 1887, were made applicable to the island possessions of the United States and to the colonies of the Netherlands. Art. III declared that: "Application for the surrender of a criminal may be made directly to the governor or chief magistrate of the island possession or colony in which the criminal has sought refuge, by the governor or chief magistrate of an island possession or colony of the other contracting party, Provided, That both island possessions or colonies are situated in Asia or both in America (including the West India Islands); in making such application, the intervention of a consular officer in such a possession or colony may be used, although no

A naval commander cannot execute an extradition treaty under the laws of the United States or in conformity with its express stipulations.[1]

(b)

§ 340. Executive Discretion. Obstacles to Surrender.

The Secretary of State exercises a revisory power in cases where accused has been duly committed by a magistrate, and even where an order of commitment has been sustained on *habeas corpus*.[2] The sufficiency of the evidence is a question for the courts, without whose certificate of criminality the President cannot order the extradition of the accused.[3] It is believed, therefore, that the Executive has no power to surrender a fugitive upon any charge other than one which has been heard before a magistrate and certified by him to be sustained by the evidence offered.[4] On the other hand, the Secretary of State is unwilling to consider evidence which was not produced before the committing magistrate, in behalf either of the accused or of the demanding government.[5]

modification shall thereby be made in his capacity as a commercial agent. The aforesaid governors or chief magistrates shall have authority either to grant the extradition or to refer the matter for decision to the mother country. In all other cases, application for extradition shall be made through the diplomatic channel." Malloy's Treaties, II, 1272.

Attention is called to Art. IX of the extradition treaty with Mexico of February 22, 1899, which permits, under certain circumstances, requisitions to be made by specified authorities of "frontier States or Territories." This Article is believed to contemplate the surrender also by such authorities. Malloy's Treaties, I. 1188. Respecting the operation of the treaty, see Mr. Adee, Acting Secy. of State to Mr. Foster, October 24, 1900, 248 MS. Dom. Let. 453, Moore, Dig., IV, 244. Also Art. XIII treaty with France, Jan. 6, 1909, Charles' Treaties, 37.

[1] Such was the language of Mr. Blaine, Secy. of State, in a communication to Mr. Denby, Minister to China, No. 680, Dec. 7, 1891, For. Rel. 1892, 74 75, Moore, Dig., IV, 283, where it was also said: "No order of his, for instance, would legally take the place of the warrant of surrender, which can only be issued by the Secretary of State after due fulfilment of the precedent judicial requirements. The same course of reasoning applies to the powers of the United States minister to grant extradition in such a case. He has no such power, by statute or treaty. Neither has a consul."

[2] Statement in Moore, Dig., IV, 399, *citing* Moore, Extradition, I 551–556, In re Stupp, 11 Blatchf. 124; 14 Op. 281, In re Stupp, 12 Blatchf. 501. See, also, Mr. Bayard, Secy. of State, to Mr. West, April 15, 1886, MS. Notes to Great Britain, XX, 233, Moore, Dig., IV, 403.

[3] Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 217, cited in Moore, Dig., IV, 400. The language of Mr. Moore is employed in the text.

[4] The language in the text is taken from a statement in Moore, Dig., IV, 400, based upon a communication of Mr. Blaine, Secy. of State, to Sir J. Pauncefote, British Minister, May 17, 1892, MS. Notes to Great Britain, XXI, 664.

[5] Mr. Hay, Secy. of State, to Messrs. Kingsford and Son, Feb. 25, 1899, 235 MS. Dom. Let. 152, Moore, Dig., IV. 400; J. R. Clark, Jr., in *Proceedings*

In view of the provision of the Act of Congress permitting the accused to secure his release under specified circumstances, if within two calendar months after the order of commitment, he shall not have been conveyed out of the United States, any revisory action on the part of the Secretary of State must necessarily be taken without delay.[1] Hence, an appeal in behalf of the accused from the order of commitment should be made imme-

of Am. Soc., III. 95, 114, *citing* Moore, Extradition, I, §§ 374–376; and the Pouren Case.

Mr. Root, Secy. of State, in a communication to Mr. Shields, United States Commissioner, Oct. 13, 1903, declared: "Counsel for Jan Janoff Pouren, whom, pursuant to the provisions of our treaty of extradition with Russia, you recently committed, upon various charges, for surrender to that Government, have submitted to the Secretary of State certain affidavits not offered before the Commissioner, which are intended to show that the offences with which Pouren is charged and for which he was committed for surrender are of a political character.

"It would appear that in submitting these affidavits to the Secretary of State, counsel for the accused acted under the mistaken belief that matters of this sort might be brought directly before the Executive even though forming no part of the record of the case. Such, however, is not the practice of this Department which has, in the past, repeatedly refused to consider evidence which did not form a part of the record submitted by the committing magistrate.

"The evidence which counsel now offer is clearly of a kind that should have been submitted to the committing magistrate at the hearing when full opportunity was afforded, in order that such portions of it as might be found proper should become a part of the record and so be considered by the Commissioner in reaching his determination to release or hold the fugitive. Since as to the merits the only defence offered by the accused in this case appears to be that the offences with which he is charged are political in their character, and since the mistaken action of his counsel practically deprived him of this defence at the hearing, and since, further, if the offences are in reality political, extradition for their commission is expressly prohibited by the treaty, it would seem that the plain intent of the treaty would fail if this evidence were now altogether excluded from consideration.

"The courts have in the past repeatedly held fugitives, against whom a demanding government failed in the first instance to establish an extraditable offence, to await the production of further evidence by the demanding government, and fugitives have afterwards been surrendered upon such evidence so produced. Fair play and justice would appear to require that the fugitive in a proper case should be given similar reasonable opportunities.

"It would seem, therefore, that the fugitive should not under these circumstances be punished for his counsel's mistake, but should be given a reasonable opportunity to present such further evidence as he may have bearing upon this question of political offence.

"The record is therefore returned to you to the end that you may reopen the case and permit the counsel for both parties to offer such further evidence as they may see fit relating to the question of political offences. Upon the receipt of the amended certified record and your decision thereon, the Secretary of State can determine whether the warrant of surrender should issue." (The author is indebted to the courtesy of Mr. Knox, Secy. of State, Jan. 17, 1913, for a copy of the foregoing communication.)

[1] Rev. Stat. § 5273. Concerning it see In re Dawson, 101 Fed. 253; also, Mr. Olney, Secy. of State, to Messrs. Ingram & Hewitt, May 11, 1896, 210 MS. Dom. Let. 94, Moore, Dig., IV, 404; Mr. Adee, for Mr. Knox, Secy. of State, to the Ambassador of Austria-Hungary, Oct. 26, 1910, For. Rel. 1910, 78.

diately upon the entering thereof. Such proceedings, however important, are of an informal character. The filing of briefs by counsel is permitted. Should the Department of State deem it useful, opportunity for informal conference with the law officer of the Department may also be given. "It is not the practice of the Department to have formal hearings in extradition cases." [1]

Several of the more recent treaties of the United States make provision that extradition shall be deferred where the accused is being prosecuted in the State upon which requisition is made, for an offense there committed, until at least he is entitled to liberation.[2] It is said that the "warrant of the Secretary of State for the surrender of a fugitive from justice is subject to the authority of the courts of the United States to hold the fugitive for trial on any charge which may be pending therein against him." [3]

(c)

§ 341. Transit.

No foreign State having custody of a person surrendered to it by any other, pursuant to extradition proceedings, may lawfully convey him through the territory of a third State or into a place subject to its exclusive control without its consent.[4] Hence, special

[1] Mr. Root, Secy. of State, to Mr. Hyde, of counsel for Christian Rudovitz, Dec. 15, 1908, file No. 16649/11; also Moore, Extradition, I, § 376.

[2] See, for example, Art. VI of treaty with Guatemala, Feb. 27, 1903, Malloy's Treaties, I, 881. Also Mr. Hay, Secy. of State, to Mr. Aspiroz, No. 158, March 14, 1901, MS. Notes to Mexican Legation, X, 573, Moore, Dig., IV, 402; correspondence between the United States and Mexico in 1895, respecting the Case of Chester W. Rowe, For. Rel. 1895, part II, 997–1011, Moore, Dig., IV, 302–303, 401–402.

[3] The language in the text is quoted from that in Moore, Dig., IV, 401, which is based upon the following authorities: Mr. Gresham, Secy. of State, to Mr. Romero, Mexican Minister, May 15, 1893, MS. Notes to Mexico, IX, 666; Mr. Adee, Acting Secy. of State, to Mr. Romero, July 3, 1893, *id.*, 676; Mr. Gresham to Mr. Romero, July 12, 1893, *id.*, 679; Mr. Rockhill, Acting Secy. of State, to Atty.-Gen., July 21, 1896, 211 MS. Dom. Let. 440.

[4] Mr. Frelinghuysen, Secy. of State, to Mr. Brewster, Atty.-Gen., Jan. 2, 1885, 153 MS. Dom. Let. 549, Moore, Dig., IV, 406. "In consequence of the theory of English and American jurisprudence, regarding the territoriality of crime, no person can lawfully be arrested or held in custody in this country for a crime committed outside of its jurisdiction, except as provided by statute or by treaty." Memorandum to the Japanese Embassy, March 2, 1907, For. Rel. 1907, II, 759.

In 1908 the German Embassy objected to the action of the American Consul-General at Tangier in having put on board a German merchant vessel in 1906, for transportation to New York, without application for the assent of the German government, one Paul O. Stensland in the custody of two authorized agents of the United States, through whose efforts he had been arrested. For. Rel. 1908, 353–355.

See difficulties connected with the transit of a fugitive from justice in the course of extradition proceedings between Luxemburg and the United States, contained in For. Rel. 1910, 81–104.

arrangements have been made necessary for the return of a fugitive to the United States where a vessel conveying him thereto was obliged to stop at an intermediate foreign port.[1] In the absence of an appropriate Act of Congress, or of a treaty, the executive authority of the United States is believed to lack the right to consent to transit through its territory, at least to the extent of preventing the courts from releasing the prisoner by a writ of *habeas corpus*.[2] While the United States may at any time object to the transit through its domain of fugitives in the course of transportation between third States, the Department of State has declared that "this is a right which in practice is left to be invoked by the party in appropriate judicial proceedings and not by this government in the first instance." [3]

[1] Memorandum to the Japanese Embassy, For. Rel. 1907, I, 759, 760, referring also to the case in For. Rel. 1878, 151, where, in transit across the Isthmus of Panama, the fugitive was permitted to escape.

[2] Mr. Strobel, Third Assist. Secy. of State, to Mr. Coppinger, Consul at Toronto, No. 9, Feb. 20, 1894, 144 MS. Inst. Consuls, 411, Moore, Dig., IV, 406.

It may be observed that Art. XVI of the treaty with Mexico of Feb. 22, 1899, which makes provision for the transit of fugitives through the territories of the contracting parties, declares that the Article shall not take effect "until the Congress of the respective countries shall by law authorize such transit, and the issue of a warrant therefor." Malloy's Treaties, I, 1189.

See, also, treaty with Great Britain of May 18, 1908, in reference to reciprocal rights for the United States and Canada in the matters of conveyance of prisoners and wrecking and salvage. Malloy's Treaties, I, 830.

Art. XIV of the treaty with Salvador of April 18, 1911, makes provision for transit, where the fugitive is not a citizen of the country to be passed through, if the permission of the Secretary of State of the United States, or of the Minister for Foreign Relations of Salvador, as the case may be, is first obtained. U. S. Treaty Series, No. 560, Charles' Treaties, 111.

[3] Memorandum to the Japanese Embassy, March 2, 1907, For. Rel. 1907, 759, 761.

TITLE D

NATIONALITY

1

§ 342. In General.

Nationality refers to the relationship between a State and an individual which is such that the former may with reason regard the latter as owing allegiance to itself.[1] The State may describe such a person as its national. It will be seen that in the case of a minor child, the right to claim allegiance is oftentimes challenged or regarded as held in abeyance, when the sovereign does not also possess the power to exact allegiance. Hence the State may

[1] See, generally, documents in Moore, Dig., III, 273–810; cases in Moore, Arbitrations, III, 2449–2655; papers relating to Expatriation, Naturalization and Change of Allegiance, For. Rel. 1873, II, 1185–1438; Report on Citizenship of the United States, Expatriation and Protection Abroad, by J. B. Scott, David J. Hill and Gaillard Hunt, Washington, 1906, House Doc. No. 326, 59 Cong., 2 Sess.; Frederick Van Dyne, Citizenship of the United States, Rochester, 1904; same author, Law of Naturalization of the United States, Washington, 1907; Compilation of Certain Departmental Circulars relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., Department of State, 1916.

For bibliographies of the extensive literature relating to Nationality see Clunet, *Tables Générales*, I, 559–587, 915–919, Bonfils-Fauchille, 7 ed., § 417; E. M. Borchard, Diplomatic Protection, § 320; Carlo Bisocchi, *Acquisto e Perdita della Nazionalità*, Milan, 1907, xxiii–xxxiv; A. G. de Lapradelle, *De la Nationalité d'Origine*, Paris, 1893, ix–xvii.

See, also, Edouard de Germiny, *Les Conflits de Nationalités devant les Juridictions Internationales*, Paris, 1916; Ernest Lehr, *La Nationalité dans les Principaux États du Globe*, Paris, 1909; Sir Francis T. Piggott, Nationality, 2 parts, London, 1906; E. S. Zeballos, *La Nationalité (au point de vue de la législation comparée et du droit privé humain)*, French translation by André Bosq, 3 vols., Paris, 1914–1916; E. Oudin, "*État des traités et lois relatifs à la Nationalité et la Naturalisation en vigueur dans les principaux pays au 15 avril* 1917", Clunet, XLIV, 817–841; W. W. Willoughby, "Citizenship and Allegiance in Constitutional and International Law", *Am. J.*, I, 914; D. O. McGovney, "American Citizenship", *Columbia Law R.*, XI, 231 and 326; Richard W. Flournoy, Jr., "Observations on the New German Law of Nationality", *Am. J.*, VIII, 477 (text of law printed in Supp., *Am. J.*, VIII, 217); T. H. Thiesing, "Dual Allegiance in the German Law of Nationality and American Citizenship", *Yale Law J.*, XXVII, 479.

not be disposed to shield him from the conflicting although reasonable demands of a foreign country within whose territory he may happen to be, so long as he remains therein.[1] In the case of an adult, it will be found that if the claim to his allegiance has a just foundation, the retention of his national character, according to the view of the United States, does not depend upon his remaining within the physical control of his sovereign. Hence, until his expatriation, he may commonly invoke its aid to protect himself from the exactions of any other.[2]

In a broad sense international law limits the right of a State to impress its national character upon an individual, or to prevent that character from being lost or transferred. The freedom of action of each member of the family of nations is, however, wide. That circumstance, as well as the tendency of States to declare by statute what persons are deemed to be nationals by birth, and how nationality may be acquired or lost, serve to obscure from view the final test of the reasonableness of the local law.

Citizenship, as distinct from nationality, is a creature solely of domestic law.[3] It refers to rights which a State sees fit to confer upon certain individuals who are also its nationals. When the Constitution or laws of the United States declare that persons born under specified circumstances, or changing their allegiance by certain processes, shall become American citizens, citizenship may be truly regarded as a source of American nationality; for the citizen of the United States is necessarily also a national of the United States. It is to be observed, however, that the United States claims as nationals numerous persons upon whom it has not conferred rights of citizenship. International law is concerned with American citizenship only in so far as it emphasizes or establishes simultaneously American nationality.

[1] Double Allegiance, *infra*, § 372.

[2] This is indicated in the attitude of the United States respecting the status of naturalized American citizens. The Right of Expatriation, *infra*, §§ 376–379.

[3] "National character, in legal and diplomatic discussion, usually is denoted by the term 'citizenship.' In most cases this is not misleading, since citizenship is the great source of national character. It is not, however, the only source. A temporary national character may be derived from service as a seaman, and also, in matters of belligerency, from domicil, so that there may exist between one's citizenship and his national character, for certain purposes, an actual diversity. . . . Citizenship, strictly speaking, is a term of municipal law, and denotes the possession within the particular State of full civil and political rights, subject to special disqualifications, such as minority or sex. The conditions on which citizenship is acquired are regulated by municipal law." Moore, Dig., III, 273.

2

THE ACQUISITION OF AMERICAN NATIONALITY BY BIRTH

a

Citizenship

(1)

By Right of Place. *Jure Soli*

(a)

§ 343. The Common Law.

According to the common law every child born "within the ligeance and jurisdiction" of the King of England was regarded as his subject.[1] It is not true that all persons born within the King's domain were within his "ligeance and jurisdiction." Thus, the child of an alien enemy born in British territory within hostile military occupation was regarded as outside thereof; likewise the child born within the realm whose father was an alien, and at the time of the birth of the child, a diplomatic officer accredited to the Crown by a foreign sovereign.[2] As these were, however, the only instances where persons born within the royal domain failed to acquire English nationality, it became natural to assert as a rule of law, commonly known as the *jus soli*, that, subject to these exceptions, a person became a natural-born subject by reason of his birth within the King's domain.[3]

(b)

§ 344. The Laws of the United States.

It was not until 1866 that any law was enacted in the United States indicating what persons born within its territory of alien

[1] Calvin's Case, 7 Rep. 18a; A. Cockburn, Nationality, 7; A. V. Dicey, Conflict of Laws, 2 ed., 166–167; also authorities cited in United States *v.* Wong Kim Ark, 169 U. S. 649, 656; "*De l'applicabilité du jus soli en matière de nationalité*, by Richard Kleen, *Rev. Gén.*, III, 429.

[2] Calvin's Case, 7 Rep. 18 *a*; A. V. Dicey, Conflict of Laws, 2 ed., 167–168. Also Story, J., in Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 155–156, 164.

[3] "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England; and it might occasionally happen that

parentage were to be regarded as nationals. Up to that time the opinion was oftentimes expressed, judicially and otherwise, that the rule of the common law would be followed, in cases where the parents were temporarily residing in the United States at the time of the birth of the child,[1] as well as in those where they were domiciled therein.[2]

> In 1866 the Civil Rights Act became a law. According to it all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.[3]

In 1868 the Fourteenth Amendment to the Constitution was declared ratified by a joint resolution of the Congress and was duly promulgated. It provided that

> all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[4]

Prior to 1897, the Supreme Court of the United States had made no decision respecting the application of the Fourteenth Amendment to a child born within the United States to foreign parents.[5] In that year, however, that Court, in the case of United

a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown." A. V. Dicey, Conflict of Laws, 2 ed., 781.

[1] See, for example, Lynch *v.* Clarke, 1 Sandf. Ch. 583; Munro *v.* Merchant, 26 Barb. 383, 400.

[2] See Opinion of Attorney-General Black, 9 Ops. Attys.-Gen., 373; Opinion of Attorney-General Bates, 10 Ops. Attys.-Gen., 382; Report on Citizenship of the United States, 73; Van Dyne on Citizenship, 1–7.

Declared Mr. Justice Gray, in United States *v.* Wong Kim Ark, 169 United States, 649, 674: "It is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States."

[3] Rev. Stat. § 1992; 14 Stat. 27, U. S. Comp. Stat. 1918, § 3946.

[4] Section 1. See Mr. Bayard, Secy. of State, to Mr. de Bounder, Belgian Minister, April 2, 1888, For. Rel. 1888, I, 48, Moore, Dig., III, 277.

[5] The Court had, however, in the case of Elk *v.* Wilkins, 112 U. S. 94, expressed the opinion "that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States and 'subject to the jurisdiction thereof', within the meaning of the clause in question." Gray, J., in United States *v.* Wong Kim Ark, 169 U. S. 649, 680.

States *v.* Wong Kim Ark, decided that a child born in the United States of parents of Chinese descent who, at the time of his birth, were subjects of the Emperor of China, and domiciled within the United States, where they were engaged in business, became, at the time of his birth, a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment.[1] In the opinion of the Court, delivered by Mr. Justice Gray, it was stated that the Amendment should be interpreted in the light of the common law; that the rule of that law respecting nationality by birth of a child of alien parents was in force in all of the English Colonies on the American continents until the Declaration of Independence, and continued to prevail thereafter in the United States; that there was little ground for the theory that at the time of the adoption of the Fourteenth Amendment, there was any settled and definite rule of international law generally recognized by civilized nations inconsistent with the ancient rule of citizenship by birth within the dominion; that in the forefront both of the Amendment and of the Civil Rights Act of 1866, the principle of citizenship by birth within the domain was reaffirmed in the most explicit and comprehensive terms; that notwithstanding considerations that might influence the legislative or executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens, there were none that could constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Amendment.[2]

There appears to be no reason to anticipate a different conclusion in case the alien parents of a child born in the United States were temporary sojourners, and not domiciled therein.[3] The Department of State is not, at the present time, in view of the

[1] 169 U. S. 649.

[2] *Id.*, 653–654, 657, 658, 667, 675, 694. See, also, Benny *v.* O'Brien, 58 N. J. L. 36; In re Giovanna, 93 Fed. 659. Also In re Look Tin Sing, 21 Fed. 905, and other cases of children born in the United States of Chinese parentage, cited in Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt, 73–74. It is there observed that the question relative to citizenship of a child of parents who may not become citizens has "arisen in connection with alien parents who were domiciled in this country, and not in connection with persons here temporarily. Moreover, the cases found have always concerned the citizenship of persons of Chinese parentage."

[3] Inasmuch as the Supreme Court interprets the Fourteenth Amendment in the light of the common law, and as that law pays no heed to the domicile of the parents in determining the nationality of the child, it would be difficult if not impossible for that Tribunal to raise a distinction based upon the domicile of the former, without abandoning the theory of interpretation which has been adopted. Nor do the *dicta* contained in the opinion of the Court in United States *v.* Wong Kim Ark, 169 U. S. 649, at 682, 687 and 693, encourage belief that such a change of theory is to be anticipated.

decisions of the courts, disposed to raise a distinction based upon the domicile of the parents.[1]

Following the exceptions of the common law, a child born in the United States would not be regarded as acquiring American nationality by birth, in case either the alien father was a diplomatic officer accredited to the United States,[2] or in case the parents were alien enemies, and the birth of the child occurred in a place under hostile military occupation.[3]

(2)

§ 345. By Right of Blood. *Jure Sanguinis.*

By right of blood, *jure sanguinis*, a child may at birth acquire the nationality of his father. Numerous States regard as their respective nationals children born to their own subjects or citizens in foreign lands.[4] The United States makes such a claim, conferring its citizenship as well as its nationality upon children

[1] Mr. Bacon, Acting Secy. of State, to Mr. Towle, American Ambassador at Berlin, Mar. 8, 1907, For. Rel. 1907, I, 516; also Mr. Fish, Secy. of State, to Mr. Marsh, May 19, 1871, MS. Inst. Italy, I, 350, Moore, Dig., III, 278; Mr. Adee, Acting Secy. of State, to Mr. Iddings, Chargé at Rome, Aug. 8, 1901, For. Rel. 1901, 303. *Compare* Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 394, Moore, Dig., III, 278; Mr. Bayard, Secy. of State, to Mr Winchester, Minister to Switzerland, Nov. 28, 1885, For. Rel. 1885, 814, Moore, Dig., III, 279.

Relative to the case of a foundling whose existence first became known in Philadelphia, and who was, therefore, regarded as a native citizen of the United States, see Mr. Hay, Secy. of State, to Mr. Leishman, Minister to Switzerland, July 12, 1899, For. Rel. 1899, 760, Moore, Dig., III, 281.

[2] Geofroy *v.* Riggs, 133 U. S. 258, 264; United States *v.* Wong Kim Ark, 169 U. S. 649, 682; Mr. Wharton, Acting Secy. of State, to Mr. Grant, Minister to Austria-Hungary, Aug. 10, 1891, For. Rel. 1891, 21, Moore, Dig., III, 281. See, also, Mr. Bacon, Acting Secy. of State, to Mr. White, American Chargé, Feb. 15, 1907, For. Rel. 1907, I, 38.

[3] United States *v.* Wong Kim Ark, 169 U. S. 649, 682; Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99. In the latter case (p. 156) Mr. Justice Story said, in the course of the opinion of the Court: "Thus, the children of enemies, born in a place within the dominions of another sovereign, then occupied by them, by conquest, are still aliens; but the children of the natives born during such temporary occupation by conquest, are, upon a re-conquest, or re-occupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy."

[4] The laws of several States making such a claim are enumerated in Appendix III of the Report on Citizenship of the United States, by Messrs. Scott, Hill and Hunt.

Concerning the English statutes, see Sir F. T. Piggott, Nationality, London, 1907, 47–56.

According to the Belgian law on the acquisition and loss of nationality, of June 8, 1909, "a child born, even in a foreign country, of either a Belgian father or a Belgian mother, if the father has no fixed nationality", is deemed to be a Belgian. See text in *Am. J.*, IV, Supp., 167. See, also, § 4, Part II, of German Imperial and State Citizenship Law of July 22, 1913, *Am. J.*, VIII, Supp., 217.

born under the following conditions specified in the Act of Congress of February 2, 1855:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.[1]

The two conditions thus made essential to the acquisition of American citizenship by birth, in the case of a child born outside of the limits and jurisdiction of the United States are, the American citizenship of the father at the time of the birth of the child, and the residence of the father at some time within the United States.[2] Residence of the father in an American community in a foreign State, where he is subjected to the extraterritorial jurisdiction of the United States, is not regarded by the Department of State as compliance with the statutory requirement that he shall have resided within the United States.[3]

[1] Rev. Stat. § 1993. See, also, Act of 1790, 1 Stat. 104, Chap. 3; Act of 1795, 1 Stat. 415, Chap. 20, Sec. 3; Act of 1802, 2 Stat. 155, Chap. 28, Sec. 4. Concerning this legislation see F. Van Dyne, Citizenship, 32–33; also Report on Citizenship of the United States, 77–78. It may here be observed that § 6 of the Act of March 2, 1907, 34 Stat. 1229, has reference to the retention, rather than the acquisition of citizenship by birth, of children born outside of the limits of the United States. Whether the Act of 1855, and the Statute of 25, Edw. III, providing for the right of inheritance by foreign-born children of English subjects, were declaratory of the common law, see United States *v.* Wong Kim Ark, 169 U. S. 649, 669–674.

[2] In 1873 Mr. Fish, Secy. of State, in a communication to Mr. Washburne, Minister to France, expressed the opinion that Congress intended that a distinction should be observed between the right of citizenship conferred by the Act of 1855, and the "full citizenship" of persons born within the territory and jurisdiction of the United States, inasmuch as "those declared to be citizens by the Act could not transmit citizenship to their children without having become residents within the United States; the heritable blood of citizenship was thus associated unmistakably with residence within the country, which was thus recognized as essential to full citizenship." For. Rel. 1873, I, 256, Moore, Dig., III, 282. See, also, Report on Citizenship, 77–78; F. Van Dyne, Citizenship of the United States, 32–34; Barzizas *v.* Hopkins, 2 Randolph, 276; State *v.* Adams, 45 Iowa, 99; Browne *v.* Dexter, 66 Calif. 89; Mr. Adee, Acting Secy. of State, to Mr. Terres, Sept. 25, 1893, MS. Inst. Haiti, III, 346, Moore, Dig., III, 287; Mr. Gresham, Secy. of State, to Captain Crowninshield, U. S. N., Feb. 23, 1895, For. Rel. 1895, I, 426; Moore, Dig., III, 284; Mr. Hill, Acting Secy. of State, to Mr. White, American Ambassador at Berlin, June 14, 1901, For. Rel. 1901, 179; Moore, Dig., III, 285; Case of Clemens Belling, For. Rel. 1907, II, 975; Mr. Bacon, Acting Secy. of State, to Mr. Merry, American Minister, May 11, 1907, *id.*, II, 920; decision of Court of Appeals of Santiago, Chile, enclosed in communication from Mr. Janes, American Chargé, to Mr. Root, Secy. of State, Aug. 5, 1907, For. Rel. 1907, I, 124.

[3] See circular instructions to American diplomatic and consular officers in China and Turkey, July 27, 1914, enclosing memorandum of Mr. Johnson,

As American citizenship is not derived through the mother, it is immaterial how she be regarded, provided she is the lawful wife of an American citizen.[1] If, however, the child is illegitimate and born abroad of an American mother, the Department of State has in recent years held in a number of cases that the child is an American citizen.[2]

In interpreting the Act of 1855, there would appear to be no ground for a distinction between children of native, and those of naturalized parents;[3] or between children of parents domiciled abroad, and those of parents temporarily residing abroad.[4]

b

American Nationality as Not Derived from Citizenship

(1)

§ 346. By Right of Place. *Jure Soli*

The limits of American territory embrace lands with respect to the inhabitants of which neither the constitutional nor statutory

Solicitor of the Dept. of State, June 22, 1914, in the matter of the citizenship of Ben Zion Lillienthal, Circulars Relating to Citizenship, 1916, p. 43.

[1] Report on Citizenship, 77, *citing* the early cases of Charles *v.* Monson and Brimfield Mfg. Co. (1835), 17 Pick. 70; Davis *v.* Hall (1818), 1 Nott and McCord, 292; Ludlam *v.* Ludlam, 31 Barb. 486.

With respect to naturalization by marriage, see Nationality of Married Women, *infra*, §§365–366.

A foreign marriage valid where contracted may not be accorded full recognition as such in the United States, where the union is one regarded as contrary to a local and well-defined public policy. In such case the issue of the union would not be regarded as within the scope of the statute.

[2] These decisions necessarily involve a free construction of the Act of 1855 which provides for the citizenship of children born abroad of American fathers, but makes no specific provision for the citizenship of children born abroad of unmarried American mothers.

Compare opinion of Mr. Lowndes, for the Commission, United States and Spanish Claims Commission (1871), Moore, Arbitrations, III, 2462, Moore, Dig., III, 285.

See Mr. Hay, Secy. of State, to Mr. Lardy, Swiss Chargé, Aug. 23, 1901, relative to the effect of the laws of New York legitimatizing a child by the marriage of its parents after its birth, in a case where the father was a citizen of New York, and the child born out of wedlock in France, to a French mother who was afterwards married to the father in London. For. Rel. 1901, 512, Moore, Dig., III, 285. See, also, opinion of Mr. Ames, Acting Atty.-Gen., addressed to the Secy. of State, April 7, 1920, in the course of which it was said: "The State Department has for many years held that a child born out of wedlock which, by the laws of the father's domicile has been legitimated, is a citizen of the United States within the meaning of Revised Statutes, section 1993. There appear to be no considerations of public policy which require a different decision."

[3] Oldtown *v.* Bangor, 58 Me. 353; Sasportas *v.* De La Motta, 10 Rich. Eq. 38.

[4] In United States *v.* Gordon, 5 Blatchf. 18, where a child was born to American parents on an American merchant vessel while at a foreign port in the course

provisions for the acquisition of American citizenship by birth are necessarily applicable. Nevertheless, the United States may reasonably claim as nationals persons born to foreign parents in territory which, in an international sense, is American, and yet which, in a domestic sense, is not a part of the United States.[1] It would be consistent with the policy applied in situations where American nationality is derived by citizenship, if such a claim were made with respect to persons born in such a territory regardless of the domicile or residence of their alien parents. Moreover, there is ground for contention that in view of the traditional assertions of the United States under the *jus soli*, the United States does, by implication and without the aid of affirmative enactment, make such a claim automatically in the case of persons born in all territories under its flag.[2] The Department of State has, however, decided otherwise, concluding that children born to alien parents in the Philippines subsequent to their annexation, lack American nationality.[3] The United States does not appear to have manifested, at least by its legislation, a broad claim generally to the allegiance of persons born in territories acquired by cession from Spain under the treaty of 1898.[4] Children born in

of a voyage, the Court laid stress on the fact that the American domicile of the parents remained unchanged. See, also, Albany *v.* Derby, 30 Vt. 718; Lynden *v.* Danville, 28 Vt. 809. *Compare* Ware *v.* Wisner, 50 Fed. 310.

[1] Gonzales *v.* Williams, 192 U. S. 1; American Railroad of Porto Rico *v.* Didricksen, 227 U. S. 145.

According to the Act of April 30, 1900, in relation to the Territory of Hawaii, Chap. 339, § 4, 31 Stat. 141, U. S. Comp. Stat. 1918, § 3647, "all persons who were citizens of the Republic of Hawaii" on Aug. 12, 1898, were declared to be "citizens of the United States and citizens of the Territory of Hawaii."

[2] This would be due to the circumstance that apart from the origin of the *jus soli*, and regardless of territorial limits to be observed in applying the Constitution or particular Acts of Congress, the United States has in fact constantly deemed the *jus soli* to be declaratory of the principle of international law fairly applicable in determining a rule of establishing the acquisition of American nationality by birth. See opinion of Mr. Justice Gray, in United States *v.* Wong Kim Ark, 169 U. S. 649, 667.

[3] It is understood that the Department of State, upon the advice of its law officers, made known such a conclusion in a communication to the War Department in 1912. The author has examined the memorandum upon which it was based.

[4] According to the Act of April 12, 1900, in relation to Porto Rico, § 7, Chap. 191, 31 Stat. 79, U. S. Comp. Stat. 1918, § 3754, all inhabitants continuing to reside in Porto Rico who were Spanish subjects on April 11, 1899, and then residing in Porto Rico, "and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain" on or before April 11, 1900, in accordance with the provisions of the treaty of peace between the United States and Spain.

According to the Act of March 2, 1917, Chap. 145, § 5, 39 Stat. 953, U. S. Comp. Stat. 1918, § 3803bb, all citizens of Porto Rico, as defined by § 7 of the Act of April 12, 1900, and all natives of Porto Rico who were temporarily

Porto Rico or in the Philippine Islands to transient alien sojourners therein do not appear to have been regarded as acquiring American nationality at birth. Nor is it understood that a claim is made to the allegiance of children of foreign parentage born under like circumstances in the Virgin Islands.[1]

(2)

§ 347. By Right of Blood. *Jure Sanguinis*

If the Act of Congress of February 2, 1855, concerning the acquisition of American citizenship by birth by reason of the citizenship of the father, indicates generally the policy of the United States,[2] a like claim, similarly restricted, might be made in the case of children born in foreign States to American nationals, however lacking in American citizenship, and whether residing or temporarily sojourning in the place of birth. Thus the child

absent from that island on April 11, 1899, "and have since returned and are permanently residing in that island, and are not citizens of any foreign country", were declared to be and were to be deemed to be citizens of the United States, provided that any person within this category might retain his existing political status by making a specified declaration under oath, of his decision to do so, within a fixed time. Special opportunity was provided also for a person absent from the island during the period when this proviso might be availed of, to take advantage of the privilege accorded by it. The same section of the Act provided further, "That any person who is born in Porto Rico of an alien parent and is permanently residing in that island may, if of full age, within six months after the taking effect of this Act, or if a minor, upon reaching his majority or within one year thereafter, make a sworn declaration of allegiance to the United States before the United States District Court for Porto Rico", setting forth specified facts required, "and from and after the making of such declaration shall be considered to be a citizen of the United States." Possibly the purpose of this Act was to confer citizenship (in a domestic sense) upon persons who were already deemed to be nationals of the United States.

According to the Act in relation to the Philippine Islands of Aug. 29, 1916, Chap. 416, § 2, 39 Stat. 546, U. S. Comp. Stat. 1918, § 3809, all inhabitants of the Philippine Islands who were Spanish subjects on April 11, 1899, "and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands", except such as might have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace of 1898, and except such others as might have since become citizens of some other country. The same section embraced the proviso that the Philippine Legislature was authorized to provide for the acquisition of a Philippine citizenship "by those natives of the Philippine Islands who do not come within the foregoing provisions, the natives of the insular possessions of the United States, and such other persons residing in the Philippine Islands who are citizens of the United States, or who could become citizens of the United States under the laws of the United States if residing therein."

See Mr. Wilson, Acting Secy. of State, to the Secy. of War, Sept. 11, 1911, For. Rel. 1911, 71, in the Case of José Velasco.

[1] No requirement in the matter appears to be laid down in Art. VI of the treaty of cession of Aug. 4, 1916, *Am. J.*, XI, Supp., 53, 57.

[2] Acquisition of American Citizenship by Right of Blood, § 345.

born in Germany, whose father was a citizen of the Philippine Islands, might be regarded as acquiring American nationality, with as much reason as if the father were a citizen of the United States. The United States has not as yet, however, enacted a law indicative of such a claim.

c

§ 348. The Attitude of International Tribunals.

The inquiry whether the *jus soli* or the *jus sanguinis* should be applied in determining nationality by birth has frequently confronted international courts of arbitration, where one State has demanded of another an indemnity in behalf of a person regarded by the latter as one of its own citizens. Neutral arbitrators have generally been agreed in requiring the sovereign which claimed an individual as a national to adhere to a position consistent with its own municipal laws or constitution. Thus a State of which the law, based upon the *jus sanguinis*, does not provide for the acquisition of nationality by birth of a child born within its territory to foreign parents domiciled abroad, is not permitted to deny the right of the State of the parents' nationality to claim (if it may do so consistently with its own laws) that the child at birth became one of its nationals.[1] In case of a conflict of laws, the opinion seems to have prevailed that the law of the State in which the individual resided when the claim arose should govern the question of his allegiance in so far as it was derived from or dependent upon the fact of his nationality by birth.[2] It is to be observed, however, that the cases involving

[1] Case of Joseph O. Wilson, No. 121, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2454; Case of Heirs of H. S. Shreck *v.* Mexico, No. 768, Mexican-American Commission, Convention of July 4, 1868, *id.*, 2450; Claim of Maria Adelaide Morton, included in J. M. Ancira, attorney for numerous claimants *v.* Mexico, No. 374, before same Commission, *id.*, 2453; Stevenson's Case, respecting certain children born in Trinidad, British-Venezuelan Commission, 1903, Ralston's Report, 438, 454.

In the Corvaïa Case, before the Italian-Venezuelan Commission, 1903, it was held by Ralston, umpire, that the original claimant, born a subject of the Two Sicilies, and who had lost his citizenship according to the code of that country by accepting diplomatic employment from Venezuela, and who had never regained such citizenship, had taken steps which made it inequitable for the Italian Government subsequently to claim him as a subject as against Venezuela. *Id.*, 782, 808.

[2] Cases of L. Lavigne and F. Bister, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2454; also Plumley, umpire, in Mathison's case, British-Venezuelan Commission, 1903, Ralston's Report, 429, 433–438.

See award of May 3, 1912, in the Canevaro Case between Italy and Peru, before the Permanent Court at the Hague, respecting the claim of Raphael Canevaro.

a conflict usually raise a question respecting the effect of certain acts or events alleged to have changed the nationality of the individual, rather than an issue concerning his nationality by birth.[1]

3

§ 349. Acquisition of Nationality by Revolution.

When a colony by process of revolution wins independence and becomes a State, the persons formerly nationals of the parent State who adhere to the new one and continue to reside within its territory may be regarded as becoming automatically the nationals of the latter. Thus, as a consequence of the American Revolution, persons formerly of British nationality, who adhered to the cause of the revolutionists and resided in the territory which they controlled, acquired American nationality when the United States came into being.[2] A privilege of election was, however, accorded. British subjects withdrawing from the United States and so manifesting their adherence to the British Crown, were regarded as never acquiring American citizenship. The Supreme Court of the United States was of opinion that the change of nationality wrought by the Revolution was effected on or about July 4, 1776; and it tested generally, by reference to that date, the timeliness of acts indicative of an election to retain British nationality.[3] In England the courts were of opinion

[1] Cases of Narcisa de Hammer and Amelia de Brissot, American-Venezuelan Commission, convention of Dec. 5, 1885, Moore, Arbitrations, 2456, 2461; Plumley, umpire, in Stevenson's Case, British-Venezuelan Commission, 1903, Ralston's Report, 438, 442–452; Ralston, umpire, in Brignone Case, Italian-Venezuelan Commission, 1903, *id.*, 710, 715; same umpire in Miliani case, before same Commission, *id.*, 754, 759–760; same umpire in Poggioli case, before same Commission, *id.*, 847, 866.

[2] McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209; Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99; Mr. Gallatin to Mr. Lowrie, Feb. 19, 1824, 2 Gallatin's Writings, 287; Moore, Dig., III, 294.

"All white persons, or persons of European descent, who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were, by the Declaration, invested with the privileges of citizenship." Van Dyne, Naturalization, 272.

[3] Thompson, J., in Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 120–126. The learned Justice who delivered the opinion of the Court said in part: "*Prima facie*, and as a general rule, the character in which the American *ante-nati* are to be considered, will depend upon, and be determined by, the situation of the party, and the election made, at the date of the Declaration of Independence according to our rule; or the treaty of peace, according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election be at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the Declaration of Independence and the treaty of peace. To say that the election must have been before, or immediately at the declaration of independence, would render the right nugatory."

that the change of nationality took effect with the operation of the treaty of peace concluded September 3, 1783.[1]

Nationality which results from revolution is a natural consequence of the change of sovereignty brought about by the occupants of the territory of the new State. No affirmative acts are required of such individuals. Their duty of allegiance to the new sovereign arises from the circumstance that it, as the successor of the parent State, may reasonably claim as nationals all who previously owed allegiance to that State, at least while they remain residents of the territory of which the sovereignty has undergone a change. The situation does not resemble that where an individual attempts through his own acts to expatriate himself, and simultaneously to acquire through naturalization the benefits of the nationality of a foreign State.

4

Naturalization

a

§ 350. Definition. Regulation.

Naturalization is the process by which a State adopts a foreigner and stamps upon him the impress of its own nationality.[2] The reasonableness of such action depends upon whether, in the particular case, circumstances have so combined as to warrant the claim that a relationship has been established between the naturalizing State and the individual such that there is due from him to it an obligation of allegiance superior to and inconsistent with any previously due to any other sovereign.

Whether naturalization serves also to confer rights of citizenship depends solely upon the will of the State whose nationality

[1] Doe *v.* Acklam, 2 Barn. & Cresw. 779. With reference to the treaty of peace, the text of which is contained in Malloy's Treaties, I, 586, see, also, Story, J., in Shanks *v.* Dupont, 3 Pet. 242, 247, 248, Moore, Dig., III, 292–293.

Also Art. II of the Jay Treaty of Nov. 19, 1794, Malloy's Treaties, I, 591, concerning the right of British settlers and traders within the precincts of military posts within the boundaries of the United States and occupied by British forces, to retain British nationality after the removal of said forces, and the opinion of Mr. Wirt, Atty.-Gen., as to the interpretation of the treaty. 5 Ops. Attys.-Gen., 716, Appendix, Moore, Dig., III, 293–294.

[2] "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Fuller, C. J., in Boyd *v.* Thayer, 143 U. S. 135, 162.

See, also, Report on Citizenship of the United States, by J. B. Scott, D. J. Hill and G. Hunt, House Doc. No. 326, 59 Cong., 2 Sess.; Frederick Van Dyne, Law of Naturalization of the United States, Washington, 1907; Dana's Wheaton, Dana's Note No. 49.

is acquired.[1] That State is free to determine according to its discretion what classes or races of aliens it will accept as nationals and the conditions on which they may become such. It may be noted that until the beginning of the twentieth century the statutory law of the United States offered abundant opportunity for fraud on the part of aliens seeking to acquire American citizenship.[2]

b

§ 351. Voluntary Individual Action.

The United States has always maintained that a transfer of allegiance, save where it is brought about collectively through the operation of a change of sovereignty over territory, must be a distinctively voluntary act, and that loss of nationality should not be imposed as a penalty, nor a new national status forced as a favor by one government upon a citizen of another.[3] A transfer of allegiance is deemed to possess an involuntary aspect when, without the knowledge or consent of the individual, it is made the legal consequence of his purchase of land,[4] or of his

[1] This is true when naturalization takes place in the United States by virtue of Sec. 1 of the Fourteenth Amendment to the Constitution, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[2] President Grant, Annual Message, Dec. 5, 1876, For. Rel. 1876, ix, Moore, Dig., III, 298; President Arthur, Annual Message, Dec. 1, 1884, For. Rel. 1884, x, Moore, Dig., III, 299; President Cleveland, Annual Message, Dec. 3, 1888, For. Rel. 1888, I, xvii-xviii, Moore, Dig., III, 300; President Roosevelt, Annual Message, Dec. 6, 1904, For. Rel. 1904, xxxii-xxxiv; opinion of Mr. Justice Brandeis, in United States *v.* Ness, 245 U. S. 319, 324.

But see § 15 of the Act of Congress of June 15, 1906, respecting fraudulent naturalization, and the Diplomatic Instructions and Consular Regulations based thereon, April 19, 1907, For. Rel. 1907, I, 8–9.

[3] The language in the text (save for the proviso) is substantially that of Mr. Bayard, Secy. of State, to Mr. Manning, Minister to Mexico, Nov. 20, 1886, For. Rel. 1886, 723, Moore, Dig., III, 305–306. See, also, Same to Same, April 27, 1887, For. Rel. 1887, 717, Moore, Dig., III, 307; Mr. Fish, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 22, 1875, MS. Inst. Venezuela, II, 283, Moore, Dig., III, 303.

It may be observed that through the operation of the treaty between the United States and Spain of Dec. 10, 1898, the natives of the Philippine Islands and Porto Rico were collectively naturalized, and left without means of retaining their Spanish nationality while they remained in those islands.

[4] See cases relative to the ownership of land in Mexico, before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2468–2483, especially Case of Fayette Anderson and Wm. Thompson, No. 333, *id.*, 2479, and 2481. Mr. Bayard, Secy. of State, in a communication, to Mr. Manning, Minister to Mexico, April 27, 1887, expressed "dissent from the position that foreigners who have purchased land or had children born to them in Mexico may, from time to time, by a municipal statute, be deprived of their nationality unless they take some affirmative step to preserve it." For. Rel. 1887, 717, Moore, Dig., III, 307.

Compare Mr. Olney, Secy. of State, to Mr. Ransom, Minister to Mexico,

residence within the territory of a State.[1] No objection is, however, apparent when the granting of land to an alien is made contingent upon his accepting the nationality of the grantor. In such case the transaction is regarded as a voluntary arrangement.[2] While the Department of State has been unwilling to admit the principle that a foreign government may denationalize domiciled aliens who fail, within a specified time, to declare an intention to retain their nationality, it has, under certain circumstances, acquiesced in the practice, by advising American residents to make the desired declaration before an American diplomatic or consular representative.[3]

C

§ 352. Collective Naturalization.

Whenever a State acquires territory from another, the inhabitants of the area transferred, who were nationals of the former territorial sovereign, are collectively naturalized. They are at once subjected to a duty of allegiance to the transferee.[4] The process by which the change of sovereignty is brought about seems to be immaterial.[5] If it is effected by a treaty of cession, the

Dec. 13, 1895, For. Rel. 1895, II, 1008, Moore, Dig., III, 307, respecting the refusal of Mexico to extradite one Chester W. Rowe, a fugitive from the justice of the United States.

[1] Mr. Webster, Secy. of State, to Mr. Sharkey, Consul at Havana, July 5, 1852, Moore, Arbitrations, 2701, 2703, in which it was declared: "Change of *domicil* is matter of intention, and, notwithstanding residence in fact, there must be the *animus manendi*. Change of allegiance, which is manifested by the voluntary action, and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect. It is certainly just that acts which are to be regarded as changing the allegiance of American citizens, should be distinctly understood by those to whom they are applied, as having that effect; that the practical as well as the theoretical construction of such acts should be unequivocal and uniform, and that no acts should be deemed acts of expatriation, except such as are openly avowed and fully understood."

[2] Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, Dec. 1, 1899, For. Rel. 1899, 403, Moore, Dig., III, 310.

[3] See abstracts of documents in Moore, Dig., III, 307–310, concerning a discussion with Brazil in 1890.

[4] American Insurance Co. *v.* Canter, 1 Pet. 511, 542; Fuller, C. J., in Boyd *v.* Thayer, 143 U. S. 135, 162; Tobin *v.* Walkinshaw, McAllister, 186, Moore, Dig., III, 312; Case of Egle Aubrey, American-French Commission, Convention of Jan. 15, 1880, Moore, Arbitrations, III, 2511. See, also, Van Dyne, Naturalization, 266–332; Oppenheim, 2 ed., I, § 301.

[5] "It is a universally recognised customary rule of the Law of Nations that the inhabitants of subjugated as well as ceded territory lose their nationality and acquire that of the State which annexes the territory." Oppenheim, 2 ed., I, § 302. See, also, Hall, 6 ed., 566.

As a consequence of the subjugation by Italy in 1911 of Tripoli and Cyrenaïca, the native population acquired Italian nationality. See royal decree of Nov. 5, 1911, annexing Tripoli and Cyrenaïca, which contained no reference

agreement commonly makes provision that nationals of the former sovereign, residing within the territory and who so elect, may retain their allegiance to it by taking certain specified steps appropriate to that end.[1]

The treaty may declare that persons whose nationality is to be changed may become citizens as well as nationals of the new sovereign.[2] In the absence of agreement the change of allegiance resulting from the change of sovereignty does not serve also to confer rights of citizenship. The acquisition of them depends

to the change of nationality, Arch. Dip., 3 ser., 52d year, tom. 121, p. 181. The same document is contained in *Nouv. Rec. Gén.*, 3 ser., VI, 4. See, also, treaty of peace between Italy and Turkey, Oct. 18, 1912, Arch. Dip., 3 ser., 53d year, tom. 125, p. 16. The same document is contained in *Nouv. Rec. Gén.*, 3 ser., VII, 7. In this connection see "*Die Erwerbung Tripolitaniens durch Italien und deren völkerrechtlicher Charakter*", by Dr. G. Diena, *Zeit. Int. Recht*, XXIII, Part I, 1.

If by occupation a State asserts dominion over a region not deemed to belong to any civilized State or to any country or political entity regarded as capable of possessing title, as in the case of a land inhabited solely by uncivilized people, the impressing of the nationality of the occupant upon the native inhabitants is the natural consequence of the creation of a right of property and control over the territory on which they dwell. Such persons might, therefore, be regarded as possessed of no nationality until subjected to the allegiance of the occupying State.

[1] See, for example, Art. VIII, Treaty of Guadalupe-Hidalgo, Feb. 2, 1848, Malloy's Treaties, I, 1111, and documents respecting its operation in Moore, Dig., III, 319; also cases in Moore, Arbitrations, III, 2509–2511; Art. III, convention with Russia, March 30, 1867, ceding Alaska to the United States, Malloy's Treaties, II, 1523, also documents respecting its operation in Moore, Dig., III, 320; Art. IX of the treaty of peace between the United States and Spain, Dec. 10, 1898, Malloy's Treaties, II, 1693, and documents concerning its operation in Moore, Dig., III, 321–327; also Bosque *v.* United States, 209 U. S. 91, where the removal of a Spanish resident from the Philippine Islands in 1899, and his absence therefrom until 18 months after the ratification of the treaty of peace, caused him to remain a Spaniard, in spite of no declaration of intention to preserve allegiance to Spain. See Martinez *v.* Asociación de Señoras, 213 U. S. 20, with reference to a Spanish corporation organized for purely local and charitable purposes in Porto Rico, in which the court declared: "We are of opinion that the cession of Porto Rico by Spain to the United States severed all relations between Spain and this corporation, and that thereafter it cannot be regarded in any sense as a citizen or subject of Spain. Spain has no duty to or power over it. We confine this statement to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity in the island of Porto Rico."

[2] "Every treaty of cession to which the United States has been a party, with the exception of the treaty of peace of 1898 (30 Stat. L. 1754), with Spain, ceding Porto Rico and the Philippine Islands to the United States, contains a stipulation providing that the inhabitants of the territory ceded may, in whole or in part, become citizens of the United States, either immediately or under certain conditions. The treaty with Russia for the cession of Alaska (15 Stat. at L. 542) excepted 'uncivilized native tribes' from the privilege of admission to citizenship." Van Dyne, Naturalization, 275–276.

See, also, Art. VI of the treaty between the United States and Denmark of Aug. 4, 1916, U. S. Treaty Series, No. 629, *Am. J.*, XI, Supp., 53, 57.

upon the will of the new sovereign. No principle of international law is involved.

The principle of collective naturalization was necessarily applied in the German treaty of peace of June 28, 1919. Thus, for example, it was declared that German nationals habitually resident in any of the territories recognized as forming part of the Czecho-Slovak State would obtain Czecho-Slovak nationality *ipso facto* and lose their German nationality.[1] Careful provision was made, however, for the exercise of the right to opt for German nationality by German nationals so habitually resident, under conditions specified.[2]

d

American Naturalization

(1)

§ 353. Regulated by Congress. Entrusted to the Courts.

By the Fourteenth Amendment[3] to the Constitution, one who is naturalized in the United States and subjected to the jurisdiction thereof becomes a citizen as well as a national thereof.

The power to enact naturalization laws is lodged exclusively in Congress.[4] Upon compliance with the regulations which it has

[1] Art. 84. See, also, Art. 91, with respect to Poland.

[2] Art. 85, where it was provided that persons who should exercise the right to opt should within a specified time be obliged to transfer their place of residence to the State for which they had opted.

[3] Section 1; Behrensmeyer v. Kreitz, 135 Ills. 591.

[4] Art. 1, Sec. 8 of the Constitution declares that the Congress shall have power "to establish an uniform rule of naturalization." See United States v. Villato, 2 Dall. 370; Chirac v. Chirac, 2 Wheat. 259. *Compare* Collet v. Collet, 2 Dall. 294. Also Van Dyne, Naturalization, 6–9; Moore, Dig., III, 327–328, and documents there cited, including a list of statutes of the United States relating to citizenship and naturalization from 1790 to 1894

Bureau of Naturalization. The Act of June 29, 1906, Chap. 3592, § 1, 34 Stat. 596, established a so-called Bureau of Immigration and Naturalization under the direction of the Secretary of Commerce and Labor. To this Bureau was given charge of "all matters concerning the naturalization of aliens." It was made the duty of the Bureau among other things to cause the registration of every alien arriving in the United States, and also to issue to him a certificate of such registration. In order to prevent the perpetration of fraud upon the citizenship of the United States, later sections of the Act made pro vision for coöperation between courts exercising jurisdiction in naturalization proceedings and the Bureau, in connection with both the granting and canceling of naturalization. The purpose was to establish an organ of the Government which should be possessed of complete information with respect to all naturalization cases arising in the United States, and which should exercise important administrative functions greatly needed as an additional safeguard to supplement the judicial functions intrusted to the courts.

By an Act of March 4, 1913, Chap. 141, § 3, 37 Stat. 737, U. S. Comp. Stat. 1918, §§ 961 and 962, the Bureau of Naturalization was established under the direction of the Secretary of Labor. A Commissioner of Naturalization

adopted, aliens are admitted to citizenship without regard to any claims upon them asserted by the State of their origin.[1]

Naturalization in the United States is normally effected through the operation of a judicial act which must be performed by a court.[2] The executive branch of the Government cannot prescribe the action of any tribunal on a given application.[3] It should be observed that naturalization may be, and at times has been, effected by special Act of Congress.

(2)

§ 354. Persons Capable of Naturalization as American Citizens.

Under the existing law, the provisions for naturalization are declared to "apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent." [4]

was declared to be the administrative officer in charge of the Bureau "and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor."

[1] Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31, Moore, Dig., III, 328.

[2] The statement in the text is substantially that of Professor Moore, in Dig., III, 328. See, also, Marshall, C. J., in Spratt *v.* Spratt, 4 Pet. 393.

Inasmuch as the act to be performed by the court involves a decision based upon the examination of witnesses as to whether the petitioner satisfies the requirements of the law, that act may be fairly described as a judicial one. While the court does not decide that the petitioner is or is not a citizen, it does decide whether the evidence suffices to justify the admission of the petitioner to citizenship.

That American diplomatic and consular officers in countries where they exercise judicial functions by law and treaty, are without authority to naturalize aliens, see Mr. Gresham, Secy. of State, to Mr. Terrell, Minister to Turkey, Nov. 2, 1893, For. Rel. 1893, 701, Moore, Dig., III, 329.

Courts Authorized to Naturalize. According to the Act of June 29, 1906, § 3, 34 Stat. 596: "Exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts: United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the Supreme Court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

[3] The language of the text is that of Mr. Bayard, Secy. of State, in a communication to Mr. Stuart, Sept. 9, 1885, 157 MS. Dom. Let. 93, Moore, Dig., III. 328.

Concerning the Functions of Judges under the Act of June 29, 1906, and that of March 2, 1907, see Van Dyne, Naturalization, 19–22. Concerning the Duties of Clerks of Courts under the Act of June 29, 1906, *id.*, 22–34; and concerning the Duties of United States District Attorneys under the same Act, *id.*, 34–36.

[4] Rev. Stat. § 2169, amended, Feb. 18, 1875, Chap. 80, § 1, 18 Stat. 318, U. S. Comp. Stat. 1918, § 4358.

"By the Acts of 1802 and 1824, only 'free white persons' were capable of

"Chinese, since they are neither of the 'white' (Caucasian), nor of the African, race, are not within the general statutes relating to naturalization." [1] An Act of Congress of May 6, 1882, provided that thereafter no court should admit Chinese to citizenship.[2] Hence it was subsequently held that a certificate of naturalization issued to a Chinaman is void.[3]

Judicial opinion in the United States has lacked uniformity respecting what individuals are to be regarded as "free white persons" within the meaning of the Act of Congress. It has been held that Syrians, Armenians, Parsees and high caste Hindus were eligible for naturalization.[4] Japanese have been deemed to be ineligible.[5]

It must be clear that the conditions on which persons who are nationals of the United States and owing allegiance to it, but who are not citizens thereof, may be admitted to citizenship are matters solely of domestic concern. In the absence of restrictions imposed by treaty they possess no international significance.[6]

naturalization. By the Act of 1870, the benefits of the law were extended to 'aliens of African nativity and to persons of African descent.' The law, as consolidated in the Revised Statutes, thus stands, embracing only 'white persons' and persons of African descent." Statement in Moore, Dig., III, 329. See, also, Van Dyne, Naturalization, 40–42.

[1] Moore, Dig., III, 330, *citing* In re Ah Yup, 5 Sawyer C. C. 155, followed in Mr. Evarts, Secy. of State, to Mr. Holcombe, No. 250, Oct. 29, 1878, MS. Inst. China, II, 574; State *v.* Ah Chew, 16 Nev. 50, 61; Mr. Olney, Secy. of State, to Mr. Ritter, Sept. 20, 1895, 205 MS. Dom. Let. 8.

[2] Chap. 126, § 14, 22 Stat. 61, U. S. Comp. Stat. 1918, § 4359. Relative to this Act and its relation to Art. V of the treaty with China of July 28, 1868, see documents cited in Moore, Dig., III, 330.

[3] In re Gee Hop, 71 Fed. 274; In re Hong Yen Chang, 84 Cal. 163; Opinion of Mr. McKenna, Atty.-Gen., 21 Ops. Attys.-Gen., 581.

[4] In re Najour (a Syrian), 174 Fed. 735; In re Halladjian (an Armenian), 174 Fed. 834; In re Mudarri (a Syrian), 176 Fed. 465; In re Ellis (a Syrian), 179 Fed. 1002; United States *v.* Balsara (a Parsee), 180 Fed. 694; In re Akhay Kumar Mozumbar (a high caste Hindu), 207 Fed. 115; Dow *v.* United States, 226 Fed. 145 (a Syrian), *reversing* 213 Fed. 355, where Henry A. M. Smith, J., in the course of an exhaustive opinion, held that a Syrian "not being of European nativity or descent", was outside of the scope of the statute; In re Mohan Singh (a Hindu), 257 Fed. 209. *Contra*, In re Sadar Bhagwab Singh, 246 Fed. 496. Also In re Bhagat Singh Hind, 268 Fed. 683.

[5] In re Saito, 62 Fed. 126, and criticism thereof in *Am. L. Rev.*, XXVIII, 818, cited in Moore, Dig., III, 331; In re Yamashita, 30 Wash. 234; also In re Buntaro Kumagai, 163 Fed. 922; Bessho *v.* United States, 178 Fed. 245.

That a native citizen of Mexico is eligible to American citizenship, see In re Rodriguez, 81 Fed. 337; also discussion of this case in Van Dyne, Naturalization, 46–48.

Deeming individuals regarded as half white persons to be outside of the scope of the statute, see In re Knight, 171 Fed. 299; In re Young, 195 Fed. 645; s. c., 198 Fed. 715.

[6] § 30, Chap. 3592, Act of June 29, 1906, 34 Stat. 606, U. S. Comp. Stat. 1918, § 4366. See, in this connection, In re Alverto, 198 Fed. 688; In re Lampitoe, 232 Fed. 382: In re Mallari, 239 Fed. 416; In re Rallos, 241 Fed. 686; In re Bautista, 245 Fed. 765.

Concerning American Indians, see Elk *v.* Wilkins, 112 U. S. 94; Boyd *v.* Thayer, 143 U. S. 135, 162.

Anarchists and polygamists are not to be naturalized or made citizens of the United States.[1] Subject to certain limitations, persons not speaking English are not to be naturalized or admitted as citizens.[2] The Act of May 9, 1918, declared that no alien who was a native, citizen, subject or denizen of any country, State or sovereignty with which the United States was at war should be permitted to become a citizen thereof unless he had made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war, or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization should then be pending and he was otherwise entitled to admission, notwithstanding he was an alien enemy at the time and in the manner prescribed by the laws passed on that subject. A proviso, however, permitted the President at his discretion, upon specified conditions fully establishing the loyalty of an alien enemy not included in the foregoing exemption, to exempt him from the classification of "alien enemy", enabling him thereby to have the privilege of applying for naturalization.[3]

According to the Act of August 31, 1918, a national of a country which was neutral in the then existing war, who had declared his intention to become a citizen of the United States and who, pursuant to the statute, was relieved from liability to military service by making a declaration withdrawing his intention to become such a citizen, thereby not only canceled such declaration,

[1] Chap. 3592, § 7, Act of June 29, 1906, 34 Stat. 598, U. S. Comp. Stat. 1918, § 4363.

[2] Act of June 29, 1906, Chap. 3592, § 8, 34 Stat. 599, U. S. Comp. Stat. 1918, § 4364. It was declared that this requirement should not apply to aliens physically unable to comply with it if they were otherwise qualified to become citizens of the United States. Nor were the requirements of the section to apply to any alien who, prior to the passage of the Act, had declared his intention to become a citizen of the United States in conformity with the law enforced at the date of making such declaration. Nor were those requirements to apply to aliens who should thereafter declare their intention to become citizens and who should make homestead entries upon the lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

[3] Chap. 69, § 11, Act of May 9, 1918, 40 Stat. 545. It should be noted that this section repealed Rev. Stat., section 2171. See, in this connection, In re Pfleiger, 254 Fed. 511; In re Pollock, 257 Fed. 350.

Concerning the operation of the prior statutory law under § 2171, Rev. Stat., see United States *v.* Meyer, 241 Fed. 305; In re Jonasson, 241 Fed. 723; In re Kreuter, 241 Fed. 985; In re Nannanga, 242 Fed. 737; In re Haas, 242 Fed. 739; In re Naturalization of Subjects of Germany, 242 Fed. 971; In re Duus, 245 Fed. 813; United States *v.* Kamm, 247 Fed. 968; In re Weisz, 250 Fed. 1008.

but also rendered himself forever debarred from becoming a citizen of the United States.[1]

An alien woman may be naturalized under the laws of the United States in the same manner and under the same conditions that pertain to the naturalization of an alien man.[2] It is not believed, however, that a married woman whose husband is an alien is eligible to citizenship during the continuance of the marriage relationship.[3] It is to be observed that under the existing law, an alien woman, capable of naturalization and who marries an American citizen, becomes thereby herself such a citizen.[4]

(3)

§ 355. Usual Legal Conditions.

The usual conditions of naturalization in the United States are: first, a declaration on oath of an intention to become a citizen; secondly, a petition for admission to citizenship; thirdly, a declaration on oath to support the Constitution of the United States and to renounce former allegiance to any foreign power; fourthly, proof of residence for a required period of time; fifthly, proof of good behavior and attachment to the principles of the Constitution during such period of residence; and sixthly, renunciation of order of nobility or hereditary title, if any.[5] The filing of a

[1] Chap. 166, § 1, 40 Stat. 955.

See, also, in this connection, Neutral Persons and Property within Belligerent Territory, Military Service, Attitude of the United States, *infra*, § 626–627.

[2] The statement in the text is the language of Mr. Evarts, Secy. of State, in a communication to Mr. Hinton, Oct. 19, 1877, 120 MS. Dom. Let. 232, Moore, Dig., III, 331. See, also, Minor *v.* Happersett, 21 Wall. 162. It was held by Wade, J., in 1917, that a petition for naturalization filed by an alien during his minority is void. In re Cordaro, 246 Fed. 735.

[3] § 3 of Act of March 2, 1907, 34 Stat. 1228, declares that "any American woman who marries a foreigner shall take the nationality of her husband", and it provides also for the resumption of her "American citizenship at the termination of the marital relation." The inference seems clear that during the continuance of that relationship and while her husband remains an alien, the wife is incapacitated from acquiring American citizenship. See, also, Van Dyne, Nationality, 51–52, *citing* note by the court in In re Langtry, 31 Fed. 879, 880. *Compare* Comitis *v.* Parkerson, 56 Fed. 556.

[4] Revised Stat. § 1994. Sprung *v.* Morton, 182 Fed. 330; In re Nicola, 184 Fed. 322; Marriage of Alien Women to American Citizens, *infra*, § 366.

[5] Act of June 29, 1906, Chap. 3592, 34 Stat. 596.

Petition for Naturalization. The Act of June 29, 1906, par. 2, § 4, declares that the petition for naturalization shall be not less than two nor more than seven years after the applicant has made his declaration of intention. Concerning the operation of this requirement, see Eichhorst *v.* Lindsey, 209 Fed. 708; In re Yunghauss, 210 Fed. 545; In re Goldstein, 211 Fed. 163; In re Yunghauss, 218 Fed. 168; Harmon *v.* United States, 223 Fed. 425.

See, especially, United States *v.* Morena, 245 U. S. 392, where it was held that the requirement of the Act that the petition for citizenship be filed not

certificate of arrival is also deemed to be an essential prerequisite to a valid order of naturalization.[1]

(4)

Declaration of Intention

(a)

§ 356. **Requirements of the Law.**

According to the Act of June 29, 1906, the alien seeking admission as a citizen of the United States

> shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and particularly, by name, to the prince, potentate, State, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.[2]

(b)

§ 357. **Exceptions.**

The requirement as to a declaration of intention is removed in certain exceptional situations specified in the statutory law. Thus, under the Act of May 9, 1918, a person not an alien enemy who had resided uninterruptedly within the United States during the period of five years next preceding July 1, 1914, and was

more than seven years after the making of a declaration of intention was applicable to declarations made before the Act was passed, the enactment not invalidating such old declarations, but causing the time to run from the date of the declaration.

[1] § 4, subdivision 2, of the Act of June 29, 1906, and the construction placed upon it in the case of United States *v.* Ness, 245 U. S. 319.

[2] Chap. 3592, § 4, Par. 1, 34 Stat. 596, U. S. Comp. Stat. 1918, § 4352(1).

on that date otherwise qualified to become a citizen of the United States, except that he had not made the declaration of intention required by law, and who during or prior to that time, because of misinformation regarding his "citizenship status" had erroneously exercised the rights and performed the duties of a citizen of the United States in good faith, was permitted to file his petition for naturalization without making the preliminary declaration of intention required of other aliens.[1]

According to the same Act any alien serving in the military or naval service of the United States during the time when it was engaged in the then existing war was permitted to file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States.[2]

By virtue of the Act of June 29, 1906, when any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized, his widow and minor children may, by complying with the other provisions of the Act, be naturalized without making any declaration of intention.[3] According to the Act of February 24, 1911, when an alien who has declared his intention, becomes insane before he is actually naturalized, and his wife thereafter makes a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws, be naturalized without making any declaration of intention.[4]

(c)

§ 358. Does not Confer Citizenship.

A declaration of intention is merely one of the steps to be taken by an alien seeking admission to citizenship.[5] Such action does not imply a renunciation of allegiance, but simply expresses the purpose of the declarant to make such renunciation at a future

[1] Chap. 69, 40 Stat. 545, U. S. Comp. Stat. 1918, § 4352(10). See, also, exception under former statutes now repealed, and noted in Moore, Dig., III, 334–336; also provisions of the Act of June 25, 1910, Chap. 401, § 3, 36 Stat. 830, repealed by the Act of May 9, 1918.

[2] Chap. 69, 40 Stat. 542, U. S. Comp. Stat. 1918, § 4352(7).

[3] Par. 6, § 4, 34 Stat. 596, U. S. Comp. Stat. 1918, § 4352(6). See, also, Act of April 30, 1900, 31 Stat. 161, dispensing with a previous declaration of intention by persons residing in Hawaii for at least five years prior to the taking effect of the Act.

[4] Chap. 151, 36 Stat. 929, U. S. Comp. Stat. 1918, § 4365.

[5] Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, May 8, 1890, For. Rel. 1890, 695, Moore, Dig., III, 342.

time.[1] A declaration of intention does not, therefore, confer citizenship [2] or effect naturalization.[3]

It seems important to observe, however, that as a possible limitation upon or exception to the principle above stated, the existing statutory law of the United States declares that every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, "be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States." [4]

(5)

Residence

(a)

§ 359. Five Years' Rule.

According to the Act of June 29, 1906, it must be made to appear to the satisfaction of the court admitting any alien to citizenship, that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or territory where such court is at the time held one year at least.[5] This conforms with the requirement of Section 2170 of the Revised Statutes forbidding the admission to citizenship of one "who has not for the continued term of five years next preceding his admission resided within the United States."

The term "residence" doubtless refers, as Mr. Gresham, Secretary of State, declared in 1893, to actual residence in the United

[1] Mr. Blaine, Secy. of State, to M Hicks, Minister to Peru, Feb. 26, 1890, For. Rel. 1890, 694, Moore, Dig., III, 341; also Mr. Cass, Secy. of State, to Mr. Washburne, March 9, 1857, 46 MS. Dom. Let. 379, Moore, Dig., III, 338.

[2] Minneapolis *v.* Reum, 56 Fed. 576; In re Moses, 83 Fed. 995; Dorsey *v.* Brigham, 177 Ills. 250; Frick *v.* Lewis, 195 Fed. 693, 697; United States *v.* Uhl, 211 Fed. 628, 631. See executive order of President Roosevelt, April 6, 1907, concerning Citizenship, in relation to paragraph 143 of the existing Instructions to the Diplomatic Officers of the United States. Also Mr. Buchanan, Secy. of State, to Mr. Campbell, Consul at Havana, July 26, 1848, 10 MS. Desp. to Consuls, 473, Moore, Dig., III, 337; Circular Notice of Mr. Bryan, Secy. of State, respecting "Liability for Military Service in Foreign Countries of Persons Residing in the United States", Aug. 14, 1914.

[3] Mr. Fish, Secy. of State, to Mr. de Luna, April 22, 1869, 81 Dom. Let. 7, Moore, Dig., III, 338.

[4] Chap. 69, Act of May 9, 1918, 40 Stat. 542, 544. It may be noted that this Act is not to be construed to repeal or modify any portion of the Seamen's Act of March 4, 1915, 38 Stat. 1164. See Seamen, *infra*, § 394.

[5] Par. 4, § 4, 34 Stat. at L. 596, 598, U. S. Comp. Stat. 1918, § 4352 (4).

States.[1] The continued term has been regarded by the Department of State as not interrupted by a transient sojourn abroad,[2] the opinion being expressed, however, that an extended lodgment in a foreign country would be incompatible with the requirements of the statute,[3] and that it remains for the court of naturalization to decide in the particular case whether the absence suffices to prevent the issuance of a certificate of citizenship.[4]

The courts of the United States have concurred in the view that continuous residence is capable of interruption. There seems to be a tendency, however, to regard the intention of the applicant to give up his residence in the United States rather than the length of his sojourn abroad, the test of whether the requisite continuity has been broken.[5] The length of such sojourn may, however, be so great as to destroy the value of intention.[6]

(b)

§ 360. Certain Exceptions.

According to the Act of May 9, 1918, any alien (or any Porto Rican not a citizen of the United States), of the age of twenty-one years and upward, who had enlisted in or entered or might thereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the

[1] Communication to Mr. Terrell, Minister to Turkey, Nov. 2, 1893, For. Rel. 1893, 701, Moore, Dig., III, 353.

[2] Mr. Bayard, Secy. of State, to Mr. Cramer, Minister to Switzerland, No. 138, May 6, 1885, MS. Inst. Switzerland, II, 251, Moore, Dig., III, 356; Mr. Hill, Acting Secy. of State, to Mr. Leishman, Minister to Turkey, June 14, 1901, For. Rel. 1901, 520, Moore, Dig., III, 356.

[3] Mr. Olney, Secy. of State, to Mr. Breckinridge, Minister to Russia, No. 169, Jan. 27, 1896, MS. Inst. Russia, XVII, 406, Moore, Dig., III, 356; Mr. Bayard, Secy. of State, to Mr. Cramer, Minister to Switzerland, 1885 and 1886, Moore, Dig., III, 355, and documents there cited; Mr. Bacon, Acting Secy. of State, to Mr. White, Ambassador to Italy, May 25, 1906, For. Rel. 1906, II, 912.

[4] Mr. Hill, Acting Secy. of State, to Mr. Leishman, Minister to Turkey, June 14, 1901, For. Rel. 1901, 520, Moore, Dig., III, 356. See, also, concerning the meaning of "continued residence", Van Dyne, Naturalization, 95–105.

[5] In re Schneider, 164 Fed. 335; United States *v.* Aakervik, 180 Fed. 137; United States *v.* Cantini, 199 Fed. 857, 860; United States *v.* Rockteschell, 208 Fed. 530; In re Deans, 208 Fed. 1018; United States *v.* Cantini, 212 Fed. 925. See, also, In re Cameron, 165 Fed. 112; also with respect to the requirements of the statute, United States *v.* Shanahan, 232 Fed. 169; United States *v.* Griminger, 236 Fed. 285; In re Reichenburg, 238 Fed. 859; In re Cook, 239 Fed. 782; United States *v.* Jorgenson, 241 Fed. 412; United States *v.* Ginsberg, 244 Fed. 209.

[6] United States *v.* Bragg, 257 Fed. 588, where physical absence for four years and seven months of the five-year period required for residence in the United States was decisive of failure to meet with the requirements of the Act.

National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who had served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reënlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, might, on presentation of the required declaration of intention, petition for naturalization without proof of the required five years' residence within the United States, if upon examination by the representative of the Bureau of Naturalization (in accordance with the requirements of the subdivision of the Act), it was shown that such residence could not be established.[1]

According to the same Act any alien serving in the military or naval service of the United States during the time it was engaged in the existing war, was permitted to file a petition for naturalization without proof of the required five years' residence within the United States.[2] Again, any alien declarant who had served in the United States Army or Navy, or the Philippine Constabulary, and had been honorably discharged therefrom, and had been accepted for service in either the military or naval service of the United States on the condition that he should become a citizen of the United States, was permitted to file his petition for naturalization upon proof of continuous residence within the United States for the three years preceding his petition, by two witnesses, citizens of the United States.[3]

[1] Chap. 69, 40 Stat. 542. This Act repealed Rev. Stat. §§ 2166 and 2174. The provisions stated in the text were also made applicable to "any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for re-enlistment."

[2] Chap. 69, 40 Stat. 542. It has been noted that such individuals were excused from making the preliminary declaration of intention.

[3] 40 Stat. 543. It was declared that "in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization."

The same Act provided that any alien, or any person owing permanent allegiance to the United States embraced within "this subdivision", might

Provision was also made that any person who was serving in the military or naval forces of the United States at the termination of the existing war, and any person who before its termination might have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, should, if he applied to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he had resided continuously within the United States for the time required by law of other aliens, or within the State, Territory or the District of Columbia for the year immediately preceding the date of his petition for naturalization.[1]

e

Conventional Arrangements of the United States

(1)

§ 361. Essential Features of the Treaties.

The naturalization treaties of the United States fall chronologically into two distinct series, the first of which was concluded between 1868 (when George Bancroft signed the convention that bears his name with the North German Union) and 1872,[2] and the second between 1902 and 1911.[3] With two exceptions,[4] a European State was a party to each of the earlier group, while

file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitations in that regard laid down in section 3 of the Act of June 29, 1906.

[1] Chap. 69, 40 Stat. 546.

[2] The treaties of the first series were concluded with the States named, in the following order: North German Union, Feb. 22, 1868, Malloy's Treaties, II, 1298; Bavaria, May 26, 1868, *id.*, I, 60; Mexico, July 10, 1868, *id.*, I, 1132; Baden, July 19, 1868, *id.*, I, 53; Württemberg, July 27, 1868, *id.*, II, 1895; Hesse, Aug. 1, 1868, *id.*, I, 949; Belgium, Nov. 16, 1868, *id.*, I, 80; Sweden and Norway, May 26, 1869, *id.*, II, 1758; Great Britain, May 13, 1870, *id.*, I, 691; Austria-Hungary, Sept. 20, 1870, *id.*, I, 45; Great Britain (supplemental convention), Feb. 23, 1871, *id.*, I, 698; Ecuador, May 6, 1872, *id.*, I, 434; Denmark, July 20, 1872, *id.*, I, 384.

[3] The treaties of the second series were concluded with the States named, in the following order: Haiti, March 22, 1902, Malloy's Treaties, I, 939; supplemental convention, Feb. 28, 1903, *id.*, I, 941; Peru, Oct. 15, 1907, *id.*, II, 1449; Salvador, March 14, 1908, *id.*, II, 1570; Brazil, April 27, 1908, Charles' Treaties, 19; Portugal, May 7, 1908, Malloy's Treaties, II, 1468; Honduras, June 23, 1908, *id.*, I, 958; Uruguay, Aug. 10, 1908, *id.*, II, 1829; Nicaragua, Dec. 7, 1908, Charles' Treaties, 95; Argentina, Aug. 9, 1909, *id.*, 343; Costa Rica, June 10, 1911, *id.*, 23; Nicaragua, Supplementary convention, June 17, 1911, U. S. Treaty Series, No. 567.

[4] The two treaties which constituted the exception concluded with Mexico, July 10, 1868, and with Ecuador, May 6, 1872, are no longer in force.

with one exception,[1] those of the later were concluded with States of Latin-America.

The treaties of both series are alike in that they recognize the propriety of naturalization and the change of allegiance effected thereby. Almost all provide that a declaration of intention shall not serve to perfect naturalization.[2] It is a common although not universal provision that a naturalized citizen, upon his return to the State of former allegiance, may there be subjected to criminal prosecution for acts committed prior to emigration.[3] He is not, however, to be made punishable for the act of emigration, according to a provision common to the later treaties.[4] which also finds occasional expression in the earlier series.[5] With the exception of the convention with Great Britain of May 13, 1870, and that with Denmark of July 20, 1872, all of the earlier treaties make the recognition of naturalization depend upon a continuous or uninterrupted residence of five years within the territory of the State of adoption.[6]

The treaties usually provide that the renewal of residence by the naturalized citizen in the State of former allegiance, without intention to return to the State of adoption, shall constitute a renunciation of naturalization, and that such intention may be held to exist where such person resides more than two years in the former State.[7] The treaties of the later series commonly provide,

[1] The exceptional treaty is that concluded with Portugal, May 7, 1908.

[2] The treaty with Portugal of May 7, 1908, is the one convention of the later series which lacks this provision. Of the earlier series it is not found in those with Belgium, Great Britain and Denmark.

[3] A limitation is commonly expressed in case the right to punish has been lost by lapse of time as provided by law. See Naturalization Not Retroactive, *infra*, § 364.

[4] *Compare*, however, in this respect, Art. II, convention with Portugal, May 7, 1908, Malloy's Treaties, II, 1468.

[5] Protocol relating to Art. II of the treaty with Bavaria of May 26, 1868, Malloy's Treaties, I, 62; also protocol relating to Art. II, of the treaty with Sweden and Norway of May 26, 1869, *id.*, II, 1760.

The treaty with Baden of July 19, 1868, and that with Austria-Hungary of Sept. 20, 1870, provide that one who, by or after his emigration has transgressed the legal provisions on military duty by any acts or omissions beyond those enumerated in the convention, is not thereafter to be subjected to military service or criminal prosecution for the non-fulfillment of such military duty.

[6] In the treaty with Belgium of Nov. 16, 1868, the five years' residence is made necessary merely to secure a release from military service. In that with Sweden and Norway of May 26, 1869, it is not essential if the individual has been discharged from his original citizenship. Moore, Dig., III, 407–408.

[7] While this exact provision is not found in some of the earlier treaties (such as those with Baden, Belgium, Great Britain and Austria-Hungary), it is present in all of the later ones. Concerning the interpretation of this provision in the German treaties, see documents in Moore, Dig., III, 744–754.

According to a protocol annexed to the convention with Sweden and Nor-

however, that this presumption may be destroyed by evidence to the contrary.[1]

A provision peculiar to the later treaties, and present in all but two of them,[2] declares that the term "citizen," as therein employed, signifies a person to whom the nationality of either of the contracting parties attaches.[3] These agreements would appear, therefore, to embrace within their scope any persons of American nationality, whether or not citizens of the United States.

On January 28, 1913, President Taft made proclamation of the naturalization convention signed August 13, 1906, at the Third International American Conference at Rio de Janeiro, and purporting to establish the status of naturalized citizens who should again take up their residence in the country of their origin.[4] The agreement provided that if a citizen, a native of any of the countries signing the convention, and naturalized in another, should take up his residence in his native country without the intention of returning to the country in which he had been naturalized, he would be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by naturaliza-

way of May 26, 1869, it was agreed that "If a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship."

"The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway." Malloy's Treaties, II, 1761. In 1911, the Department of State announced, in correspondence with the Norwegian Government, that the protocol was interpreted to mean "that a former Norwegian who secures naturalization in the United States may be deemed to have renounced his American citizenship before the expiration of the two years if it be satisfactorily shown that he does not intend to return to the United States." For. Rel. 1911, 673. See, also, in this connection, United States *v.* Howe, 231 Fed. 546.

[1] This provision was employed in the treaty with Mexico of July 10, 1868, and again in that with Ecuador of May 6, 1872, both of which agreements are no longer in force. It did not again find expression until the convention with Peru of Oct. 15, 1907. Since then it has been commonly embodied in the naturalization treaties of the United States. An exception, however, is seen in that with Portugal of May 7, 1908. See, also, in this connection, Sec. 2, Act of March 2, 1907, 34 Stat. 1228 in reference to the Expatriation of Citizens and their Protection Abroad.

[2] The exceptions are the treaties with Haiti of March 22, 1902, and with Portugal of May 7, 1908.

[3] According to Art. V of the Convention with Nicaragua of Dec. 7, 1908: "It is agreed . . . to define the word 'citizenship', as used in this Convention, to mean the status of a person possessing the nationality of the United States or Nicaragua." Charles' Treaties, 96.

[4] U. S. Treaty Series, No. 575. The proclamation announced that the convention had been duly ratified by the United States, by and with the advice and consent of the Senate thereof, and by the Governments of Colombia, Chile, Costa Rica, Nicaragua, Guatemala, Brazil, the United States of Mexico, Ecuador, Honduras, Panama, Salvador, and the Argentine Republic.

tion. It was declared that the intention not to return would be presumed to exist when the naturalized person should have resided in his native country for more than two years. Such a presumption might, it was said, be destroyed by evidence to the contrary.[1]

(2)

§ 362. Controversies with Germany.

The return to Germany of former subjects naturalized in the United States pursuant to the terms of conventions with the German States gave rise to prolonged controversy.[2] The Bancroft treaties with the North German Union, Bavaria, Württemberg and Hesse, contained the common provision that renewal of residence by a naturalized citizen in the territory of the State of former allegiance, without intention to return to that of the State of adoption, should constitute renunciation of naturalization, and that such intention might be held to exist after more than two years' residence in the domain of the former State.[3] The United States contended that this provision, especially in the light of Article I of the treaty with Prussia of May 1, 1828 (conferring upon the inhabitants of the respective States the right to reside in the territories of each party),[4] gave to the naturalized American citizen the right to return and reside for at least two years in the State from which he had come and whose allegiance he had renounced, in the absence of any prior manifestation of an intention not to return again to the United States, and provided also that his conduct throughout such sojourn was blameless.[5]

[1] Arts. I and II. Mr. R. W. Flournoy, Jr., of the Department of State, has declared that this convention is in effect a naturalization treaty, in which the usual provisions concerning recognition of naturalization, although not expressed, are to be necessarily implied.

[2] See, generally, Moore, Dig., III, 376–406, and documents there cited.

Alsace-Lorraine. Concerning the controversy respecting the applicability of the Bancroft treaties to Alsace-Lorraine, and the endeavor of the United States to secure from the German Government an arrangement, conventional or otherwise, serving to place American citizens born in Alsace-Lorraine upon the same footing as other American citizens of German origin returning to that country for legitimate purposes, see documents in Moore, Dig., III, 364–376; also For. Rel. 1905, 470–472; *id.*, 1906, I, 648–653; *id.*, 1907, I, 511–514; *id.*, 1908, 376–377; also notice to citizens formerly subjects of Germany who contemplated returning to that country, Dept. of State, March 29, 1912.

[3] See, for example, Art. IV of the convention with the North German Union, of Feb. 22, 1868, Malloy's Treaties, II, 1299. The convention with Baden of July 19, 1868, contained a somewhat different provision, *id.*, I, 53.

[4] Malloy's Treaties, II, 1496.

[5] Mr. Bayard, Secy. of State, to Mr. Pendleton, Minister to Germany, March 12, 1886, For. Rel. 1887, 369, Moore, Dig., III, 383; same to Mr. von Alvensleben, German Minister, March 4, 1887, For. Rel. 1887, 419, Moore, Dig., III, 395, 397–398.

Germany, on the other hand, contended that nothing in the naturalization treaties, or in the earlier treaty with Prussia, conferred upon the naturalized American citizen an absolute right to reside in a treaty State for two years, or deprived such State of the right to expel him from its domain during that period.[1] It was urged that when a German had emigrated to the United States for the purpose of evading military service and had there become naturalized, his return to and prolonged residence in Germany was so detrimental to its welfare by reason of the pernicious influence of his example, that his expulsion became necessary and hence justifiable.[2] Moreover, the bare fact of emigration (when followed by naturalization) was regarded as *prima facie* evidence of an intention to evade military service.[3]

Admitting the obvious possession by Germany of the right of expulsion, the just exercise of which was not supposedly curtailed by the treaties, the United States persistently contended that, in view of the conventions, the exercise of that right became arbitrary when applied to a naturalized American citizen of German origin, who committed no illegal act during his stay on German soil;[4] and that an intention to evade military service was not to be presumed from the bare fact of emigration, especially in a case when, at the time of emigration, military service was not due.[5]

In practice the German Government became disposed to relax the rigor of its rules in cases where, upon adequate representa-

[1] Mr. von Alvensleben, German Minister, to Mr. Bayard, Secy. of State, July 8, 1886, For. Rel. 1887, 416, Moore, Dig., III, 391.

[2] *Id.*; also Count H. v. Bismarck, Imperial Secy. for Foreign Affairs, to Mr. Pendleton, Minister to Germany, Jan. 6, 1886, For. Rel. 1886, 316, Moore, Dig., III, 382; Baron Marschall, Imperial Minister for Foreign Affairs, to Mr. Uhl, American Ambassador, March 27, 1897, For. Rel. 1897, 209, Moore, Dig., III, 399.

[3] Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, Feb. 16, 1901, For. Rel., 1901, 159, Moore, Dig., III, 404.

[4] Mr. Bayard, Secy. of State, to Mr. von Alvensleben, German Minister, March 4, 1887, For. Rel. 1887, 419, Moore, Dig., III, 395.

[5] Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, Feb. 5, 1901, For. Rel. 1901, 158, Moore, Dig., III, 403–404.

In a notice to American citizens formerly subjects of Germany, who contemplated returning to that country, issued by the Department of State, March 29, 1912, it was declared that: "a naturalized American of German birth is liable to trial and punishment upon return to Germany for an offense against German law committed before emigration, saving always the limitations of the laws of Germany. If he emigrated after he was enrolled as a recruit in the standing army; if he emigrated while in service or while on leave of absence for a limited time; if, having an unlimited leave or being in the reserve, he emigrated after receiving a call into service or after a public proclamation requiring his appearance, or after war broke out, he is liable to trial and punishment on return."

tion by the American Embassy, it appeared that the naturalized citizen had not in fact sought by emigration to evade military service.[1]

While the design of the treaty provision was doubtless to express agreement respecting the renunciation of naturalization, rather than to record a right of residence, the language employed seemed to justify the claim that residence in the territory of the State of former allegiance should not itself be deemed unreasonable, still less provocative of the exercise of the right of expulsion, so long as the resident committed no offense. If the exigencies of domestic policy made it of supreme importance to the German contracting States to reserve the right to expel any member of an entire class of law-abiding aliens who might attempt to reside on German soil, the treaties should have definitely proclaimed the fact.

(3)

§ 363. Controversies with Austria-Hungary.

The naturalization treaty with Austria-Hungary of September 20, 1872,[2] differed from the Bancroft treaties with the German States (with the exception of that with Baden of July 19, 1868), in that it seemed to import, as Mr. Hay, Secretary of State, declared in 1900, that a naturalized American citizen might reside indefinitely in the country of his origin without incurring any disability, and without being obliged to resume his original citizenship.[3] The treaty provided also that the right to try and punish a former national of the Austro-Hungarian Monarchy, who had become a naturalized American citizen, for non-fulfillment of military duty prior to emigration was restricted to acts or omissions enumerated in the convention.[4]

[1] See important and interesting communication of Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, April 21, 1900, For. Rel. 1900, 25–26, Moore, Dig., III, 401.

[2] Art. IV, Malloy's Treaties, I, 46.

[3] Communication to Mr. Harris, Minister to Austria-Hungary, July 19, 1900, For. Rel. 1900, 22, Moore, Dig., III, 421–422. See, however, Sec. 2, Act of March 2, 1907, 34 Stat. at L. 1228, in reference to the Expatriation of Citizens and Their Protection Abroad.

[4] See documents cited in Moore, Dig., III, 414–415, indicating a desire on the part of the Imperial and Royal Government in 1899 to modify the treaty in this and other respects. Concerning the interpretation placed by the United States upon the provision respecting uninterrupted residence for five years as a condition precedent to naturalization, see Mr. Tripp, Minister to Austria-Hungary, to Mr. Gresham, Secy. of State, Aug. 23, 1894, and Mr. Uhl, Acting Secy. of State, to Mr. Tripp, Sept. 14, 1894, For. Rel. 1894, 36, 38, 46 Moore, Dig., III, 411–412.

Without any allegation of offense within the terms of the treaty, but rather upon the ground that the individual had emigrated in order to avoid military service, and that his presence in the country thereafter was undesirable, the Austro-Hungarian Government oftentimes sought to expel its former citizens of American nationality upon their return to and residence within its domain.[1] The United States maintained, on the other hand, that the propriety of expulsion depended upon the particular circumstances of each case, that the pernicious character of the returning person should be affirmatively shown in justification of the extreme resort to expulsion, and that the exercise of that right should not rest upon "a vague and general theory of inconvenient example." [2]

(4)

§ 364. Naturalization not Retroactive.

Naturalization cannot retroactively affect a penalty imposed before the naturalization took place.[3] When an alien who has been naturalized in the United States voluntarily returns to his native country with legal obligations contracted before he left there, the naturalization is not held to absolve him therefrom if the government or individual to whom they may be due shall think proper to enforce them.[4] In such a spirit the naturaliza-

[1] Mr. Adee, Acting Secy. of State, to Mr. Hunter, April 12, 1895, 201 MS. Dom. Let. 480; Moore, Dig., III, 418, also Count Szecsen, Minister of Foreign Affairs, to Mr. Harris, American Minister, June 5, 1900, For. Rel. 1900, 21, 22, Moore, Dig., III, 420–421.

[2] Mr. Hay, Secy. of State, to Mr. Herdliska, American Chargé at Vienna, July 9, 1901, For. Rel. 1901, 10, Moore, Dig., III, 422; same to Mr. Harris, Minister to Austria-Hungary, July 19, 1900. For. Rel. 1900, 22, Moore, Dig., III, 421–422; President McKinley, Annual Message, Dec. 3, 1900, For. Rel. 1900, xvi, Moore, Dig., III, 423. Also For. Rel. 1910, 67–71, respecting the emigration and military service law of Hungary.

[3] The language of the text is that contained in Moore, Dig., III, 426, based upon a communication of Mr. Adee, Acting Secy. of State, to Mr. Kunze, Aug. 3, 1897, 220 MS. Dom. Let. 38. See, also, Opinion of Mr. Black, Atty.-Gen., 9 Ops. Attys.-Gen., 356, Moore, Dig., III, 424; Mr. Bayard, Secy. of State, to Mr. Turner, Sept. 10, 1885, 157 MS. Dom. Let. 109, Moore, Dig., III, 425.

"It is not the practice of the Department to present claims arising out of the military arrest and detention of naturalized American citizens who return to the country of their birth." Mr. Adee, Acting Secy. of State, to Mr. Harris, Minister to Austria-Hungary, Sept. 20, 1899, For. Rel. 1899, 75, Moore, Dig., III, 426. For a contrary view expressed in certain earlier instances, see documents cited in Moore, Dig., III, 426.

[4] The language of the text is that of Mr. Marcy, Secy. of State, to Mr. Vroom, Minister to Prussia, No. 37, Dec. 26, 1856, MS. Inst. Prussia, XIV, 242, Moore, Dig., III, 424. That the decree of naturalization does not operate retroactively, see Ex parte Kyle, 67 Fed. 306; State *v.* Boyd, 48 N. W. 739 (Neb.); Dryden *v.* Swinburne, 20 W. Va. 89; Wulff *v.* Manuel, 23 Pac. 723 (Mont.), all cited in Moore, Dig., III, 423.

tion treaties of the United States have been conceived. Provision is commonly made, as has been observed, for the punishment of a naturalized American citizen upon his return to the State of former allegiance for the violation of its criminal laws prior to the date of emigration, unless the right to punish has been lost by the lapse of time provided by law.[1] Desertion from active military service is not condoned by treaty,[2] or any other form of disobedience to the command of the former sovereign with respect to military service issued prior to emigration.[3]

f

Nationality of Married Women

(1)

§ 365. Marriage of American Women to Aliens. Reversion of Nationality.

According to the existing law of the United States "any American woman who marries a foreigner shall take the nationality of her husband." [4] That her domicile or residence at the time of marriage is unimportant appears to be obvious.

[1] Concerning cases relating to statutes of limitations under German treaties, see Moore, Dig., III, 437–441, and documents there cited.

[2] Mr. Hill, Assist. Secy. of State, to Mr. Whelden, June 19, 1900, 245 MS. Dom. Let. 664, Moore, Dig., III, 425; also For. Rel. 1903, 442.

[3] See German military service cases in Moore, Dig., III, 427–437. See Department of State Circular Concerning Liability for Military Service in Foreign Countries of Persons Residing in the United States, Aug. 14, 1914; Circulars Relating to Citizenship, 1916, p. 62; also Mr. Lansing, Secy. of State, to Messrs. Hubbard & Hubbard, Aug. 18, 1915, *id.*, 80.

See, also, Expatriation, Difficulties with Certain Foreign States, Respecting Military Service, *infra*, § 381; Relation of Expatriation to Emigration, *infra*, § 377.

That a member of the reserve corps who does not respond to a call to active service made after his emigration to the United States should not, after his naturalization therein, upon his return to the State of origin, be punished as a deserter, under the German and Austro-Hungarian treaties, see respectively, Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, No. 111, July 21, 1875 (in the case of Henry Mumbour), MS. Inst. Germany, XVI, 76, Moore, Dig., III, 430; and Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31, Moore, Dig., III, 444.

[4] § 3, Chap. 2534, Act of March 2, 1907, 34 Stat. 1228, U. S. Comp Stat. 1918, § 3960.

In the course of the opinion sustaining the law in Mackenzie *v.* Hare, 239 U. S. 299, Mr. Justice McKenna said: "The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not neces-

At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.[1] Thus the termination of the marital relation, whether by the death of the husband or by divorce, does not in itself effect a reversion of nationality, but simply capacitates the woman, upon compliance with the conditions prescribed, to resume her former American citizenship. That such resumption, in order to become the natural consequence of the termination of the marital relation, is conditioned upon the return to reside in, or of continued residence in the United States, is a reasonable provision, in harmony with the position taken by the Department of State.[2] That resumption may be effected

sity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. . . . It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. . . . This is no arbitrary act of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded." (311–312.)

See, also, In re Rionda, 164 Fed. 368; United States *v.* Cohen, 179 Fed. 834; Techt *v.* Hughes, 128 N. E. 185 (New York).

Concerning the divergent opinions expressed in the United States prior to the enactment of this law, respecting the effect of marriage to a foreigner upon the nationality of an American woman, see documents in Moore, Dig., III, 448–454; Van Dyne, Naturalization, 242–255. See, also, Thornton, Umpire, in M. J. de Lizardi case, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2483; same Umpire, in case of Heirs of Felix Maxan, before same commission, *id.*, 2485.

See Fred K. Nielsen, "Some Vexatious Questions Relating to Nationality," *Columbia Law Rev.*, XX, 840.

[1] The language of the text is that of Sec. 3, Act of March 2, 1907, 34 Stat. 1228.

For cases arising prior to the Act of 1907, see Documents in Moore, Dig., III, 454–456; especially the Case of Nellie Grant Sartoris, daughter of President Grant, who had married a British subject, had resided in England until his death in 1896, and was by joint resolution of Congress of May 18, 1898, 30 Stat. 1496, "on her own application, unconditionally readmitted to the character and privileges of a citizen of the United States", pursuant to Art. III of the Naturalization Convention with Great Britain of May 13, 1870. Malloy's Treaties, I, 692.

[2] Mr. Bacon, Acting Secy. of State, to Mr. Clay, Minister to Switzerland, Jan. 26, 1906, For. Rel. 1906, II, 1371; Mr. Root, Secy. of State, to Mr. Vogel, Swiss Minister, June 2, 1906, in which he declared: "Under the practice of the Department of State a widow or a woman who has obtained an absolute divorce, being an American citizen and who has married an alien, must return to the United States, or must have her residence here in order to have her American citizenship revert on becoming *femme sole*." *Id.*, II, 1365.

See, also, opinion of Plumley, Umpire, in the Stevenson Case, British-Venezuelan Commission, 1903, Ralston's Report, 442, 453. *Compare* Case of

also, in case of absence from the United States, by formal election manifested through registration with a consul, is believed to be a wise provision.[1]

(2)

§ 366. Marriage of Alien Women to American Citizens. Reversion of Nationality.

According to the existing law of the United States: "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."[2] The law is, moreover, deemed applicable to a woman who is married to an alien who later himself becomes naturalized.[3]

By virtue of the Act of March 2, 1907, any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she

Martha M. Calderwood, No. 360, American and British Claims Commission, treaty of May 8, 1871, Moore, Arbitrations, 2485–2486: also comment on this and other cases in Hale's Report, 17, Moore, Arbitrations, III, 2486.

[1] Following an executive order of April 6, 1907, Mr. Root, Secy. of State, on April 19, 1907, issued circular instructions to American diplomatic and consular officers concerning the "Registration of Women Who Desire to Resume or Retain American Citizenship", announcing a form of registration to be used, according to which a woman is obliged to make affidavit that she is "temporarily" residing abroad, that within a definite period, to be named by herself, she intends to return to the United States, with the intention also of there residing and of performing the duties of an American citizen. For. Rel. 1907, I, 10–13. The inquiry suggests itself whether the foregoing requirements, however wise in respect to policy, do not exceed the requirements of the statute.

[2] Rev. Stat. § 1994. Concerning the application of the statute, see documents cited in Moore, Dig., III, 456–458; also Low Wah Suey *v.* Backus, 225 U. S. 460, 473–474; In re Nicola, 184 Fed. 322; Sprung *v.* Morton, 182 Fed. 330; United States *v.* Williams, 173 Fed. 626; Opinion of Mr. Wickersham, Atty.-Gen., respecting case of Nazara Gossin, 28 Ops. Attys.-Gen., 504; also Persons Capable of Naturalization as American Citizens, *supra*, § 354.

[3] Kelly *v.* Owen, 7 Wall. 496; Headman *v.* Rose, 63 Ga. 458; Burton *v.* Burton, 1 Keyes, 359; all cited in Moore, Dig., III, 456. See, also, Van Dyne, Naturalization, 231–233.

According to an executive order by President Roosevelt, of April 6, 1907, "Any white woman or woman of African nativity or descent or Indian woman married to a citizen of the United States is a citizen thereof; and it is immaterial whether the husband became a citizen before or after marriage." Dept. of State, Circulars Relating to Citizenship, etc., 1916, p. 7.

According to an opinion of Mr. Palmer, Atty.-Gen., addressed to the Secy. of Labor, May 8, 1920, the proviso in Section 19 of the Immigration Act of Feb. 5, 1917, 39 Stat. 889, which declares that the marriage of an immoral alien female to an American citizen shall not invest such female with citizenship, is limited to marriages of immoral alien women to American citizens which are solemnized in the United States.

makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering before a United States consul within one year after the termination of such marital relation.[1] Consistently with the principle applied to the converse situation, the termination of the marital relation does not itself effect a change of nationality, but simply leaves the woman free to follow her own choice, requiring of her formal election only in case she desires to renounce or not resume, as the case may be, the nationality of the State, in which she continues to reside.

g

§ 367. **Effect of Parents' Naturalization on Infants.**

In determining what effect the naturalization of the parents should have upon the nationality of their infant children, the United States has heeded two principles, the disregard of either of which would tend to produce a conflict of allegiance.[2] The first is the right of a foreign State to claim the allegiance of children born to its own nationals, while such children reside within its domain. The second is "that it is not within the power of a parent to eradicate the original nationality of his child, though he may, during the minority of such child, invest him with rights or subject him to duties which may or may not be claimed or performed."[3] Hence the existing law, as now interpreted, permits the naturalization of the parents to effect that of the child solely on the following conditions.[4] The latter must be an infant at the time of the parents' naturalization; its citizenship does not begin

[1] § 4, 34 Stat. 1229, U. S. Comp. Stat. 1918, § 3961. Respecting the operation of the statute, see circular instructions of Mr. Root, Secy. of State, to American diplomatic and consular officers, April 19, 1907, For. Rel. 1907, I, 10–13.

[2] Zartarian *v.* Billings, 204 U. S. 170, 174, 175; Van Dyne, Naturalization, 202, 203.

[3] Mr. Blaine, Secy. of State, to Mr. Phelps, Minister to Germany, Feb. 1, 1890, in the Case of Carl Heisinger, For. Rel. 1890, 301, Moore, Dig., III, 467.

[4] § 2172, Rev. Stat. provides that "The children of persons who have been duly naturalized under any law of the United States . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."

§ 5, Act of March 2, 1907, 34 Stat. 1229, U. S. Comp. Stat. 1918, § 3962, declares: "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization

until the child begins to reside permanently within the United States, although such residence may commence, if during infancy, after the naturalization of the parents.[1] Thus a foreign-born alien child cannot gain American citizenship by a temporary sojourn in the United States, whether at the time of, or subsequent to, the naturalization of its parents;[2] nor can it do so if it fails to begin its permanent residence in the United States during infancy.[3]

That an alien child may be naturalized as a consequence of the naturalization by marriage of its widowed mother to an American citizen,[4] or by the resumption of citizenship by the mother after the termination of the marital relation (as in the case of a woman who had relinquished her American citizenship by marrying a foreigner), appears to be clear.[5] It is believed that the Act of March 2, 1907, is sufficiently comprehensive to effect the naturalization of an illegitimate alien child through the naturalization of the mother, whether by marriage or otherwise.[6]

That a citizen of the United States cannot, by adopting a child

of or resumption of American citizenship by the parent; *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

[1] Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, Jan. 22, 1900, in the Case of Anton Maček, For. Rel. 1900, 13–15, Moore, Dig., III, 470, *citing* Mr. Blaine, Secy. of State, to Mr. Phelps, Minister to Germany, Feb. 1, 1890, For. Rel. 1890, 301; Zartarian *v.* Billings, 204 U. S. 170, decided Jan. 7, 1907, *construing* § 2172, Rev. Stats. Respecting § 5 of the Act of March 2, 1907, see United States *v.* Rodgers, 185, Fed. 334.

See, also, Moore, Dig., III, 464–472, and documents there cited; Van Dyne, Naturalization, 200–218.

See in this connection Delaware, L. & W. R. Co. *v.* Petrowsky, 250 Fed. 554, 558.

[2] As to the law in this regard, prior to the enactment of the Act of March 2, 1907, see Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 394, 395; Van Dyne, Naturalization, 214–215.

[3] Case of Young *v.* Peck, 21 Wend. 389, and 26 Wend. 613, Van Dyne, Naturalization, 201.

[4] Correspondence with Germany respecting the Case of John Haberacker, For. Rel. 1891 and 1892, Moore, Dig., III, 473–483; Mr. Hay, Secy of State, to Mr. Harris, Minister to Austria-Hungary, Jan. 22, 1900, For. Rel. 1900, 13–15. See, also, United States *v.* Rodgers, 144 Fed. 711, and other cases cited in Van Dyne, Naturalization, 220–223.

[5] The Act of March 2, 1907, § 5, refers expressly to the "resumption of American citizenship by the parent."

[6] Hence it is believed that in case the mother were naturalized by marriage, the naturalization of the child would not be dependent upon showing that the husband of the mother was its reputed father, or in case he was, upon establishing that marriage served to legitimate the child as well as to naturalize the mother. That the child becomes an American citizen under the latter circumstances according to § 2172, Rev. Stats., see Van Dyne, Naturalization, 223, *citing* Mr. Hay, Secy. of State, to Mr. White, March 3, 1899.

of foreign nationality, confer upon it American citizenship appears to be accepted doctrine.[1]

h

Naturalization Partially Ineffective as to Absent Family

(1)

§ 368. Application to Wives and Infant Children.

The naturalization of an alien in the United States is partially ineffective as to his absent family. Thus, his minor children, until they begin to reside permanently in the United States, under circumstances heretofore observed, undergo no change of nationality.[2]

With respect, however, to his absent wife, there long appears to have been doubt as to the effect of the naturalization of the husband.[3] For some time past the Department of State has consistently held that the wife gains the benefit of her husband's naturalization and prior to her entering the United States.[4]

(2)

§ 369. Good Offices for Emigration.

The United States does not assert any right of interposition to secure the emigration from the State of origin of the non-

[1] Mr. Fish, Secy. of State, to Mr. Rand, Jan. 6, 1872, 92 MS. Dom. Let. 142, Moore, Dig., III, 484; Mr. Frelinghuysen, Secy. of State, to Mr. Willis, M. C., Feb. 21, 1884, 150 MS. Dom. Let. 86, Moore, Dig., III, 484; Mr. Adee, Second Assist. Secy. of State, to Mr. Goepel, Sept. 13, 1888, 169 MS. Dom. Let. 657, Moore, Dig., III, 485.

That a child born of Chinese parents in China cannot be permitted to enter the United States as an American citizen because of its adoption by a temporary resident of China who is a citizen of the United States, see For. Rel. 1906, I, 288–290; also *id.*, II, 1015.

[2] Effect of Parents' Naturalization on Infants, *supra*, § 367.

Mr. Buchanan, Secy. of State, to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330, Moore, Dig., III, 487; Mr. Trescot, Assist. Secy. of State, to Mr. Capelle, June 18, 1860, 52 MS. Dom. Let. 358, Moore, Dig., III, 487.

"This rule *a fortiori* applies to other relations, such as that of mother or sister." Moore, Dig., III, 487, *citing* Mr. Olney, Secy. of State, to Mr. Torrey, June 17, 1896, 210 MS. Dom. Let. 686; Same to Mrs. James, July 18, 1896, 211, *id.*, 410.

[3] Mr. Seward, Secy. of State, to Mr. Tinelli, April 1, 1868, 78 MS. Dom. Let. 275, Moore, Dig., III, 485; Mr. Foster, Secy. of State, to Mr. Thompson, Minister to Turkey, Feb. 9, 1893, For. Rel. 1893, 598, Moore, Dig., III, 486; Mr. Gresham, Secy. of State, to Mr. Watrous, Jan. 23, 1895, MS. Dom. Let. 346, Moore, Dig., III, 487. See, also, Burton *v.* Burton, 26 How. Pr. 474, Van Dyne, Naturalization, 234.

[4] For the statement in the text the author acknowledges his indebtedness to Mr. R. W. Flournoy, Jr.

resident alien wife or children of a naturalized American citizen.[1] The Department of State has, however, frequently instructed American diplomatic representatives (especially those accredited to Turkey), to exert their good offices on proper occasions, to secure permission for the departure of such persons for the United States upon satisfactory assurance of their possession of funds sufficient to defray the expenses of the journey.[2]

i

Impeachment of Naturalization

(1)

§ 370. American Law.

The Act of June 29, 1906, makes apt provision for the impeachment of naturalization obtained by fraud.[3] To that end three distinct yet coördinated means are employed:

First, the duty is imposed upon the United States district attorneys, "upon affidavit showing good cause therefor", to

[1] Mr. Wharton, Acting Secy. of State, to Mr. Terzian, May 14, 1891, 182 MS. Dom. Let. 9, Moore, Dig., III, 488.

[2] Report of Mr. Olney, Secy. of State, to the President, Jan. 22, 1896, For. Rel. 1895, II, 1471–1473, Moore, Dig., III, 489; Same to Same, Dec. 7, 1896, *id.*, 1896, lxxxix, Moore, Dig., III, 491; Mr. Hay, Secy. of State, to Mr. Straus, Minister to Turkey, Feb. 24, 1899, MS. Inst. Turkey, VII, 323, Moore, Dig., III, 491; also other documents cited in Moore, Dig., III, 488–492.

Indicating unwillingness to solicit permission for the emigration from Turkey of a minor brother, see Mr. Moore, Assist. Secy. of State, to Mr. Greene, May 14 and May 24, 1898, 228 MS. Dom. Let. 486, 227, *id.*, 589, Moore, Dig., III, 490. "Personal good offices were used in the case of an intended wife." Moore, Dig., III, 490, *citing* Mr. Hay, Secy. of State, to Mr. Straus, Minister to Turkey, Feb. 20, 1899, MS. Inst. Turkey, VII, 322.

[3] § 15, 34 Stat. 601, U. S. Comp. Stat. 1918, § 4374. Sustaining the constitutionality of the Act of June 29, 1906, and upholding the right of Congress to authorize direct proceedings to attack certificates of citizenship on the ground of fraud and illegality, see Johannessen *v.* United States, 225 U. S. 227.

Concerning the practice under prior laws, see Van Dyne, Naturalization, 138–141, and cases cited.

That an order or decree cannot be impeached collaterally, see Campbell *v.* Gordon, 6 Cranch, 175; Spratt *v.* Spratt, 4 Pet. 393, and other cases in Moore, Dig., III, 499–501. That a judgment admitting to citizenship one who is ineligible therefor may be regarded as void or attacked collaterally, see In re Yamashita, 30 Wash. 234; In re Hong Yen Chang, 84 Cal. 163; In re Gee Hop, 71 Fed. 274; Opinion of McKenna, Atty.-Gen., 21 Ops. Attys.-Gen., 581, all cited in Moore, Dig., III, 499 and 501.

Proof of Naturalization. Respecting the proof of naturalization before American Courts, see Van Dyne, Naturalization, 129–134, and cases there cited; also § 28, and par. 2, § 15, of the Act of June 29, 1906, establishing a Bureau of Naturalization, 34 Stat. 596. Concerning the practice of the Department of State where a person seeks to establish his naturalization by other than the ordinary proofs, see Moore, Dig., III, 498–499, and documents there cited.

institute proceedings for the purpose of setting aside and canceling certificates of citizenship on the ground of fraud.[1]

Secondly, if any alien who, under the provisions of the Act, secures a certificate of citizenship, and within five years thereafter goes to and makes his permanent residence within any foreign country, his conduct is considered *prima facie* evidence of a lack of intention on his part to become a "permanent citizen of the United States" when he filed his petition for citizenship, and in the absence of countervailing evidence it suffices to authorize the cancellation of his certificate as fraudulent.[2]

Thirdly, it is made the duty of American diplomatic and consular officers to furnish the Department of Justice through the Department of State, with the names of persons within their respective jurisdictions who have such certificates of citizenship, and who have taken such permanent residence abroad; and such statements when duly certified are made admissible in proceedings to cancel certificates of citizenship.[3]

These measures appear to be designed also to lessen the danger

[1] Concerning the necessity of the affidavit, see Van Dyne, 138.

[2] Commenting on § 15 of the Act of June 29, 1906, it was declared by Mr. Justice Van Devanter, in Luria *v.* United States, 231 U. S. 9, 23: "These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name — that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past."

See United States *v.* Wursterbarth, 249 Fed. 908, where the respondent, a native of Germany, had been admitted to citizenship in 1882, under Rev. Stat. § 2165, requiring an applicant for admission to make oath that he would support the Constitution of the United States, and that he absolutely adjured and renounced all allegiance to any foreign prince or sovereignty. Proof that when the United States and Germany engaged in war in 1917, the respondent desired the success of Germany, and recognized an allegiance to Germany superior to that due to the United States, was held, while unexplained, to warrant cancellation of his certificate of citizenship on the ground that it was procured by fraud, in that his oath to renounce allegiance to any foreign sovereignty was false, and excepted the land of his nativity.

See, also, United States *v.* Swelgin, 254 Fed. 884, where in a suit to cancel a certificate of naturalization on the ground that at the time the holder was naturalized and during the five-year period immediately preceding, he was not attached to the principles of the Constitution of the United States or well disposed to the order and happiness of the same, and that he had been and was a member of an organization commonly called the I. W. W., the evidence was held to show that that organization advocated anarchy and the overthrow of established order, and to warrant the annulment of the certificate of naturalization, where the holder of it admitted adherence to the principles of the organization.

[3] Circular instructions of Mr. Root, Secy. of State, to American diplomatic and consular officers, April 19, 1907, respecting "Reports of Fraudulent Naturalization", For. Rel. 1907, I, 9.

of international controversy produced by the acquisition by an alien of American citizenship for the sole and fraudulent purpose of enabling him to resume residence in the State of his origin, immune from common burdens imposed upon its nationals.

(2)

§ 371. Rule of International Action.

The Department of State "possesses no power to vacate decrees of naturalization; but it exercises, under the direction of the President, plenary jurisdiction over the conduct of foreign relations." [1] In so doing, the Department found it possible, prior to the enactment of the existing statutory law, to repudiate naturalization which had been improperly obtained in the United States.

The United States, whether or not itself a party to the naturalization proceedings,[2] cannot with reason deny the right of a foreign State, not a party thereto, to contest the validity of the naturalization of one who relies upon a decree obtained by fraud, or otherwise in defiance of the law.[3] By acting accordingly, the Department of State does not attempt to denationalize an American citizen, but simply declines to give support to the pretences of him who claims to be such.[4] It does not necessarily admit that

[1] Statement by Prof. Moore, Dig., III, 501, where it was added: "In the exercise of this jurisdiction, the Department, as has often been held, will, so far as any action of its own is concerned, treat as invalid a certificate of naturalization that has been improperly obtained.

"The grounds on which the Executive so acts have perhaps never been stated more concisely, nor yet with greater clearness and profundity of reasoning, than by the Commander Bertinatti, as umpire of the Costa Rican Commission, 3 Moore, Int. Arbitrations, 2586–2589." *Id.*

Illustrative of the practice of the United States, see Mr. Fish, Secy. of State, to Mr. Maynard, Minister to Turkey, No. 40, Feb. 11, 1876, MS. Inst. Turkey, III, 163, Moore, Dig., III, 503; Mr. Bayard, Secy. of State, to Mr. Scruggs, Minister to Colombia, May 16, 1885, For. Rel. 1885, 211, Moore, Dig., III, 510; Same to Mr. McLane, Minister to France, Dec. 8, 1888, For. Rel. 1888, 1, 565, Moore, Dig., III, 511; Mr. Olney, Secy. of State, to Clerk of Common Pleas, New York City, Jan. 13, 1897, 215 MS. Dom. Let. 202, Moore, Dig., III, 512; Mr. Day, Assist. Secy. of State, to Mr. Stewart, Nov. 11, 1897, 222 MS. Dom. Let. 359, Moore, Dig., III, 513.

[2] Through § 11, of the Act of June 29, 1906, the United States exercises the right to appear in naturalization proceedings, and to oppose the granting of any petition.

[3] See, in this connection, Mr. Evarts, Secy. of State, to the Spanish Minister at Washington, March 4, 1880, respecting the Case of Fernando Dominguez, before the Spanish Claims Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, 2599.

[4] *Compare* Mr. Blaine, Secy. of State, to Mr. Durant, American Advocate for the United States, Nov. 30, 1881, respecting the Case of Pedro D. Buzzi, before the Spanish Claims Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, 2618.

the United States is without power to naturalize an alien by a process other than that prescribed by the general law; it merely concedes that he who claims the benefit of that law must not perpetrate a fraud upon it, or otherwise hold it in contempt.[1]

The United States does not, however, admit the right of a foreign government to pass judgment on the validity of a decree of naturalization, reserving to itself the right, and manifesting also the disposition, in all proper cases, to inquire into the regularity of a judgment that is open to impeachment.[2]

If the validity of the naturalization of an individual claimant (or of one through whom a claim is derived) is challenged in a case before an international tribunal, the Department of State appears to recognize the reasonableness both of the right of contest and of the decision of the question by the arbitral court.[3] The consent to its jurisdiction is believed to be implied from the agreement for the submission of claims. Such tribunals have not hesitated to impeach certificates of naturalization when the evidence warranted such action.[4]

[1] Opinion of Commander Bertinatti, in the Medina Case, American-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, III, 2586.

[2] Mr. Fish, Secy. of State, to Mr. Nelson, Minister to Mexico, Feb. 13, 1872, For. Rel. 1872, 387, Moore, Dig., III, 513; Mr. Bayard, Secy. of State, to Mr. Bluhdorn, Aug. 21, 1888, MS. Notes to Austrian Legation, VIII, 575, Moore, Dig., III, 514; Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 25, Moore, Dig., III, 515.

[3] Instructions of Mr. Frelinghuysen, Secy. of State, to Mr. Suydam, advocate for the United States, before the Spanish Claims Commission, Feb. 25, 1882, in which it was declared: "The true rule to govern the commission is, that when an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law." Moore, Arbitrations, III, 2619, 2620. This rule was accepted by the commissioners for both the United States and Spain.

Concerning generally the question before the Spanish Claims Commission, see Moore, Arbitrations, 2590–2621, Moore, Dig., III, 506–509. Concerning the Disposition of Fraudulent Certificates, Moore, Dig., III, 516–518.

With respect to Crimes and Offenses against the Naturalization Laws of the United States, see Van Dyne, Naturalization, 189–194.

[4] Case of Medina, United States-Costa Rican Commission, Convention of July 2, 1860, Moore, Arbitrations, III, 2583–2589; Cases before Spanish Claims Commission, Agreement of Feb. 11–12, 1871, *id.*, 2621–2647; Cases before French-American Commission, Convention of Jan. 15, 1880, *id.*, 2647–2655; Flutie Cases before American-Venezuelan Commission, 1903, Ralston's Report, 38.

See, also, Case of Rita L. Ruiz, before Spanish Treaty Claims Commission, under Act of Congress, March 3, 1901, 37, published also in Van Dyne, Nat-

5

DOUBLE ALLEGIANCE

a

§ 372. Its Significance.

That a child may at birth become the object of a double claim of allegiance is the natural consequence of the fact that States may without impropriety rely upon either the *jus sanguinis* or the *jus soli* as the source of national character, and the necessary result whenever a State, such as the United States, bases its laws upon both principles.[1] Nevertheless, this very reliance upon both aids in the solution of the conflict by necessarily imputing to such State respect for the nature of the claim of that other within whose territory the child happens to be.[2] The latter is able to exact allegiance from him so long as he is deemed incapable of making any choice, and remains within its control. The power of the territorial sovereign and the incapacity of the child combine to fortify the claim.

When, however, the child attains his majority, emigrates to a foreign country, acquires by naturalization its nationality, and returns to the State of his origin, it will be seen that, according to the view of the United States, the doctrine of double allegiance is not applicable. Naturalization by the adult, capable of making a choice, is regarded as impressing upon him a new and solitary national character, entitled to general respect until he expatriates himself.[3]

uralization, 144, in which it was held that the Commission, although established by Act of Congress, was sitting as an international tribunal, and as such was empowered to impeach for cause an American certificate of naturalization.

[1] Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, June 9, 1915, American White Book, European War, II, 149; Department of State, Circulars Relating to Citizenship, etc., 1916, p. 75. See, generally, Moore, Dig., III, 518–519; Oppenheim, 2 ed., 383–386; Westlake, 2 ed., I, 221–225.

[2] Opinion of Mr. Hoar, Atty.-Gen., 13 Ops. Attys.-Gen., 89, 91, Moore, Dig., III, 519; Report of Mr. Fish, Secy. of State, to the President, Aug. 25, 1873, For. Rel. 1873, II, 1186, 1191–1192, Moore, Dig., III, 519; see, also, Westlake, 2 ed., I, 223. See, also, Mr. Wilson, Acting Secy. of State, to Mr. Pierrepont, Chargé at Santiago, Aug. 3, 1910, For. Rel. 1910, 195.

Obviously a State cannot justly exact allegiance of a resident not born within its territory and the child of alien parents; for such an attempt would defy the principle that claims of allegiance, in order to be just, must be derived from recognized sources. Herein is illustrated the fact that the propriety of the action of the individual State in respect to nationality, as in all other matters, finds its ultimate test in an international rather than a domestic standard, and in one manifest in the practice of enlightened States.

[3] Declares Professor Moore: "It is sometimes stated that a double allegiance also exists where a person born in one country afterwards emigrates to and becomes a citizen of another country. That a person in such a situation may be subject to the claims of allegiance in two countries, is in point of

b

The Attitude of the United States

(1)

§ 373. Foreign-born Children.

Children born outside of the limits of the United States who are citizens thereof by virtue of section 1993 Revised Statutes,[1] and who continue to reside outside of the United States, are deemed by the Department of State to be entitled to passports during minority.[2] Recognizing the impropriety of interference with the allegiance which such children owe to the country of birth which regards them as nationals, the United States formerly issued passports qualified with the statement that the rights of the holders were subject to the rights, obligations and duties which might attach to them in the State of birth and of continued residence.[3]

According to the Act of March 2, 1907, such persons, in order to receive the protection of the United States, are required, upon reaching the age of eighteen years, to record at an American Consulate their intention to become residents and remain citizens of the United States, and are further required to take the oath

fact no doubt true; but it is in point of principle equally true that, when writers place such a case under the head of double allegiance, they at least impliedly hold that the doctrine of voluntary expatriation, as maintained by the United States, is not well founded. From the point of view of the doctrine of expatriation, as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance, acquires a new one, has thereafter but one allegiance — that of his adopted country." Dig., III, 518–519. See, also, the Right of Expatriation, *infra*, §§ 376–378.

[1] § 1993 provides that "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

[2] Mr. Adee, Acting Secy. of State, to Mr. Combs, No. 71, Sept. 15, 1903, For. Rel. 1903, 595, Moore, Dig., III, 525.

[3] See excellent statement of Mr. Bayard, Secy. of State, to Mr. Vignaud, Chargé at Paris, July 2, 1886, For. Rel. 1886, 303, 304, referring to opinion of Mr. Hoar, Atty.-Gen., 13 Ops. Attys.-Gen., 89, Moore, Dig., III, 529; Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 396, 398, Moore, Dig., III. 530; Mr. Olney, Secy. of State, to Mr. Strobel, Minister to Chile, June 4, 1896, For. Rel. 1896, 34–35, Moore, Dig., III, 526.

Obviously where such a conflict does not arise under the legislation of the foreign State, no reason other than what may be apparent from the domestic law of the United States exists for the withholding of protection in the country of birth. Mr. Adee, Acting Secy. of State, to Mr. Coombs, Minister to Japan, April 28, 1893, For. Rel. 1893, 401, Moore, Dig., III, 530.

It should be noted that qualified passports have not been issued for many years.

of allegiance to the United States upon attaining their majority.[1] It may be doubted whether bare compliance by the foreign-born child with either or both of the foregoing requirements would justify the United States in attempting to shield him from burdens of citizenship which might be imposed by the country of birth; for such conduct on his part, while he remained within its territory, could not reasonably deprive that State of the right to exact allegiance of him as a consequence of his birth within its territory.[2] The international value of an election of American nationality by one having capacity to elect, is believed to depend upon actual removal to the United States.[3]

It is not unreasonable for the State of origin to declare that a child of its own citizens born within its own territory, who is naturalized abroad in consequence of the parents' naturalization, is, nevertheless, not deprived of his nationality of origin if he during minority returns to its domain. Under such circumstances it is believed that the duty of that State to respect the

[1] § 6, 34 Stat. 1229, U. S. Comp. Stat. 1918, § 3963. See circular instructions of Mr. Root, Secy. of State, to American Diplomatic and Consular Officers, April 19, 1907, For. Rel. 1907, I, 9.

According to a notice to American Diplomatic and Consular Officers, Mar. 14, 1911, it was declared by Mr. Wilson, Acting Secy. of State, that the Department of State had decided that the declarations of "intention to become residents and remain citizens of the United States" required by the statute had reference to the right of protection rather than citizenship under the municipal law, and that "such declarations may be made at any time after the minors concerned have reached the age of eighteen years and before they take the oath of allegiance to the United States; not necessarily before they reach the age of nineteen years." For. Rel. 1911, 2.

See, also, Mr. Adee, Acting Secy. of State, to Mr. Kerens, Ambassador to Austria-Hungary, Oct. 7, 1910, respecting the citizenship of R. Warren-Lippit, For. Rel. 1910, 76.

[2] The purpose of the statute was to prescribe circumstances when foreign-born children should cease to have the right to invoke the protection of the United States, rather than to assert conditions when they should be protected by the United States against claims of allegiance made by the State of birth and of continued residence.

The fact of election, as prescribed by the statute, may serve by virtue of the law of the State of birth and residence (as in France) to produce relinquishment by it of its claim of allegiance. In such case compliance with the Act of Congress is efficacious only so far as it results in compliance also with the foreign law. See Mr. Vignaud, Chargé at Paris, to Mr. Bayard, Secy. of State, June 15, 1886, For. Rel. 1886, 301, Moore, Dig., III, 528. *Compare* the situation in Russia, indicated in a communication of Mr. Adee, Acting Secy. of State, to Mr. Coombs, Minister to Japan, April 28, 1893, For. Rel. 1893, 401, Moore, Dig., III, 530.

[3] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, Feb. 15, 1888, For. Rel. 1888, I, 510, 511, Moore, Dig., III, 548; Same to Mr. Vignaud, Chargé at Paris, July 2, 1886, For. Rel. 1886, 303, 304, Moore, Dig., III, 546; Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, No. 959, Nov. 4, 1899, MS. Inst. Germany, XXI, 104, Moore, Dig., III. 551.

See, in this connection, Ex parte Gilroy, 257 Fed. 110, 126; also Native-born Children, *infra*, § 374.

naturalization of the parents fails to include the duty to heed also that of the child. Thus a foreign-born child naturalized in the United States in consequence of the naturalization of its parents, upon returning during minority to the State of origin may be regarded (while within its territory) as a national thereof, and subject to the performance of obligations incidental to allegiance, from which the United States should not endeavor to shield him.[1] It will be observed that the Act of Congress clothing such an individual with American citizenship by virtue of the naturalization of his parents is conditioned upon the child's "beginning to reside permanently in the United States." [2]

(2)

§ 374. Native-born Children.

Children born to foreign parents in the United States, and who are American citizens within the meaning of the Fourteenth Amendment to the Constitution, if taken to the country of the parents' nationality, are deemed to be entitled to passports during minority.[3] The Department of State does not, however, endeavor to protect the child from the burdens of allegiance imposed by that State, in case its laws regard him as a national by virtue of the *jus sanguinis*.[4]

[1] The United States might possibly exercise its good offices in behalf of such an individual if he entered the domain of a foreign State as a transient visitor not contemplating an extended sojourn therein.

See Case of René Dubuc, For. Rel. 1910, 514–516.

The Department of State has maintained that the naturalization, by virtue of the statutory laws of the United States, of a child of Portuguese birth, in consequence of the naturalization of the parents in the United States, attaches to such child an American nationality which should be respected by Portugal by reason of Art. I of its naturalization convention with the United States of May 8, 1908, which provides that subjects of Portugal who become naturalized citizens of the United States and shall have there resided uninterruptedly for five years shall be held by Portugal to be American citizens and shall be treated as such. Mr. Knox, Secy. of State, to Mr. Bryan, Minister to Portugal, Jan. 12, 1910, telegram, in the Case of Antonio S. Nunes, where it is also stated that "similar construction has been put upon provisions in our naturalization treaties with other countries." For. Rel. 1910, 832.

[2] § 5, Act of March 2, 1907, 34 Stats. 1229. Also Effect of Parents' Naturalization on Infants, *supra*, § 367.

[3] Fourteenth Amendment, Section 1.

[4] Mr. Frelinghuysen, Secy. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 MS. Dom. Let. 270, Moore, Dig., III, 532; Mr. Blaine, Secy. of State, to Mr. Phelps, Minister to Germany, May 3, 1892, For. Rel. 1892, 189, Moore, Dig., III, 533; Mr. Bacon, Acting Secy. of State, to Mr. Tower, Ambassador to Germany, March 8, 1907, For. Rel. 1907, I, 516.

Compare the divergent rulings in Case of R. J. J. Pinto and other cases in 1899 and 1901, For. Rel. 1899, 588–589; *id.*, 760, 762; *id.*, 1901, 532.

When a child, born in the United States to parents previously naturalized therein, is taken during minority to the territory of the State of the parents'

A passport has been denied when sought for the protection of a minor born in the United States, whose parents proposed to return with him "for a brief period" to the country of which they were subjects.[1] The Department has, at least on one occasion, however, encouraged the use of the good offices of an American diplomatic officer to protect an American-born minor from military service in the State of the parents' nationality, when it appeared that the father's domicile had been in the United States ever since the birth of the son, and that the latter was only temporarily within the domain of the State which regarded him as a national.[2] It is not believed that the United States would to-day assert that the American domicile or residence of either parent or child lessens the strict right of the foreign State to exact allegiance from the latter; for the presence of the minor within its domain justifies the claim so long as it is derived from a recognized source.

The Department of State has held, that the child, upon attaining his majority, must elect between the nationality which is his by birth, and that which is his by parentage; and that election of American nationality is effective by the manifestation of an intention in good faith to return to the United States with all convenient speed and there to assume duties of citizenship.[3] While such action may enable the declarant to invoke successfully the protection of the United States in case no opposing claim is made by the State of residence, it has been repeatedly held that the mode of expressing election is to return to the United States, the evidence of election being to place oneself in the territory of that country which is elected.[4] The effect of election so

origin, a different situation arises. In such case the contention is justified that the acquisition by the parents of American nationality which gave them a new and single national character, served also to cut off the right of their former sovereign to claim allegiance of a child subsequently born outside of its domain and later permitted to enter it. The United States could not admit the validity of such a claim, or the invocation of the doctrine of dual allegiance in support of it. See the facts in the Case of Ugo Da Prato, mentioned in a communication of Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, June 9, 1915, American White Book, European War, II, 149.

[1] Mr. Gresham, Secy. of State, to Mr. Seely, March 9, 1893, 190 MS. Dom. Let. 553, Moore, Dig., III, 533.

[2] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, concerning the Case of A. F. Gendrot, Dec. 28, 1887, For. Rel. 1888, I, 498, Moore, Dig., III, 537. See, also, other documents concerning the same case in Moore, Dig., III, 537–539.

[3] See memorandum of the law officer of the Department of State, enclosed in a communication of Mr. Bacon, Acting Secy. of State, to the German Ambassador, Nov. 20, 1906, For. Rel. 1906, I, 656, 657.

[4] Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, Feb. 15, 1888, For. Rel. 1888, I, 510; also Mr. Adee, Acting Secy. of State, to Mr. Tripp, Minister at Vienna, July 23, 1895, For. Rel. 1895, I, 20–22, Moore,

manifested is believed to be not unlike that produced by naturalization in destroying the right of the foreign State to claim allegiance, because the action of the individual in relation to the State of birth renders thereafter unreasonable the assertion of the claim derived from the nationality of the parents. Hence, after such election and domicile in the United States, the Department of State is disposed to protect the individual as an American citizen upon his return as a transient visitor to the domain of the former State.[1]

(3)

§ 375. Effect of Change of Parents' American Nationality.

The American-born child of a naturalized American citizen who upon returning to the State of his origin resumes his former allegiance, is regarded by the United States as reasonably subject to the allegiance of such State, provided the child is within its domain, and is claimed as a national pursuant to the local law. Such child is, nevertheless, deemed to possess the right to elect American citizenship by the usual mode, upon attaining his majority.[2]

Dig., III, 549–550; Mr. Bacon, Acting Secy. of State, to Mr. Tower, Ambassador to Germany, March 8, 1907, For. Rel. 1907, I, 516.

[1] As to the time within which election should be made, see documents cited in Moore, Dig., III, 550–551; also For. Rel. 1906, I, 657, *id.*, II, 1180.

See, also, Case of Frank Ghiloni, in American White Book, European War, III, 373–387, where the Department of State undertook to protect from military service a man who had been born in Massachusetts in 1885, his father being an Italian subject who obtained naturalization as an American citizen the following year. The son was taken to Italy when two years of age, returning to the United States in 1897, when about twelve years of age. He resided continuously in the United States until June, 1914, when he went to Italy for his health, he then being twenty-nine years of age. During that visit The World War broke out, and he was impressed into service in the Italian Army as an Italian subject. In seeking to effect his release Secretary Lansing declared, July 20, 1915, *id.*, 375: "It is considered by this Government that the principle of election of nationality should be recognized in cases of persons born with dual nationality, whether or not the municipal laws of the countries concerned prescribe definite modes of election. This Government has no desire to intervene in cases of persons who were born in the United States of Italian parents but were domiciled there, and have evidently elected Italian nationality." The Italian Government declined to accede to the request. The man was subsequently taken prisoner by the Austro-Hungarian forces. The Department of State demanded and obtained his release.

[2] The statement in the text does not purport to define or describe acts fairly to be deemed to constitute a resumption of former allegiance by the father. See, in this connection, correspondence with the German Foreign Office in 1884–1885, For. Rel. 1885, 393–411, 414–416, and summary thereof in Moore, Dig., III, 748–749. *Compare* views of Mr. Pierrepont, Atty.-Gen., in Steinkauler's Case, 15 Ops. Attys.-Gen., 15, Moore, Dig., III, 539, concerning Art. IV of the treaty with North Germany of 1868.

"If the father . . . did in fact renounce his American citizenship and resume his original allegiance, in a manner recognized by the laws of his native country, that fact would operate as a renunciation of the adopted citizenship

It is believed that the same respect should be accorded the claim of the foreign territorial sovereign, where the parents are American-born, and duly change their nationality.

However much the change of the nationality of the parents may depend upon their domicile or residence within the foreign State, it may be doubted whether any rule of general acceptation makes the claim to the child, as a consequence of the parents' naturalization, dependent also upon its domicile or residence.[1] The Department of State, in declaring that the child partakes of the father's domicile, has apparently regarded that fact as important in justifying the claim of the foreign State.[2] Hence doubt has been expressed as to the correctness of the position of such a State in a case where the right of an alien widowed mother to change the legal home of her American-born child domiciled in the United States was also questioned.[3]

6

THE RIGHT OF EXPATRIATION

a

§ 376. Relation to Naturalization.

The word expatriation is here used to describe the conduct of one who permanently leaves the territory of the State of which he is a national and voluntarily renounces allegiance to its sovereign. As such conduct is almost invariably characterized by the attempt to acquire the nationality of another State to which the individual has emigrated and in which he has made his home, expatriation is closely associated with the transfer as well as the

for his minor children, at least while they remain within the jurisdiction which their father reacknowledged." Mr. Frelinghuysen, Secy. of State, to Mr. Kasson, Minister to Germany, Jan. 15, 1885, For. Rel. 1885, 396, 397, Moore, Dig., III, 540.

See, also, Mr. Bayard, Secy. of State, to Mr. de Weckherlin, April 7, 1888, For. Rel. 1888, II, 1341, Moore, Dig., III, 542; Mr. Olney, Secy. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406, Moore, Dig., III, 542.

[1] In the converse situation, § 5 of the Act of March 2, 1907, 34 Stat. 1229, compels the alien child, as has been noted, to begin to reside permanently in the United States, in order to enjoy the benefits of the father's naturalization. Effect of Parents' Naturalization on Infants, *supra*, § 367.

[2] Mr. Porter, Acting Secy. of State, to Mr. Winchester, Minister to Switzerland, Sept. 14, 1885, For. Rel. 1885, 811, Moore, Dig., III, 541; Mr. Bayard, Secy. of State, to Mr. de Weckherlin, April 7, 1888, For. Rel. 1888, II, 1341, Moore, Dig., III, 542.

[3] Mr. Bayard, Secy. of State, to Mr. Liebermann, July 9, 1886, 160 MS. Dom. Let. 667, Moore, Dig., III, 541.

abandonment of allegiance.[1] In a strict sense, however, expatriation refers to the conduct solely of the individual, while naturalization refers to that of the State of adoption as well as of the man. For that reason the inquiry as to the existence or scope of his right to terminate at will his political relationship to his own country is distinct from that as to whether naturalization serves in itself to produce such a result. It is, however, the effect of the endeavor of the State to impress its national character upon the person who is naturalized that has been the subject of international controversy. Herein has the question of expatriation become important to the United States.

b

§ 377. Relation to Emigration.

While in a descriptive sense the word expatriation doubtless embraces the idea of emigration as well as of abandonment of allegiance, the question arises whether any right of expatriation asserted in behalf of the individual possesses likewise this twofold character. One reason which may have retarded acceptance in the United States of the theory that the individual may at will free himself from the duty of allegiance towards his sovereign was a consciousness that the right of a man to leave his own country, as his right to commit any other act within a place subject to its control, depends upon the will of the State, and that no act committed within its territory can be reasonably regarded as lawful which the sovereign thereof itself forbids.[2] If, therefore, the right of expatriation necessarily embraced the right to emigrate as well as to abandon or transfer allegiance, it rested in part upon a fiction, for it necessarily denied the supremacy of the foreign territorial sovereign within its own domain.[3]

[1] "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." Van Dyne, Naturalization, 333. See, also, §§ 2 and 3, Act of March 2, 1907, 34 Stat. 1228.

[2] See, for example, Mr. Everett, Secy. of State, to Mr. Barnard, Minister to Prussia, Jan. 14, 1853, S. Ex. Doc. 38, 36 Cong., 1 Sess., 53, 54, Moore, Dig., III, 567; also Opinion of Mr. Cushing, Atty.-Gen., Oct. 31, 1856, in which it was declared: "The assumption of a natural right of emigration, without possible restriction in law, can be defended only by maintaining that each individual has all possible rights against the society, and the society none with respect to the individual; that there is no social organization, but a mere anarchy of elements, each wholly independent of the other, and not otherwise consociated save than by their casual co-existence in the same territory. [Ahrens, *Droit Naturel*, p. 324.]" 8 Ops. Attys.-Gen., 139, 163, Moore, Dig., III, 570, 571.

[3] It may be doubted, therefore, whether the assertion of Attorney-General Black in his opinion respecting the Case of Christian Ernst, in 1859, that the

As a matter of fact, the United States has not concerned itself with inquiries respecting the lawfulness of the emigration of the applicant for its citizenship. That citizenship has been within the reach of him who, regardless of the propriety of his previous conduct in relation to emigration, has, within the United States, complied with its naturalization laws.[1] Stripped, therefore, of impedimenta relating to emigration, and confined to the legal aspect of the attempt to dissolve the tie of allegiance to one sovereign by naturalization within the territory of another, the right of expatriation, whatever it may be, is freed from an unstable prop, and entitled to intelligent support. While the United States has oftentimes intimated that the right of expatriation embraces the right also to emigrate,[2] it has, in the convention with Portugal of May 7, 1908, acknowledged the right of the country of origin to make legal provisions for the regulation of emigration, and to punish those who transgressed the same upon their return to its territory.[3]

right of expatriation possessed this twofold aspect, added weight to the argument which he ably sought to advance. It was there declared to be the "natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose." 9 Ops. Attys.-Gen., 356, 357, Moore, Dig., III, 573. See also Mr. Seward, Secy. of State, to Mr. Marsh, Minister to Italy, July 15, 1868, MS. Inst. Italy, I, 269, Moore, Dig., III, 608.

[1] The naturalization laws of the United States make no reference to the matter.

[2] Opinion of Mr. Black, Atty.-Gen., 9 Ops. Attys.-Gen., 356, Moore, Dig., III, 573; Mr. Cass, Secy. of State, to Mr. Wright, Minister to Prussia, May 12, 1859, MS. Inst. Prussia, XIV, 274, Moore, Dig., III, 572; Mr. Seward, Secy. of State, to Mr. Johnson, Minister to Great Britain, July 20, 1868, Dip. Cor. 1868, I, 328, 329, Moore, Dig., III, 581.

[3] After declaring in Art. II that the recognized citizen of the one party on returning to the territory of the country of origin shall not be punishable for the act of emigration itself, it is provided that "the infraction of the legal provisions which in the country of origin regulate emigration shall not be held, for the purposes of this Article, as pertaining to the emigration itself and, therefore, the transgressors of those provisions who return to the country of their origin are there liable to trial on account of any and whatever responsibility they may have incurred through such infraction." Malloy's Treaties, II, 1468.

Declared Mr. Bayard, Secy. of State, in a communication to Mr. Lothrop, Minister to Russia, Feb. 18, 1887, "The Department is far from questioning the right of His Imperial Majesty to refuse to permit his subjects to emigrate. This is an incident of territorial sovereignty recognized by the law of nations, but can only be exercised within the territory of Russia. . . . His Imperial Majesty may 'prevent' Russians from coming to the United States, but when they have come, and have acquired American citizenship, they are entitled to the privileges conferred by the Article [10 of the treaty of commerce of Dec. 18, 1832]." For. Rel. 1887, 948, Moore, Dig., III, 633. The foregoing language was used in connection with the case of one Adolph Lipszyc, a naturalized American citizen of Russian origin, subjected to punishment upon his return to Russia. "His sole offense" was "his naturalization in the United States without the consent of Russia." Mr. Bayard contended that under

C

§ 378. Development of the Doctrine in the United States.

That the alien who came to the United States, and there made his abode, possessed the right by any process to dissolve the existing tie of allegiance binding him to the country of his origin was not the accepted view in the early days of the Republic. The common-law doctrine which denied the individual such a right found support in the views of publicists and judges.[1] Doubt was, moreover, expressed as to the effect of naturalization.

It was frequently suggested by the political department of the Government that the naturalized American citizen acquired a character not necessarily entitled to recognition by the country of origin, and which did not, upon his return to its domain, justify the United States in making the endeavor to protect him as its national.[2] The doctrine of dual allegiance thus became as readily applied to the adult naturalized American citizen as to a minor child born within the United States, but subjected by virtue of the *jus sanguinis* to duties of allegiance towards the State of the father's nationality in the territory of which the child happened to be; for the right to treat the adult as a national was regarded as dependent upon the power to exact allegiance from him, rather than upon a new political status conferred upon him by the State of adoption.

It was Mr. James Buchanan who, in 1845, was the first Secretary of State to announce the principle that naturalization put an end to any tie of former allegiance, and that the naturalized American

the treaty of commerce of 1832, American citizenship had been acquired with the assent of Russia, and that Lipszyc could "not be tried for an emigration which, when followed by naturalization in the United States, Russia herself recognizes as conferring citizenship of the United States." The withdrawal of the penal action "based exclusively on that emigration" was urgently sought. See, also, further concerning this case, For. Rel. 1887, 959–960, *id.*, 961, Moore, Dig., III, 637–643.

[1] J. B. Moore, Principles of American Diplomacy, 1918, Chap. VII; also documents cited in Moore, Dig., III, 552, among which are 2 Kent's Comm. 49; 3 Story's Constitution, 3, note 2; Inglis *v.* Trustees of Sailor's Snug Harbour, 3 Pet. 99; Shanks *v.* Dupont, 3 Pet. 242, 246; The Santissima Trinidad, 7 Wheat. 283; and *contra*, Alsberry *v.* Hawkins, 9 Dana (Ky.), 178. See, also, Moore, Dig., III, 554–562, and cases there cited and quoted.

With respect to the relation of Expatriation to the question of Impressment see Moore, Dig., III, 563, *citing* Am. State Pap., For. Rel., III, 630, Adams' Hist. of the United States, II, 332–339.

[2] Mr. Marshall, Secy. of State, to Mr. Humphreys, Sept. 23 1800, Moore, Arbitrations, II, 1001, Moore, Dig., III, 562; Mr. Webster, Secy. of State, to Mr. Bryan, March 21, 1843, 33 MS. Dom. Let. 117, Moore, Dig., III, 565; also Mr. Wheaton, Minister to Prussia, to Mr. Knoche, July 24, 1840, enclosed with Mr. Wheaton's No. 157, to Mr. Forsyth, Secy. of State, July 29, 1840, S. Ex. Doc. 38, 36 Cong., 1 Sess., 6, 7, Moore, Dig., III, 564.

citizen was, therefore, entitled to complete recognition as such by the country of his origin.[1] It was not, however, until after Mr. Buchanan became President that this view was the accepted position of the Department of State,[2] and not until 1868 that it was embodied in the statutory law of the United States.[3] That law did not define the right of expatriation. Its purpose was to make clear the doctrine, first, that the right of an alien to change his nationality was not dependent upon the consent of his sovereign beyond whose control he had placed himself; secondly,

[1] Communication to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330, Moore, Dig., III, 566; Mr. Buchanan, Secy. of State, to Mr. Bancroft, Minister to Great Britain, Oct. 28, 1848, Brit. and For. State Pap., XLVII, 1236, 1237, Moore, Dig., III, 566; Same to Same, Dec. 18, 1848, Brit. and For. State Pap., XLVII, 1241, Moore, Dig., III, 566.

"A comprehensive examination of our unpublished diplomatic records enables me to say that the First Secretary of State to announce the doctrine of expatriation in its fullest extent — the doctrine that naturalization in the United States not only clothes the individual with new allegiance but also absolves him from the obligations of the old — was James Buchanan." J. B. Moore, Principles of American Diplomacy, 1918, 276.

[2] Thus, for example, Mr. Everett, Secy. of State, to Mr. Barnard, Minister to Prussia, Jan. 14, 1853, S. Ex. Doc. 38, 36 Cong., 1 Sess., 53–54, Moore, Dig., III, 567; Mr. Marcy, Secy. of State, to Mr. Daniel, Minister to Sardinia, Nov. 10, 1855, MS. Inst. Italy, I, 88, Moore, Dig., III, 569; Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 139, Moore, Dig., III, 570. President Buchanan's views found expression in the Case of Christian Ernst, and were communicated by Mr. Cass, Secy. of State, to Mr. Wright, Minister to Prussia, July 8, 1859, S. Ex. Doc. 38, 36 Cong., 1 Sess., 132, Moore, Dig., III, 574.

Concerning the course of the United States during the Civil War, see documents in Moore, Dig., III, 577–579.

[3] The Act of July 27, 1868, 15 Stat. 223, as embodied in Rev. Stats. §§ 1999, 2000, 2001, is as follows: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

"Any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of the Republic.

"All naturalized citizens of the United States, while in foreign countries, are entitled to, and shall receive from this Government, the same protection of persons and property which is accorded to native-born citizens.

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release; and all the facts and proceedings relative thereto shall as soon as practical be communicated by the President to Congress."

that naturalization within the United States served to dissolve the tie of allegiance with respect to that sovereign; and thirdly, that by such process the individual acquired a new national character entitled to recognition upon his return to the country of origin.[1]

d

§ 379. Significance of the Existing Law.

It is not believed to be inconsistent with this doctrine for the State of origin to punish the naturalized American citizen, upon his return to its territory, for emigrating in disobedience to its command and contrary to its laws; for in so doing that State does not necessarily deny the validity of naturalization, but merely inflicts a penalty upon one who transgressed the local law when within its territory and while also a national.[2]

In calling upon the State of origin, in spite of its domestic laws forbidding renunciation of allegiance without governmental consent, to accord complete recognition to the American naturalization of a former national who has disobeyed its commands, the United States is not believed to take an unreasonable position. Such an individual has voluntarily and unequivocally renounced allegiance to his former sovereign, he has made his residence for a period of years on American soil, and he has sworn allegiance to the State of his adoption. The United States has clothed him, therefore, with its nationality under circumstances when it has become reasonable for it as a sovereign to establish a bond between itself and the individual, not only more intimate than can exist

[1] Respecting the circumstances leading to the enactment of the Act of July 27, 1868, see Moore, Dig., III, 579–581, and documents there cited. Respecting the cases of Warren and Costello, naturalized American citizens of British origin, arrested in Dublin in 1867, see Dip. Cor. 1866, I.

[2] The United States deplores with reason the policy of foreign States whose statutory laws render emigration without governmental consent illegal and provide penalties for the violation thereof; and it wisely endeavors to incorporate in naturalization conventions of the present day a provision that the naturalized citizen shall not, upon returning to the State of origin, be punished for the act of emigration. See, for example, Art. IV Convention with Brazil, April 27, 1908, Charles' Treaties, 20. It may be doubted, however, whether in dealing with States steadfastly opposed to relaxing control of emigration, objection by the United States to the punishment of the naturalized American citizen for the act of illegal emigration serves to encourage recognition of the new national character which such an individual may be justly deemed to possess. It is believed that the readiness of certain European States to attach to American naturalization the consequences which the United States claims for it, may prove to be proportional to the disposition on its part to confine the issue to one respecting solely the right of the State of adoption to impress a new political status upon him who has come within its territory and there made his home.

between himself and any other, but also one which is inconsistent with the continuance of a similar relationship between himself and any other. Through the process of naturalization the United States, therefore, justly asserts that it both dissolves the political relation of the individual to his former sovereign, and simultaneously impresses upon him a new national character entitled to general recognition.[1] This principle is necessarily at variance with the theory of dual allegiance; for it cannot be admitted that the political status conferred by naturalization is consistent with the existence of any other, or that until it is dissolved by some reasonable process it may be disregarded at will by the State of origin.[2]

Although the United States may find itself unable to prevent a foreign State from withholding recognition of American naturalization when obtained in defiance of its laws forbidding the attempt

[1] From the principles of Conflict of Laws as applied in the United States and England an analogy suggests itself. The civil status or artificial condition attached to a man may be dissolved by a State other than that which conferred or imposed it. Thus if he be a slave, the State to which he removes and in which he makes a new legal home, may not only decline to recognize his status, but also proceed formally to destroy it. In a word, the State which becomes the new domicile habitually dissolves for cause the status previously attached to the individual by the law of his former home, and furnishes the proper law for him to invoke in order to accomplish such an end. The reasonableness of this assertion of sovereign power is, moreover, recognized, when the individual resumes his home in the State to which he formerly belonged. His former status is deemed to have been destroyed, and the imposition or conferring of a new and similar one is believed to require affirmative action.

[2] "The doctrine embodied in the Act of 1868 is that naturalization invests the individual with a new and single allegiance, and by consequence absolves him from the obligations of the old. The position of governments and of publicists who deny the American contention is that naturalization merely adds a new allegiance to the old, so that the individual becomes subject to a dual allegiance, and may be held to all the obligations of his original citizenship if he returns to his native country. The doctrine of dual allegiance is, in a word, the precise test, the acceptance of which distinguishes those who reject the doctrine of voluntary expatriation from those who support it." J. B. Moore, Principles of American Diplomacy, 1918, p. 294. In the light of this statement see President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxxi, Moore, Dig., III, 586; also Mr. Hay, Secy. of State, to Mr. Garabedyan, Feb. 19, 1900, For. Rel. 1900, 938, Moore, Dig., III. 689, same to Mr. Combs, Minister to Guatemala, No. 30, April 18, 1903, For. Rel. 1903, 584, Moore, Dig., III, 608.

"The cases of persons born in the United States of alien parents should not be confused with the cases of persons born abroad who have obtained naturalization as citizens of this country. In the former cases the Department recognizes now, as it always has heretofore, that the persons concerned are born with a dual nationality. In the latter cases the Department does not recognize the existence of dual nationality in view of the fact that persons who obtain naturalization as citizens of this country are required to renounce their original allegiance." Mr. Lansing, Secy. of State *ad interim*, to Senator H. C. Lodge, concerning the Case of Ugo Da Prato, June 9, 1915, American White Book, European War, II, 149, 151.

to transfer allegiance, it is always possible to emphasize the fact that the foreign law which embodies the command and penalizes disobedience is arbitrary, not only because it ignores the true significance of naturalization, but also on account of the paucity of enlightened States which at the present time pursue such a course.

e

Difficulties with Certain Foreign States

(1)

§ 380. Respecting Recognition of Naturalization.

The return of the naturalized American citizen to the territory of the State of his origin, itself not a party to a naturalization convention with the United States, has heretofore oftentimes given rise to controversy respecting either the recognition of his expatriation or the imposition upon him of burdens not necessarily inconsistent with the change of his national character.

The lack of the consent of the former sovereign has, in the case of a few States, served to bar recognition of American naturalization. Thus France has been unwilling to respect the change of allegiance of a French citizen until certain specified grades of military service were rendered, or until the individual reached an age after which such service was not required.[1] Russia, under the Romanoffs, asserted "the extreme right to punish a naturalized Russian on return to his native jurisdiction, not merely for unauthorized emigration, but also specifically for the unpermitted acquisition of a foreign citizenship."[2] Turkey also refused to recognize the new political status of a Turkish subject naturalized

[1] "By the terms of Article 17 of the Civil Code, if a Frenchman is still subject to the obligations of military service in the active army, naturalization abroad will not cause him to lose the quality of Frenchman unless it was authorized by the French government." Mr. Delcassé, Minister of Foreign Affairs, to Mr. Vignaud, American Chargé, Oct. 31, 1901, For. Rel. 1901, 157, Moore, Dig., III, 599. See, also, Mr. Vignaud, Chargé d'Affaires *ad interim*, to Mr. Sherman, Secy. of State, Aug. 2, 1897, For. Rel. 1897, 141, Moore, Dig., III, 599; Circular Notice, Dept. of State, Jan. 21, 1901, For. Rel. 1901, 153, Moore, Dig., III, 602; other documents cited *id.*, III, 588–603.

See, in this connection, Dept. of State, Circular of Aug. 2, 1915, Circulars Relating to Citizenship, 1916, p. 66.

Also position of Serbia indicated in Circular, Department of State, Aug. 2, 1915, *id.*, p. 73.

[2] Report of Mr. Olney, Secy. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxix, Moore, Dig., III, 652. Also Mr. Hay, Secy. of State, to Mr. Belmont, Jan. 25, 1900, 242 MS. Dom. Let. 391, Moore, Dig., III, 655; other documents, *id.*, III, 622–656; Dept. of State, Circular of Jan. 9, 1914, Circulars Relating to Citizenship, 1916, p. 72.

abroad without imperial consent.[1] While the Department of State has not questioned the right of Ottoman authorities to expel from Turkish soil naturalized American citizens of Turkish origin shown to have been concerned in movements against the Turkish Government, it has been declared that the United States cannot and will not acknowledge that such citizens may be fairly subjected to punishment when in Ottoman territory simply because they have become previously invested with American citizenship without Turkish consent.[2]

Switzerland, acting on the principle that every Swiss conserves his citizenship as long as he does not renounce it himself, and as long as he can prove his descent, has not regarded naturalization as necessarily producing a change of political status; and has made its recognition of the loss of Swiss nationality dependent upon a formal and express renunciation of allegiance in Switzerland and in the manner prescribed by its law.[3] Without compliance with these conditions Swiss nationality has been deemed

[1] Declared Mr. Hay, in a communication to Mr. Garabedyan, Feb. 19, 1900: "The United States controverts this position, but unavailingly." For. Rel. 1900, 938, Moore, Dig., III, 689. Also Mr. Bayard, Secy. of State, to Mr. Cox, Minister to Turkey, Nov. 28, 1885, For. Rel. 1885, 885, Moore, Dig., III, 682, also other documents, *id.*, III, 679–696; Department of State, Circular of Feb. 29, 1912, Circular Relating to Citizenship, 1916, 75.

[2] Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, No. 147, Jan. 14, 1891, MS. Inst. Turkey, V, 196, Moore, Dig., III, 696; President Cleveland, Annual Message, Dec. 3, 1894, For. Rel. 1894, xv, Moore, Dig., III, 701; Mr. Gresham, Secy. of State, to Mr. Terrell, Minister to Turkey, March 29, 1894, For. Rel. 1894, 754, 755–756, Moore, Dig., III, 701; other documents, *id.*, III, 696–707.

In a Circular of Feb. 29, 1912, it was announced that "The Department of State holds that a naturalized American citizen of Turkish origin who returns to his native country as an Ottoman subject, concealing the fact of his naturalization in order to evade the Ottoman law mentioned [forbidding the naturalization of Turkish subjects without the consent of the Turkish Government], thereby so far relinquishes the rights conferred upon him by his American naturalization as to absolve this Government from the obligation to protect him as a citizen while he remains in his native land." Circulars Relating to Citizenship, 1916, p. 75.

[3] Moore, Dig., III, 658–678, and documents there cited, especially Mr. Peak, Minister to Switzerland, to Mr. Olney, Secy. of State, Feb. 3, 1897, For. Rel. 1897, 557, inclosing translation of an extract from the *Handbuch des Schweizerischen-Bundesstaatrechts*, by Dr. J. J. Blumer, Vol. I, page 330; also Circular Notice, Department of State, Jan. 8, 1901, For. Rel. 1901, 499.

It is not understood that the purpose or operation of the law serves to prevent the renunciation of allegiance by the Swiss who complies with its provisions, or to make his right to expatriate himself dependent solely upon the consent of his commune. Such an individual is not forced to keep his Swiss citizenship against his will. See The Swiss Federal Council to Mr. Peak, American Minister, April 20, 1897, For. Rel. 1897, 564, Moore, Dig., III, 666; The President of the Swiss Confederation to Mr. Peak, American Minister, Jan. 22, 1897, For. Rel. 1897, 560, Moore, Dig., III, 673. *Compare* Report of Mr. Olney, Secy. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxviii, Moore, Dig., III, 672. See Dept. of State, Circular of Aug. 2, 1915, Circulars Relating to Citizenship, 1916, p. 74.

to descend from generation to generation, as in the case of a child born in the United States, whose father at the time of the birth of the child was a naturalized American citizen of Swiss origin.[1]

(2)

§ 381. Respecting Military Service.

Certain States, recognizing the change of nationality produced by naturalization, have sought to exact military service from former nationals, or have otherwise endeavored to inflict punishment upon them for previous evasion of such service.[2] The Italian Civil Code of 1866 announces that the loss of citizenship does not carry with it exemption from the obligation of military service.[3] For the infringement of a law prior to emigration manifest in the evasion of military service then due, the former sovereign has an undoubted right to impose a penalty. The United States does not appear to question the assertion of it with respect to naturalized American citizens returning to the State of origin.[4] For the failure to respond to a call to arms after emigration but prior to naturalization, the sovereign may, not unreasonably, penalize its disobedient non-resident national by depriving him, should its laws so provide, of civil or other rights,

[1] Case of F. A. Schneider, For. Rel. 1897, 562–569, Moore, Dig., III, 664–668.

Concerning the position of Greece, see documents in Moore, Dig., III, 604–607; also For. Rel. 1905, 510; *id.*, 1906, I, 812–813, containing opinion of Mr. A. Glarakis, Legal Adviser to the Ministry of War; Circular of Dept. of State, Aug. 2, 1915, Circulars Relating to Citizenship, 1916, p. 68.

Concerning the position of Persia, see Circular of Dept. of State, May 19, 1914, Circulars Relating to Citizenship, 1916, p. 71.

[2] See, in this regard, the law of Roumania, indicated in Circular Notice, Department of State, Feb. 20, 1901, For. Rel. 1901, 441, Moore, Dig., III, 621. It was here stated that "One who did not complete his military service in Roumania, and cannot prove that he performed military service in the United States, is subject to arrest, or fine, or both, for evasion of military duty." This language was omitted from the Circular of Dec. 18, 1913. See Dept. of State, Circulars Relating to Citizenship, 1916, p. 72.

[3] For. Rel. 1878, 458, *id.*, 1879, 600, Moore, Dig., III, 610.

In Art. 12 of that Code it is declared that "Loss of citizenship in the cases stated in the preceding Article does not exempt from the obligations of military service, nor from penalty inflicted on any one who bears arms against his native country." Moore, Dig., III, 610.

Circular of Aug. 2, 1915, Dept. of State, Circulars Relating to Citizenship, 1916, p. 69; also note of Mr. Lansing, Secy. of State, to Senator Lodge, June 9, 1915, *id.*, p. 75.

For earlier cases in relation to Italy, see documents in Moore, Dig., III, 608–616, especially notice to citizens formerly subjects of Italy who contemplate returning to that country, March 18, 1901, For. Rel. 1901, 282.

[4] Mr. Frelinghuysen, Secy. of State, to Mr. Hunt, Minister to Russia, Dec. 22, 1883, H. Ex. Doc. 88, 48 Cong., 1 Sess., 7–8, Moore, Dig., III, 627.

or of property within its control.[1] Should he after American naturalization return to the State of his origin, the United States would have difficulty in maintaining that the former sovereign lacked the right to punish him for his act of disobedience committed abroad, unless prepared to assert that the fact of naturalization served not only to dissolve allegiance but also to cancel every unfulfilled obligation incidental to it.[2] The United States is, however, believed to be justified in protesting against the punishment of a naturalized American citizen for alleged evasion of military service, in case he emigrated from the State of origin when a child of tender years and obviously long before such service was due.[3] With equal reason it may protest against the treatment as an offender of one who failed to perform military service accruing after his naturalization was effected.[4]

It is believed to be important as a means of obtaining wider recognition abroad of the reasonableness of the American claim as to the general effect of naturalization, that, in the United States and elsewhere, fresh consideration be given the nature and source

[1] See, for example, Art. 326 of the Russian Criminal Code, For. Rel. 1897, 439, 440, Moore, Dig., III, 654; also Mr. Bayard, Secy. of State, to Mr Authes, Aug. 7, 1885 (a German Case), 156 MS. Dom. Let. 482, Moore, Dig., III, 432.

[2] See the situation in the Case of Henry Mumbour, arising under the naturalization convention with the North German Union of Feb. 22, 1868, and referred to by Mr. Fish, Secy. of State, in a communication to Mr. Davis, Minister to Germany, No. 111, July 21, 1875, MS. Inst. Germany, XVI, 76, Moore, Dig., III, 430–431; also documents, *id.*, III, 427–437, respecting German military cases.

In a circular notice respecting "Liability for Military Service in Foreign Countries of Persons Residing in the United States", Aug. 14, 1914, it was declared that: "The United States holds that no naturalized citizen of this country can rightfully be held to account for military liability to his native land accruing subsequent to emigration therefrom, but this principle may be contested by countries with which the United States has not entered into treaties of naturalization. The latter countries may hold that naturalization of their citizens or subjects as citizens of other countries has no effect upon their original military obligation, or may deny the right of their citizens or subjects to become naturalized as citizens of other countries, in the absence of express consent or without the fulfillment of military obligations." Dept. of State, Circulars Relating to Citizenship, 1916, p. 62. It is believed that the claim here announced in behalf of the United States is too broad in its scope if it is designed to be applicable to all cases where the demand for military service has accrued subsequent to emigration.

[3] Case of Vittorio Gardella, For. Rel. 1896, 423–426, Moore, Dig., III, 614–615; also Mr. Frelinghuysen, Secy. of State, to Mr. Hunt, Minister to Russia, Dec. 22, 1883, H. Ex. Doc. 88, 48 Cong., 1 Sess., 7–8, Moore, Dig., III, 627.

[4] Possibly an exception to the statement in the text may be urged in the case of the naturalized citizen who returns and becomes domiciled in the territory of the State of his origin. In such case, however, the fact of domicile would serve to deprive the individual either of the right of protection or of the nationality (through expatriation) of the United States.

See Neutral Persons within Belligerent Territory, Exaction of Military Service, *infra*, §§ 625–627.

of the right of a sovereign to punish an individual because of his disobedience to its commands while he was a national. Moreover, there needs to be swept aside the confusion of thought that has rendered obscure the solid distinction between the direct legal effect of naturalization upon the right of a sovereign to exact duties of allegiance from its former national, and the effect of it upon any acts committed by a national which were not productive of or were unrelated to his naturalization.

f

Modes of Expatriation

(1)

§ 382. Naturalization in a Foreign State.

According to the Act of March 2, 1907, "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws." [1] This provision contains no restriction with respect to residence or domicile within the State of adoption. No mention is made of the voluntary aspect of the change of allegiance, nor is any limitation expressed as to the procedure or the processes whereby a foreign State may endeavor to impress its national character upon an American citizen.

It is obviously unnecessary for the Department of State to issue a certificate renouncing any claim of allegiance in behalf of the United States with respect to an American citizen who seeks to expatriate himself.[2]

[1] § 2, 34 Stat. 1228.

"Whenever it comes to the knowledge of a diplomatic or consular officer that an American citizen has secured naturalization in a foreign State in conformity with its laws, or has taken an oath of allegiance to a foreign State, such diplomatic or consular officer should certify to the facts under his seal and should transmit the certification to this department. If the citizen who has thus acquired foreign naturalization was a naturalized citizen of the United States, the fact should be stated in the certification and the certificate of American naturalization should, if possible, be taken up and forwarded to the department with the certification." Circular Instruction of Mr. Root, Secy. of State, to American Diplomatic and Consular Officers, April 19, 1907, For. Rel. 1907, I, 3. See, also, par. 2, § 15, Act of June 29, 1906, 34 Stat. 601; Newcomb *v.* Newcomb, 57 S. W. 2 (Ky.), cited in Moore, Dig., III, 711.

[2] Ex parte Griffin, 237 Fed. 445. Even before the enactment of the present law it was not the custom of the Department to issue such certificates. Mr. Blaine, Secy. of State, to Count Sponneck, June 5, 1890, MS. Notes to Denmark, VII, 219, Moore, Dig., III, 714; Mr. Gresham, Secy. of State, to Mr. White, Minister to Russia, Oct. 2, 1894, For. Rel. 1894, 557, Moore, Dig., III, 714; Mr. Loomis, Acting Secy. of State, to Mr. Hengelmüller, Austro-Hungarian Ambassador, No. 49, Dec. 23, 1903, For. Rel. 1903, 20, Moore, Dig., III, 586.

(2)

§ 383. Oath of Allegiance to a Foreign State.

In the same section of the Act of March 2, 1907, it is declared that an American citizen shall be deemed to have expatriated himself "when he has taken an oath of allegiance to any foreign State." [1]

The statute is silent as to the place where the oath need be taken in order to produce such an effect. Doubtless, however, the efficacy of such an act for purposes of expatriation is not dependent upon its being the means of effecting naturalization.[2]

(3)

§ 384. Residence of a Naturalized Citizen in a Foreign Country. Renunciation of Naturalization.

Section 2 of the Act of March 2, 1907, also declares that

> When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe;

[1] § 2, 34 Stat. 1228. See, in this connection, In re Wildberger, 214 Fed. 508.

[2] Ex parte Griffin, 237 Fed. 445. For discussions, prior to the enactment of the law, respecting the significance of taking an oath of allegiance to a foreign power, see Moore, Dig., III, 718–730; especially, Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, April 5, 1895, For. Rel. 1895, II, 853; Mr. Olney, Secy. of State, to Same, Nov. 13, 1895, *id.*, II, 867; Mr. Hay, Secy. of State, to Mr. Smith, Minister to Liberia, No. 20, Nov. 6, 1898, MS. Inst. Liberia, II, 346.

In discussions respecting the Bancroft Treaties the Department of State held that renunciation of American naturalization was not dependent upon the resumption of the nationality of origin. Mr. Olney, Secy. of State, to Mr. Uhl, Ambassador to Germany, Dec. 21, 1896, For. Rel. 1896, 221, Moore, Dig., III, 754. *Compare* Mr. Hay, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 912, July 25, 1899, MS. Inst. Germany, XXI, 64, Moore, Dig., III, 754.

In relation to the Case of Antonio S. Nunes, Mr. Knox, Secy. of State, declared Jan. 12, 1910, in a telegram to Mr. Bryan, Minister to Portugal: "If he was forced by officials in Azores to swear allegiance to Portugal it cannot be considered that he has expatriated himself under the provisions of the first paragraph of Section 2 of the expatriation act of March 2, 1907." For. Rel. 1910, 832.

> And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.[1]

According to the Act of June 29, 1906, the acquisition of American citizenship by the alien applicant is conditioned upon his making oath in his petition that "it is his intention to reside permanently within the United States." [2] So great stress is laid on his good faith in meeting this requirement, that his return to the country of his nativity, or his going to any other foreign country and making permanent residence therein within five years after the issuance of a certificate of naturalization, is declared to be *prima facie* evidence of a lack of the requisite intention at the time of filing his application for citizenship, and is made sufficient, in the absence of countervailing evidence, to authorize, in appropriate proceedings, the cancellation of his certificate of citizenship as fraudulent.[3] Herein is recorded clear expression of a national policy to withhold naturalization from him who intends to reside permanently abroad.

The United States is consistent, therefore, in regarding the residence of a naturalized citizen in a foreign State for a substantial period of time as the foundation of a presumption of expatriation.[4] By so doing it conforms, moreover, to the spirit of its naturalization conventions, the more recent of which commonly provide expressly that residence in the State of origin for two years shall raise a presumption of an intent not to return to the State of adoption, indicating thereby a renunciation of naturalization — a presumption which is made capable of rebuttal by evidence to the contrary.[5]

[1] 34 Stat. 1228. See, in this connection, United States *v.* Howe, 231 Fed. 546, where there appeared to be no evidence to rebut the presumption of expatriation. *Compare* situation in Case of Banning *v.* Penrose, 255 Fed. 159, 161.

[2] Paragraph 2, § 4, 34 Stat. 596.

[3] *Id.*, § 15; Luria *v.* United States, 231 U. S. 9, 22–24. See, also, In re Naturalization of Aliens in Service of Army or Navy of United States, 250 Fed. 316.

[4] It is not unreasonable that the inference derived from residence abroad should be confined to cases of naturalized citizens. They acquire American nationality on condition that they solemnly declare an intention to reside permanently in the United States. Moreover, their residence abroad, especially in the country of origin, has been shown to be in fact productive of international controversy and of embarrassment to the United States. Van Dyne, Naturalization, 347–348; also R. W. Flournoy, Jr., in *Am. J.*, VIII, 483.

[5] See, for example, Art. II Convention with Costa Rica, June 10, 1911, Charles' Treaties, 23. Concerning the interpretation placed by the Department of State upon the Bancroft Treaties with the German States, see documents in Moore, Dig., III, 744–754.

Pursuant to the requirements of the Statute, the Department of State has announced that the presumption of expatriation may be overcome if the naturalized citizen presents to an American diplomatic or consular officer proof establishing the following facts:

(*a*) That his residence abroad is solely or principally as a representative of American trade and commerce and that he intends eventually to return to the United States to reside;[1] or,

(*b*) That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or

(*c*) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a *bona fide* intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.[2]

[1] Instructions of Mr. Root, Secy. of State, to American Diplomatic and Consular Officers, May 14, 1908, amending circular instruction of April 19, 1907, For. Rel. 1908, 2.

According to circular instructions to American Diplomatic and Consular Officers issued during the course of The World War, on Dec. 21, 1914, it was declared: "Conditions precedent to the granting of a passport are, under the law and rules prescribed by authority of the law, that the citizenship of the applicant, his identity, and, as a rule, his permanent residence in the United States and definite intention to return to it, with the purpose of performing the duties of citizenship, shall satisfactorily be established. Circular instruction of July 26, 1910, entitled, 'Protection of Native Americans Residing Abroad', and circular instruction of April 19, 1907, entitled 'Expatriation', as amended by Circular Instruction of May 14, 1908. Exceptions to the latter condition may be made in some cases by special direction of the Department, particularly in cases of persons residing abroad as representatives of American trade and commerce and as missionaries of American church organizations." American White Book, European War, II, 156.

[2] Circular Instructions of Mr. Root, Secy. of State, to American Diplomatic and Consular Officers, regarding Expatriation, April 19, 1907, For. Rel. 1907, I, 3, 4. It is also declared that "The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient." According to Circular Instructions to American Consular Officers, Nov. 30, 1907, the Department of State declared that no naturalized citizen should be registered if he had resided for two years in the country of his origin or for five years in some other foreign country, unless he produced satisfactory evidence to overcome the presumption that he had ceased to be an American citizen. Such evidence was to be directed to the points indicated as (*a*), (*b*) and (*c*) in the expatriation circular of April 19, 1907. It was also declared that no one should be refused registration until he had been afforded full opportunity to submit evidence to overcome the presumption of expatriation.

According to the opinion of the Attorney-General, Mr. Wickersham, in the Case of Nazara Gossin, the presumption of expatriation is overcome when the

In 1911 the Department of State announced as a further "Rule (*d*)", that the statutory presumption might be overcome by the presentation by the naturalized citizen to a diplomatic or consular officer of proof establishing that he had made definite arrangements to return immediately to the United States.[1] This rule has, however, been abrogated.[2]

naturalized citizen returns to reside permanently in the United States, 28 Ops. Attys.-Gen., 504, For. Rel. 1910, 421–422.

For cases arising prior to the Act of 1907, see documents in Moore, Dig., III, 735–744.

[1] Circular Instruction of Mr. Knox, Secy. of State, Nov. 11, 1911, For. Rel. 1911, I.

In an instruction to American Diplomatic and Consular Officers in China, May 13, 1908, Mr. Root, Secy. of State, announced that § 2 of the Act of March 2, 1907, and the instructions concerning it were applicable to naturalized American citizens residing in China. For. Rel. 1908, 1. In an instruction to similar officers in Turkish dominions, Dec. 11, 1907, Mr. Root made a like announcement with respect to such persons residing in Turkish dominions. *Id.*, 745. It was stated in both instructions that the presumption of expatriation derived from residence might be overcome by proof of residence as the "regularly appointed missionary of a recognized American church organization." In the case of China it was declared also that the presumption might be overcome by proof that the naturalized citizen was regularly employed in an enterprise having for its object the development or advancement of the people and in no wise inconsistent with American interests, and that he intended eventually to return to the United States to reside; or that he resided in China in the employ of the Chinese Government in a capacity not inconsistent with his American citizenship, and calculated to advance legitimate American interests, commercial or otherwise, and that he intended eventually to return to the United States to reside. In the case of Turkey, it was declared that the presumption might be overcome by proof that the naturalized citizen resided in a "distinctively American community recognized as such by the Turkish Government." In the case of both countries the presumption of expatriation was declared to be capable of rebuttal by proof that the citizen resided solely ("or principally", in the case of China) as a representative of American trade and commerce, and intended eventually to return to the United States to reside; or that some unforeseen and controlling exigency beyond his power to foresee had prevented his carrying out a *bona fide* intention of returning to the United States within the time limited by law and that it was his intention to return to reside permanently in the United States immediately upon the removal of the preventing cause.

In a circular of Dec. 16, 1912, it was announced that the Department of State prescribed the following rule whereunder the presumption of expatriation might be overcome in the case of Americans in Turkish dominions:

"(*e*) The presumption of expatriation may also be overcome, in the case of a person who was not formerly a Turkish subject, by showing that on March 2, 1907, he had already established his residence in an American community in Turkey, whether or not it has been formally recognized as such by the Ottoman Government, and that he is still residing therein, and that it has been and still is impracticable for him to return to this country to reside." There was added the following explanation: "It is important to observe that this rule has no application to persons who were formerly Turkish subjects, or to those who settled in Turkey subsequent to the passage of the law in question and must therefore be presumed to have had knowledge of its provision, or to those who obtained naturalization unlawfully. Furthermore this rule is not to be construed as applicable to persons who were born in Turkey of American parents. Their cases must be decided according to their peculiar merits." Dept. of State, Circulars Relating to Citizenship, 1916, p. 40.

[2] This action is understood to have been due to the decision of Hough, J.,

By a special rule of the Department, of February 28, 1913, it was declared that in the case of a naturalized American citizen residing in Canada, Mexico, the West Indies, Central America or Panama, the presumption of expatriation might be overcome upon his presenting to a diplomatic or consular officer satisfactory evidence that he was employed by a legitimate corporation or company, or principally engaged in any legitimate concern which was effectively owned and controlled by a citizen or citizens of the United States and materially promoted its interests, and that he intended to return to the United States to reside.[1]

The Act of 1907 does not provide for the situation where the naturalized citizen shortly after his removal to the State of his origin makes "a definitive abandonment of residence and domiciliary or representative business interest in the United States." Nevertheless, it is believed that under such circumstances, as was said by the Department of State in 1895, "the effective renewal of the original status may take place immediately upon the return to that country."[2] This principle has been applied both in the drafting and interpretation of the naturalization conventions.[3]

(4)

§ 385. Marriage of an American Woman to a Foreigner.

As has been observed, the Act of March 2, 1907, declares that

in United States *v.* Howe, 231 Fed. 546, to the effect that the bare returning to reside in the United States does not itself suffice to rebut the presumption of previous loss of citizenship under § 2 of the Act of March 2, 1907.

[1] Circular Instructions to American Diplomatic and Consular Officers, Feb. 28, 1913.

In discussions with the Governments of Haiti and Great Britain in 1912, the Department of State acknowledged that the American naturalization of persons of Syrian origin did not necessarily deprive the Government of Haiti of the right to exclude such individuals from its territory if they were "classed as undesirable by its local law upon avowed considerations of economic and political necessity." The statutory law of the United States prohibiting Chinese immigration was declared to be such as to render it hardly consistent to demand a suspension of the exercise of a similar right by Haiti, For. Rel. 1912, 529–530, 533–535. The operation, however, of the Haitian law with respect to persons of Syrian origin engaged in business in the territory of Haiti was deemed to be unjust and such as to justify vigorous protest. *Id.*, 536–541.

[2] Mr. Adee, Acting Secy. of State, to Mr. Little, Consul at Tegucigalpa, July 13, 1895, For. Rel. 1895, II, 936–937, Moore, Dig., III, 743. See, also, Van Dyne, Naturalization, 348. If the evidence sufficed the same principle might be applied in case of residence in a foreign State other than that of origin.

[3] Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, Nov. 1, 1876, MS. Inst. Germany, XVI, 249, Moore, Dig., III, 747; Mr. Kasson, Minister to Germany, to Mr. Frelinghuysen, Secy. of State, Feb. 14, 1885, For. Rel. 1885, 401, Moore, Dig., III, 751.

any American woman who marries a foreigner shall take the nationality of her husband.[1]

(5)

§ 386. Repatriation of Persons Who Lost American Citizenship in Connection with Services under Certain Foreign Belligerents during The World War.

According to the Act of May 9, 1918, any person who, while a citizen of the United States, and during the existing war in Europe, had entered the military or naval service of any country at war with a country with which the United States was then at war, who should be deemed to have lost his citizenship "by reason of any oath or obligation taken by him for the purpose of entering such service", was permitted to resume his citizenship by taking the oath of allegiance to the United States prescribed by its naturalization law and regulations.[2]

g

§ 387. Acts Held Not to Effect Expatriation. Military or Other Foreign Service.

The mere entering a foreign military service,[3] or the accepting of a foreign civil office,[4] does not necessarily serve to divest an American citizen of his nationality. Should, however, such service necessitate the taking of an oath of allegiance to a foreign State, or cause the naturalization, in conformity with its laws, of the American citizen within its territory, expatriation would result through the operation of the Act of March 2, 1907.[5] The same Act might render precarious the acceptance by a naturalized

[1] Marriage of American Women to Aliens, *supra*, § 365.

[2] Chap. 69, 40 Stat. 542, 545.

[3] Mr. Bayard, Secy. of State, to Mr. Whitehouse, Chargé at Mexico, No. 166, Nov. 14, 1888, MS. Inst. Mexico, XXII, 300, Moore, Dig., III, 733. See, also, other documents cited in Moore, Dig., III, 730–735; and in Van Dyne, Nationality, 358–360.

[4] Mr. Rives, Assist. Secy. of State, to Mr. Sewall, Consul-General at Apia, No. 28, Jan. 6, 1888, 123 MS. Inst. Consuls, 532, Moore, Dig., III, 718; Mr. Hill, Acting Secy. of State, to Mr. Lombard, May 12, 1900, 245 MS. Dom. Let. 189, Moore, Dig., III, 785; also Fish *v.* Stoughton, 2 Johns Cas. 407, cited in Van Dyne, Naturalization, 360. *Compare*, however, language of Mr. Wilson, Acting Secy. of State, in Instructions to American Diplomatic and Consular Officers, July 26, 1910, For. Rel. 1910, 1.

[5] Mr. Hay, Secy. of State, to Mr. Turley, in an analogous situation, April 6, 1899, 236 MS. Dom. Let. 186, Moore, Dig., III, 734. Ex parte Griffin, 237 Fed. 445. See, also, circular on Enlistment of Americans in Foreign Armies, Nov. 1, 1915, Dept. of State, Circulars Relating to Citizenship, 1916, p. 62.

American citizen of an office which necessitated or resulted in prolonged residence in a foreign country.[1] So long as the individual does not bring himself within the operation of the statute, various services may be rendered without necessarily endangering his American citizenship. Thus he may accept office as a foreign consul,[2] or become the adviser of a foreign government, or even act as its diplomatic representative.[3]

7

LOSS OF RIGHT TO NATIONAL PROTECTION

a

Foreign Domicile

(1)

§ 388. Native Citizens.

The Executive Department has long believed that, under certain circumstances, the American citizen who goes to a foreign State, and there makes his permanent home, ceases to possess the right to enjoy the protection of the United States. It had been intimated by Chief Justice Marshall in 1804, that until such an individual expatriated himself, he was entitled to the protection

[1] In such case it would be the indirect consequences of service, shown by the presumption derived from long residence in a foreign State, rather than the bare fact of service which would cause expatriation. See For. Rel. 1908, 1, with respect to public service in China.

[2] Mr. P. Smith, Solicitor, Dept. of State, to Mr. Boerlin, Oct. 12, 1869, 82 MS. Dom. Let. 186, Moore, Dig., III, 716. It may be observed that foreign States have frequently engaged American citizens to act as consular officers within the United States.

[3] In the Corvaia Case, Italian-Venezuelan Commission, 1903, it was held that where an original claimant, born a subject of the Two Sicilies, lost his citizenship, according to the code of that country, by accepting diplomatic service from Venezuela, and never regained it, the claim of his heirs preferred by Italy against Venezuela should be rejected. The learned Umpire (Mr. Ralston) said by way of *dictum:* "The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another nation is himself estopped from reverting to his prior condition to the prejudice of the country whose interests he has adopted." Ralston's Report, 782, 808.

See Mr. Knox, Secy. of State, to the American Minister at Teheran, Dec. 1, 1911, in relation to the protection of Mr. Shuster, an American citizen about to be recalled or dismissed as treasurer-general of Persia, For. Rel. 1911, 685; Mr. Bacon, Acting Secy. of State, to Mr. Bryan, American Minister to Portugal, May 16, 1907, For. Rel. 1907, II, 958, with respect to the effect of the acceptance of the title of baron by a native-born American citizen long residing in Lisbon, upon his American citizenship and upon his right to protection by the United States.

of his own country.[1] Possibly, therefore, in order to justify the withholding of protection, the Department of State in earlier days announced that the taking up of a permanent abode in a foreign land produced expatriation.[2] No act of Congress, however, proclaimed such a rule, and none ever has.

Gradually it came to be understood that a native American citizen might lose his right to claim the protection of the United States without losing also his national character,[3] and that so long as he did not formally renounce his allegiance or become naturalized abroad, it was both unwise and unnecessary to regard him as having forfeited his citizenship by reason of his protracted residence in the territory of a foreign State. Thus Secretary Hay, in circular instructions issued in 1899, declared that "even where expatriation may not be established, a person who is permanently resident and domiciled outside of the United States cannot receive a passport." [4]

According to the same instructions, following the view earlier expressed by Secretary Fish, a presumption of an intention to remain in the country where one had settled was derived from the mere fact of protracted residence therein, a conclusion which was interpreted to signify the acquisition of a foreign domicile. This presumption was, however, said to be capable of rebuttal by proof of a fixed and present intention to return to the United States within a given period.[5] By instructions issued in 1910,

[1] See his opinion in Murray *v.* Schooner Charming Betsy, 2 Cranch, 64, 120. Also Mr. Calhoun, Secy. of State, to Mr. Fairfield, U. S. S., Dec. 9, 1844, 35 MS. Dom. Let. 40, Moore, Dig., III, 758.

[2] Mr. Webster, Secy. of State, to Mr. Severance, July 14, 1851, H. Ex. Doc. 48, 53 Cong., 2 Sess., 342, 343, Moore, Dig., III, 758; Mr. Marcy, Secy. of State, to Mr. Kinney, Feb. 4, 1855, 43 MS. Dom. Let. 362, Moore, Dig., III, 759.

Compare Argument of Mr. Ashton, Agent and Counsel of the United States, in Case of De Leon, No. 593, before Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2696–2706; also decision of Commander Bertinatti, Umpire, in Fluvel Belcher Case, No. 23, American-Costa Rican Commission, Convention of July 2, 1860, *id.*, 2695.

[3] Mr. Buchanan, Secy. of State, to Mr. Campbell, Consul at Havana, July 26, 1848, 10 MS. Despatches to Consuls, 473, Moore, Dig., III, 719 (also comment by Prof. Moore thereon); Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, June 28, 1873, For. Rel. 1873, I, 256–259, Moore, Dig., III, 763; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to Great Britain, Feb. 27, 1884, For. Rel. 1884, 216, 218, Moore, Dig., III, 717.

[4] For. Rel. 1907, I, 5, where the same instructions appear as re-issued by Mr. Root, Secy. of State, under date of April 19, 1907.

[5] It was also declared that "The treatment of the individual cases as they arise must depend largely upon attendant circumstances. Where an applicant has completely severed his relations with the United States; has neither kindred nor property here; has married and established a home in a foreign land; has engaged in business or professional pursuits wholly in foreign countries; has so shaped his plans as to make it impossible or improbable that they

the Department of State somewhat modified its earlier position by reason of changed conditions. It was declared that an American citizen

> may now have a permanent foreign residence and yet contribute, indirectly if not directly, to the wealth and strength, the prestige and general welfare of his country, so that as long as he maintains a true allegiance to this Government and is ready, if need be, to come to its defense, he may be entitled to its protection.[1]

It was announced, therefore, that in each case of a native American permanently residing abroad, it would be necessary, before deciding as to his right to protection, to determine among other things whether he maintained his actual connection with the United States and his true allegiance thereto, or whether he had practically abandoned it and identified himself with the political community of the land of his residence. It was said that while with respect to questions arising in regard to registration and the issuance of passports a lack of intention to resume residence in the United States might, upon matters relating to protection as American citizens, still raise the presumption of expatriation, such a presumption should not be considered as conclusive, but the person concerned should be given an opportunity to show that he was "still a true citizen of the United States." [2]

will ever include a domicile in this country — these and similar circumstances should exercise an adverse influence in determining the question whether or not a passport should issue." For. Rel. 1907, I, 5.

[1] Instructions of Mr. Wilson, Acting Secy. of State, to American Diplomatic and Consular Officers, July 26, 1910, For. Rel. 1910, 1. Concerning these instructions see Richard W. Flournoy, Jr., in *Am. J.*, VIII, 482; also E. M. Borchard, Diplomatic Protection, § 328.

[2] In the same instructions it was also said: "In this connection are to be considered the cause of the foreign residence, participation in the politics of the country of residence, or abstention therefrom, ties of family, business, or property maintained with this country, and, in the case of a married man, the original nationality of the wife and the mode of raising the children, and, finally, the general conduct of the person in question. It is impossible to lay down a general rule which will be applicable to every case which arises, and each case must be decided upon its peculiar merits. You will, therefore, not finally refuse a passport or registration certificate to any person belonging to the class under consideration until you shall have been authorized to do so by the department after a full presentation of the pertinent facts."

According to Circular Instructions to American Diplomatic and Consular Officers issued during the course of The World War, on Dec. 21, 1914, it was declared: "Conditions precedent to the granting of a passport are, under the law and rules prescribed by authority of the law, that the citizenship of the applicant, his identity, and, as a rule, his permanent residence in the United States and definite intention to return to it, with the purpose of performing the duties of citizenship, shall satisfactorily be established. See circular instruction of July 26, 1910, entitled, 'Protection of Native Americans Re-

It should be observed that the Department of State has clearly announced that a presumption of foreign domicile producing a forfeiture of the right to claim the protection of the United States does not arise, when residence abroad is for the purpose of representing and extending legitimate American enterprises; or when reasons of health render travel and return impossible; or when pecuniary exigencies interfere with the desire to return; or even when family or property connections with the United States have been kept up.[1]

2)

§ 389. Naturalized Citizens.

The need of the application to naturalized American citizens of the rule that causes domicile abroad to result in loss of the right to national protection is chiefly removed by the Acts of Congress of June 29, 1906, and March 2, 1907, the earlier of which, as has been observed, renders the acquisition of a foreign domicile within a certain period after naturalization *prima facie* evidence of fraud in the acquisition of citizenship,[2] and the later of which serves to derive from a specified residence abroad a presumption of expatriation.[3] Thus, according to the existing law of the United States, conduct which serves, in the case of a native citizen to raise a presumption that he has forfeited his right to the protection of his country, may serve, in that of a naturalized citizen, to raise a presumption that he has forfeited his American nationality as well.[4]

(3)

§ 390. Residence in Oriental Countries.

The rule that the right to national protection may be lost as the result of permanent residence in a foreign country is not

siding Abroad', and circular instruction of April 19, 1907, entitled 'Expatriation', as amended by circular instruction of May 14, 1908. Exceptions to the latter condition may be made in some cases by special direction of the Department, particularly in cases of persons residing abroad as representatives of American trade and commerce and as missionaries of American church organizations." American White Book, European War, II, 156.

[1] Circular Instructions of Mr. Hay, Secy. of State, to American Diplomatic and Consular Officers, March 27, 1899, re-issued by Mr. Root, Secy. of State, April 19, 1907, For. Rel. 1907, I, 5. See, also, documents concerning the representation of American business interests abroad in Moore, Dig., III, 771–773; and concerning residence abroad for reasons of health, *id.*, III, 773–776.

[2] § 15, 34 Stat. 596, 601.

[3] § 2, 34 Stat. 1228.

[4] See, generally, Residence of a Naturalized Citizen in a Foreign Country, Renunciation of Naturalization, *supra*, § 384.

For cases arising prior to the enactment of the present laws, see documents in Moore, Dig., III, 766–771.

applied to American communities settled as such in Oriental lands and recognized in their distinctively national character by the system of government there prevailing.[1] Thus the Department of State has been disposed to afford the protection of a passport to citizens whose residence was prolonged indefinitely in the territory of a State in which the United States exercised extra-territorial jurisdiction, so long as their pursuits were legitimate and not prejudicial to the friendly relations of the United States with the government of the State of residence.[2]

On the other hand, the rule is applied to the naturalized American citizen who returns to the Oriental State of which he is a native;[3] and under the existing statutory laws of the United States, it is believed that the presumption of his fraudulent naturalization or of his expatriation would be as readily established if the country of residence were one of a different type.[4]

(4)

§ 391. Missionaries in Oriental and Other Countries.

The Department of State wisely permits the naturalized American citizen to rebut the presumption of expatriation derived from long residence in China or in the Turkish Empire, by establishing that he resides therein as the regularly appointed missionary of a recognized American church organization.[5] It is believed that the same rule might well be similarly applied in the case of naturalized American missionaries residing in other

[1] Mr. Bayard, Secy. of State, to Mr. Winchester, Minister to Switzerland, Oct. 12, 1887, For. Rel. 1887, 1073, 1074, Moore, Dig., III, 776.

[2] Circular Instructions of Mr. Hay, Secy. of State, to American Diplomatic and Consular Officers, March 27, 1899, For. Rel. 1902, 1, 3, Moore, Dig., III, 976. Also Passports, *infra*, § 400.

[3] Mr. Rockhill, Assist. Secy. of State, to Mr. Burke, No. 51, Dec. 29, 1896, 154 MS. Inst. Consuls, 682, Moore, Dig., III, 776. See, also, instances of Naturalized American Citizens of Turkish origin who have returned to the Ottoman Empire as Turkish subjects, mentioned in documents cited in Moore, Dig., III, 777–779.

[4] See, for example, circular instructions of Mr. Root, Secy. of State, respecting the Expatriation and Protection of Americans in China, May 13, 1908, For. Rel. 1908, 1, and of Americans in Turkey, Dec. 11, 1907, *id.*, 745.

See, also, especially instruction in behalf of Mr. Knox, Secy. of State (signed by Mr. Carr), to the American Consul-General at Beirut, Dec. 16, 1912, Dept. of State, Circulars Relating to Citizenship, 1916, p. 40.

It is believed that such a case as that of Hajie Seyyah, a native Persian, arising in 1893, For. Rel. 1893, 498–501, Moore, Dig., III, 779–781, would probably to-day be regarded as covered by the Act of Congress of March 2, 1907.

See, also, correspondence in 1911, concerning the naturalization of Chinese by other governments, For. Rel. 1911, 64–72.

[5] For. Rel. 1908, 1 and 745.

countries.[1] The United States has not been generally disposed to regard native or naturalized American citizens actively engaged in missionary enterprises in foreign States as having forfeited their nationality, or as having lost the right to national protection.[2]

b

Other Acts

(1)

§ 392. Participation in the Political Life of a Foreign State. Fugitives from Justice.

On grounds of public policy a State may deem the conduct of a national, apart from residence abroad, to be such as to warrant the withholding that full measure of protection which otherwise would be readily accorded. Thus, while an American citizen by taking office in a foreign State does not necessarily lose the right of national protection, his action may retard the readiness of the United States to espouse his cause, unless he becomes the victim of a denial of justice, to whom also no local remedy offers a means of redress.[3] Likewise, active participation in the political life of a foreign State may produce a similar result.[4] Any withholding of protection in such cases is due to domestic policy rather than to a requirement of international law. It

[1] While American missionary enterprises have attained largest development in Oriental States, they are also established in numerous countries of the Occident. It is believed that no distinction should be drawn in the matter of the expatriation and protection of American missionaries residing in States of the latter kind.

[2] Documents in Moore, Dig., III, 971–974, especially Mr. Adee, Acting Secy. of State, to Mr. Denby, Minister to China, No. 1470, July 20, 1897, MS. Inst. China, V. 460; and Mr. Hay, Secy. of State, to Mr. Conger, Minister to China, Jan. 18, 1900, For. Rel. 1900, 393.

[3] Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Minister to Great Britain, April 25, 1882, For. Rel. 1882, 230, 231, Moore, Dig., III, 782; Mr. Uhl, Acting Secy. of State, to Mr. Weil, Oct. 4, 1894, 199 MS. Dom. Let. 60, Moore, Dig., III, 783; Mr. Rockhill, Acting Secy. of State, to Messrs. Phillips & McKenney, Sept. 1, 1896, 212 MS. Dom. Let. 300, Moore, Dig., III, 784.

Concerning the attitude of the Department of State respecting the Case of W. Morgan Shuster, an American citizen, who became Treasurer-General of Persia, see Contractual Claims, *supra*, § 304.

See, also, Section 7 of Claims Circular of Dept. of State of 1919, Revision of Jan. 30, 1920.

[4] Mr. Evarts, Secy. of State, to Mr. Logan, No. 28, Oct. 23, 1879, MS. Inst. Cent. Am., XVIII, 47, Moore, Dig., III, 785; also other documents, *id.*, III, 785–786.

See, also, in this connection, Instructions of Mr. Wilson, Acting Secy. of State, to American Diplomatic and Consular Officers, July 26, 1910, For. Rel. 1910, 1, 2.

is not believed that a State is deprived of the right to interpose in behalf of a national because of his taking part in the organization and administration of the foreign country in which he resides.[1]

A State such as the United States may reasonably decline to come to the assistance of its own citizens who as fugitives from its justice have sought refuge on foreign soil,[2] or whose conduct is for any other reason regarded by it as censurable.[3]

(2)

§ 393. Unneutral Conduct.

The American citizen who commits acts of hostility against a country with which the United States is at peace is deemed, as has been observed, to forfeit the right of national protection from the legitimate consequences of his conduct.[4] If he participates in a war with respect to which the United States is a neutral, he so identifies himself with the State whose cause he espouses as to render himself liable to treatment as a belligerent.[5] In such case, his own country cannot assure him protection without making itself a party to his unneutral acts.[6] If after having entered the service of one belligerent he becomes the victim of a denial of justice at the hands of another State, any claim for repara-

[1] Correspondence between Mr. Olney, Secy. of State, and Baron Fava, Italian Ambassador in 1896, relative to the lynching of three Italians at Hahnville, La., For. Rel. 1896, 407, 410–411, 412, 414–418, 421–422, Moore, Dig., III, 344–353.

It was declared in Circular Instructions to certain American Consular Officers, June 22, 1907, that no circumstance is more calculated to confirm a presumption of expatriation than the fact that a person does by voting participate in the political life of a foreign country, thus acquiring a "political domicile." Ingram's Dig., Consular Instructions, Jan. 1, 1897 to May 25, 1908, p. 138.

[2] Mr. Bayard, Secy. of State, to Mr. Hanna, Minister to the Argentine Republic, No. 22, June 25, 1886, MS. Inst. Argentine Republic, XVI, 385, Moore, Dig., III, 790.

[3] Claims, Obstacles to Presentation, *supra*, § 274.

[4] Claims, Obstacles to Presentation, *supra*, § 274. Also Dept. of State Claims Circular of 1919, Revision of Jan. 30, 1920, Section 7.

See, also, opinion of Mr. Bradford, Atty.-Gen., 1 Ops. Attys.-Gen., 57, Moore, Dig., III, 786; Mr. Webster, Secy. of State, to Mr. Peyton, Jan. 6, 1842, 32 MS. Dom. Let. 140, Moore, Dig., III, 787; proclamation of President Taylor, Aug. 11, 1849, Richardson's Messages, V, 7, Moore, Dig., III, 787; proclamation of President Taft, regarding disturbances in Mexico, March 2, 1912, *Am. J.*, VI, Supp., 146; neutrality proclamations of President Wilson of 1914 and 1915, American White Book, European War, II, 15, 17.

[5] George Grafton Wilson, *Proceedings*, Am. Pol. Sc. Ass., 1904, Moore, Dig., VII, 877–878.

[6] "The Department of State will not present to a foreign government a claim based on transactions involving a violation of the neutrality of the United States." Moore, Dig., VI, 623, based on statement of Mr. Bayard, Secy. of State, to Messrs. Morris and Fillette, July 28, 1888, 169, MS. Dom. Let. 263.

tion must be preferred solely by the country in whose service he was engaged when subjected to ill-treatment.[1]

8

§ 394. Seamen.

Seamen serving in the naval or mercantile marine under a flag not their own, are said to be entitled, for the duration of that service, to the protection of the flag under which they serve.[2]

The United States, as has been observed, under the existing statutory law, announces that every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel thereof, and that such seaman shall, "for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen." [3]

Pursuant to its statutory law, the United States, through its consular service, undertakes to extend relief to American seamen found destitute in foreign countries, regardless of the flag of the vessel on which they last served, and to all seamen of whatsoever

[1] Opinion of Hassaurek, Commissioner, for the Commission in Cases of the *Good Return* and the *Medea*, American-Ecuadorean Commission, Convention of Nov. 25, 1862, Moore, Arbitrations, III, 2731–2740; Opinion of Sir F. W. A. Bruce, in certain cases before American-Colombian Commission, Convention of Feb 10, 1864, *id.*, 2740–2743; Opinion of Findlay, Commissioner, for the Commission, in certain cases before American-Venezuelan Commission, Convention of Dec. 5, 1885, *id.*, 2743–2751. With reference to these cases see, also, Moore, Dig., III, 788. Also Mr. Fish, Secy. of State, to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453, Moore, Dig., VI, 623.

[2] The language of the text is that of Sir Edward Thornton, Umpire, in the Case of Francis McCready, Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, III, 2536, 2537, Moore, Dig., III, 795.

[3] Chap. 69, Act of May 9, 1918, 40 Stat. 544, U. S. Comp. Stat. 1918, § 4352 (8). It is expressly declared that nothing in the Act of 1918 is to be construed to repeal or modify any portion of the so-called Seamen's Act of March 4, 1915, 38 Stat. 1164, Chap. 153.

See Declaration of Intention, Does Not Confer Citizenship, *supra*, § 358.

See Consular Regulations of the United States, 1888, Art. 170, cited in Mr. Bayard, Secy. of State, to Mr. Hubbard, Minister to Japan, Nov. 10, 1888, For. Rel. 1888, II, 1079–1080, Moore, Dig., III, 799.

Cf. Cases of two British sailors of the American ship *Keweenaw* attacked at Valparaiso, Chile, in 1891, For. Rel. 1891, 217–345, *id.*, 1900, 66–71, Moore, Dig., III, 796. See, also, Mr. Uhl, Acting Secy. of State, to Messrs. Goodrich *et al.*, April 10, 1894, For. Rel. 1895, I, 229, 231, Moore, Dig., III, 798; also Dept. of State, Claims Circular of 1919, Revision of Jan. 30, 1920, Sections 5 and 6.

nationality, who are found destitute immediately after having served on an American ship.[1]

9

§ 395. Care of Indigent Nationals.

No rule of international law requires a State to provide relief for indigent nationals abroad, or for their return to its territory if for any reason they have become a public charge. The United States has not as yet seen fit to burden itself with such an undertaking by treaty or otherwise.[2] In announcing this fact the Department of State has declared that the patients in the almshouses and asylums throughout the United States comprise large numbers of aliens who are none the less cared for by the authorities of the locality where their illness happens to occur.[3]

On occasions of great emergency when large numbers of Americans have been unable to leave foreign territory where their continued presence involved personal danger or hardship, the Congress has furnished necessary relief by way of subsistence and transportation to the United States.

[1] The statement in the text is based upon the language of Mr. F. W. Seward, Acting Secy. of State, to Chev. Tavera, Austro-Hungarian Minister, Aug. 13, 1877, MS. Notes to Austria, VIII, 155, Moore, Dig., III, 796, *citing* to same effect, Mr. Hill, Acting Secy. of State, to Mr. Choate, Ambassador to Great Britain, No. 639, May 24, 1901, MS. Inst. Great Britain, XXXIII, 612.

Also Rev. Stat. §§ 4577, 4578, as amended June 26, 1884, and June 19, 1886, and § 4579. These sections are §§ 8368, 8369 and 8370, of U. S. Comp. Stat. 1918 ed.

[2] Instructions to Diplomatic Officers of the United States, 1897, § 175, p. 68, Moore, Dig., III, 804; Mr. Wharton, Acting Secy. of State, to Mr. Douglas, Nov. 28, 1891, 184 MS. Dom. Let. 247, Moore, Dig., III, 806.

In his annual message of Dec. 2, 1872, President Grant wisely urged that provision be made for the relief of distressed citizens, other than seamen, who might become destitute or sick abroad. Richardson's Messages, VII, 191, Moore, Dig., III, 804.

[3] Mr. Bayard, Secy. of State, to Count Lippe-Weissenfeld, Austrian Chargé, June 8, 1886, MS. Notes to Austria, VIII, 518, Moore, Dig., III, 806.

In exceptional cases the Department of State gives information through the diplomatic channel as to indigent aliens in the United States, that relatives abroad may have the opportunity to care for those individuals. Mr. Olney, Secy. of State, to Mr. Hengelmüller, Austro-Hungarian Minister, Jan. 13, For. Rel. 1897, 13–14, Moore, Dig., III, 807.

Mr. Bayard, Secy. of State, to Mr. Lowell, Minister to Great Britain, April 10, 1885, concerning the aid to be rendered an American citizen charged with crime and lacking, for any reason, all the means of defense which the law allowed. MS. Inst. Great Britain, XXVII, 446, Moore, Dig., III, 805.

[4] The most notable instance was the relief afforded American tourists in Europe at the outbreak of the War in August, 1914.

10

THE TEMPORARY PROTECTION OF DOMICILED ALIENS DECLARING AN INTENTION TO BECOME AMERICAN CITIZENS

a

§ 396. Thrasher's Case. Koszta's Case.

From the language of Mr. Webster, Secretary of State, in his report on Thrasher's Case, December 23, 1851,[1] and from that of Mr. Marcy, Secretary of State, in his note of September 26, 1853, to the Austrian Chargé d'Affaires, in the Martin Koszta Case,[2] there developed in the United States confusion of thought, manifest even in utterances emanating from the Department of State, as to the exact significance of domicile as the basis of the right of diplomatic protection.[3] Both of these Secretaries of State were supposed to have been committed to the doctrine that domicile afforded a criterion of national character; and to Mr. Marcy was imputed the intimation that a declaration of intention to become an American citizen afforded some basis for the according of protection.[4]

Professor Moore has removed cause for misapprehension concerning both cases. He has shown that with respect to Thrasher's Case, Mr. Webster "referred to something which, although it did not necessarily presuppose the existence of domicile, went in some respects beyond it";[5] and that subsequently, upon fuller information, in a paper touching the same case, he banished the

[1] Senate Ex. Doc. No. 5, 32 Cong., 1 Sess., Moore, Dig., III, 818.
[2] House Ex. Doc. 1, 33 Cong., 1 Sess., 30, Moore, Dig., III, 824.
[3] Statement in Moore, Dig., III, 817.
[4] Mr. Frelinghuysen, Secy. of State, to Mr. Wallace, Minister to Turkey, March 25, 1884, and April 8, 1884, For. Rel. 1884, 551, 560, Moore, Dig., III, 339.

Declared Mr. Bayard, Secy. of State, to Mr. Mackey, Aug. 5, 1885: "The criterion by which Koszta's and Burnato's cases are to be measured in examining questions arising with respect to aliens who have declared, but not lawfully perfected, their intention to become citizens of the United States, is very simple.

"When the party, after such declaration, evidences his intent to perfect the process of naturalization by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of *original allegiance* whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted." Wharton, Dig., II, 359–360, Moore, Dig., III, 847.

[5] Moore, Dig., III. 817, where the same writer adds: "The early published report in Thrasher's Case related to the question whether he was entitled to the intervention of the United States, in respect of his arrest, sentence, and imprisonment in Cuba on a charge of complicity in the Lopez expedition of

suggestion that the acquisition of a foreign domicile involved expatriation, or deprived the individual of the protection of his own government.[1] Respecting the position of Mr. Marcy in the Koszta Case, the same writer has declared:

> First of all, it is seen that the supposition that Mr. Marcy held that Koszta's declaration of intention gave him an American character and a claim to the protection of the United States is not only destitute of foundation, but is directly opposed to his repeatedly expressed opinion. He referred to the declaration of intention merely as an evidence of domicile. In the second place, there likewise disappears the supposition that he held that a domiciled alien, even where he had made a declaration of intention, was entitled to the same protection abroad as a citizen of the United States, or yet to protection against the claims of the country of his original allegiance lawfully asserted, either there or in a third country. In the third place, it appears by Mr. Marcy's instruction to Mr. Marsh, of Aug. 26, 1853, that the claim that Koszta had at the time of his seizure an American character was based, in the first instance, *exclusively* upon his having been duly admitted to American protection, according to the recognized usage in Turkey.[2]

1850 It appeared that he had taken out letters of domiciliation in Cuba, and there was reason to believe that he was also domiciled in the island. The process of obtaining such letters involved the taking of an oath of allegiance, which it was thought might have had the effect of making him a Spanish subject and dissolving his allegiance to the United States. But, even assuming that this was not the case, Mr. Webster argued that if he was domiciled in Cuba he was, as a permanent resident, peculiarly subject to the operation of the laws there, and could not ask the United States to intervene to prevent the imposition of any penalties which he might justly have incurred by the violation of those laws."

[1] Moore, Dig., III, 819, *citing* also Mr. Webster's instruction to Mr. Sharkey, of July 5, 1852, conveying his final opinion on the question of domiciliation, and contained in the summary of the argument on domicile by Mr. J. H. Ashton before the Mexican-American Commission, Convention of July 4, 1868, Moore, Arbitrations, 2701.

[2] Moore, Dig., III, 843–844. Concerning the Koszta case and interpretations thereof, see documents, *id.*, III, 820–854.

The facts in the Martin Koszta Case were the following: Koszta, a Hungarian Revolutionist in the movement of 1848–1849, fled from Austria and took refuge in Turkey, from which State his extradition was vainly sought. With other refugees he was, however, confined at Kutahia, but finally released, with the understanding of Austria that they should leave the country. This banishment Austria accepted as a substitute for extradition. By reason of his having left Austrian territory without the consent of the Government and with an intention never to return thereto, he came under the operation, according to Mr. Marcy, of the Austrian statute so as to be regarded as an unlawful emigrant subjected to loss of all civil and political rights. Koszta came to the United States, where on July 31, 1852, he declared his intention to become an American citizen. After a residence of one year and eleven months, he returned to Turkey on account of alleged private business of a temporary character, and thereupon sought to place himself under the temporary

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§ 397. The Act of March 2, 1907.

The Act of March 2, 1907, authorized the Secretary of State to issue, at his discretion, a passport to a person not a citizen of the United States who had made a declaration of intention to become such a citizen as provided by law, and had resided in the United States for three years, the document "entitling him to the protection of the Government in any foreign country", provided, that such passport should not be valid for more than six months and should not be renewed, and that it should not entitle the holder to the protection of the United States "in the country of which he was a citizen prior to making such declaration of intention." [1]

The law conferring this authority was, however, repealed by an Act of June 4, 1920.[2]

According to rules issued by the Department of State June 1, 1915, it was announced that passports could not be issued, under the Act of Congress, to declarants who intended to visit their native lands.[3] It was ordered that before a passport should be

protection of the American Consul at Smyrna Later the Consul and the American Chargé d'Affaires *ad interim* at Constantinople extended protection to Koszta, furnishing him with a so-called *tezkéréh* — a kind of passport or letter of safe-conduct. No objection was made by Austria to Koszta's return to Turkey. While at Smyrna, awaiting, as he alleged, an opportunity to return to the United States, he was seized by lawless men, thrown into the sea, and immediately thereafter taken up by a boat's crew, lying in wait for him, and belonging to the Austrian warship *Huszar*, forced on board that vessel, and there confined in irons. The diplomatic and consular representatives of the United States sought in vain from both Turkish and Austrian authorities the release of the prisoner. Thereupon the U. S. S. *St. Louis* arrived at Smyrna. The Commander, Captain Ingraham, after investigating the case and learning of a plan to take Koszta clandestinely to Austrian territory, demanded his release, and intimated that he should resort to force if the demand were not complied with by a certain hour. No force was used. By agreement the prisoner was delivered to the French Consul-General to be held by him until the United States and Austria should agree as to the disposition of the case. Koszta was ultimately released and returned to the United States.

[1] 34 Stat. 1228. See, in this connection, Report on Citizenship of the United States, Expatriation, and Protection Abroad, by J. B. Scott, David J. Hill, and Gaillard Hunt, House Doc. No. 326, 59 Cong., 2 Sess., 19–22.

[2] See Act making appropriation for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921, 66 Cong., 2 Sess., Chap. 223.

[3] The text of the Rules is contained in American White Book, European War, II, 164–165. These rules were somewhat more rigid than certain others announced by the Department of State, Nov. 14, 1913. Appended to the Rules of June 1, 1915, was the statement that "Passports are not issued to declarants who are natives of countries which are at war, nor to declarants who intend to visit belligerent countries."

Shortly after the outbreak of The World War, it was declared by the Department of State, in instructions to the Embassies and Legations in Europe, that "special consular registration certificates may be issued to wives of persons

issued the following facts should be established to the satisfaction of the Secretary of State: (*a*) that the applicant had resided in the United States for at least three years as provided by law; (*b*) that he was not then eligible under the law for final naturalization; (*c*) that at least six months had elapsed since the applicant's declaration of intention; (*d*) that the applicant had not previously applied for and obtained a similar passport from the Department; (*e*) that a special and imperative exigency existed requiring the absence of the applicant from the United States;[1] (*f*) that the applicant had not applied for and obtained a passport from any other government after he had declared his intention to become a citizen of the United States.

While the enactment of the statute indicated no disposition on the part of the United States to substitute domicile for allegiance as the test of national character for purposes of diplomatic protection in times of peace, save under the exceptional circumstances noted, it is believed that the repeal of the law was altogether desirable.

11

§ 398. Extraterritorial Factories of American Citizens.

The Department of State has been confronted with the problem of determining to what extent the aid of the United States should

in the United States who have resided here more than three years and have made declarations of their intention to become American citizens. Such certificates should not describe the holders as American citizens, but should set forth their exact status." Telegram of Mr. Lansing, Acting Secy. of State, Sept. 12, 1914, American White Book, European War, II, 155, 156.

[1] In this connection it was said that "The burden of proof will, in each case, be upon the applicant to show to the satisfaction of the Secretary of State that there is a necessity for his absence. The statement as to such necessity must be detailed and supported by satisfactory corroborative evidence. Under this rule passports will not be granted to persons who wish to go abroad as commercial travelers."

See, also, Mr. Lansing, Acting Secy. of State, to the American Embassies and Legations in Europe, Sept. 12, 1914, American White Book, European War, II, 155, 156.

In a communication of Feb. 20, 1914, to the American Consul-General at Shanghai, it was declared by Mr. Moore, for the Secretary of State, that the Department of State construed § 1 of the Act of March 1, 1907, as applicable only to cases of declarants who, because of some pressing necessity, were obliged to absent themselves from the United States for a brief period, and not to cases of persons who sought to establish themselves abroad with the intention of making a protracted stay. Mr. Moore had reference to the case of Leo Koeningsberger, a native of Germany, who, some three years after having declared his intention of becoming a citizen of the United States, went to China where he desired to remain for several years and complete his naturalization upon his return. Mr. Moore adverted to the fact also that residence in a foreign country where extraterritorial privileges were enjoyed could not be taken to satisfy the requirements of residence under the naturalization laws of the United States.

be accorded American citizens who have established manufacturing plants with American capital in foreign countries. It has been perceived that in certain instances the transfer to foreign territory of American enterprises with a view to securing benefits of certain preferential features of a foreign tariff law, has rendered such concerns direct competitors in certain markets of American firms in the United States. Thus, in 1910, the Department decided that firms which had removed "all or a part of their plants from the United States to Canada" were no longer entitled to the assistance of the Government so far as their foreign factories were concerned.[1] It was recognized, however, that circumstances might justify the extension of governmental assistance to an extraterritorial factory either established or projected by American citizens who made use of American capital. It was declared that where, for example, an established manufacturing enterprise in the United States, exporting its products to foreign countries, found it expedient to meet competitive conditions in a certain foreign market by establishing a branch therein for the purpose of preëmpting the field and stopping competition, and thus preserving and fostering the main export business for the benefit of which the branch had thus been established, there would seem to be reason for the extension of the good offices and assistance of the foreign service of the United States. It was said that such a case was to be clearly distinguished from one where a foreign branch was a serious undertaking maintained to build up a trade which would compete with the genuine American export trade, "and might even result in making the branch in the foreign country a base for distributing foreign-made goods to third countries in competition with American exports." [2]

The distinction thus laid down appears to be important. It reveals the fact that when American enterprise in foreign territory opposes the economic as well as political interests of the United States, the American nationality of the actors is a matter of subordinate consideration. The strength of the equity of those who invoke the extension of the good offices of the United

[1] Mr. Knox, Secy. of State, to American Diplomatic and Consular Officers, March 24, 1910, *quoting* Circular Instruction to Consular Officers, of April 30, 1906, Dept. of State, Circulars Relating to Citizenship, 1916, 30–32.

[2] *Id.* "In cases of this kind," it was said, "the department must regard the enterprise as essentially foreign from the point of view of international competition, and, therefore, the activities of the diplomatic and consular officers in behalf of the American citizens who are concerned in the establishment of such extraterritorial factories should be limited to matters of courtesy and the supplying of general information only."

States depends not only upon the allegiance in name and in law of the individuals concerned, but also upon their abstention from commercial activities deemed to be at variance with the general economic welfare of the State.[1]

[1] The rule of policy enunciated by the Department of State is in reality an application of the fundamental principle observed in the treatment of claims of nationals, and which is deemed to justify a withholding of interposition whenever the conduct of the claimant is inconsistent with his allegiance to the United States. Dept. of State, Claims Circular, 1919, Revision of Jan. 30, 1920, Section 7. The significant thing is that his conduct is deemed to possess such a character when it opposes the obvious economic interests of the United States. The reality of commercial disloyalty to the nation is perceived, and a penalty applied which is appropriate to the act.

TITLE E

AMERICAN PASSPORTS

1

§ 399. In General.

"A passport is the accepted international evidence of nationality; in its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go, as well as lawful aid and protection." [1] A passport is the only permissible certification of American nationality.[2] While the United States does not complain of the exaction by a foreign State of

[1] The language of the text is that in Moore, Dig., III, 856.

"Other documents, such as safe-conducts, letters of protection, and special passes for individuals, and even passes for vessels, are referred to as passports, and not altogether inaccurately, since their object is to secure for the particular person or property freedom of movement and lawful protection. But these documents are used chiefly in war, and are granted on the strength of the personality rather than of the nationality of the individual, being issued, according to the circumstances of the case, even to enemies." *Id.*

See, generally, Gaillard Hunt, The American Passport, Washington, 1898; Rules Governing the Granting and Issuing of Passports in the United States, issued by President Wilson Jan. 24, 1917; proclamation and executive order of President Wilson, Aug. 8, 1918; President Wilson, message to the Congress, Aug. 25, 1919, respecting the continuance of the passport-control system, Senate Doc. No. 79, 66 Cong., 1 Sess.

A passport, as defined by Mr. Gaillard Hunt, "is a document issued by the Secretary of State, or, under his authority, by a diplomatic or consular officer of the United States abroad, to a citizen of the United States, stating his citizenship, and requesting for him free passage and all lawful aid and protection during his travels or sojourn in foreign lands." American Passport, 4.

[2] Mr. Adee, Acting Secy. of State to Mr. Terres, No. 142, Sept. 26, 1893, For. Rel. 1894, 346. See, also, Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, July 2, 1885, For. Rel. 1885, 373, Moore, Dig., III, 857.

It may be observed that American consular officers have been authorized to issue to American citizens registered at consulates certificates of registration. Such documents do not certify that the registrants are citizens of the United States, but merely that they have registered as such. The same proofs of citizenship are, however, required in applications for registration as are demanded in applications for passports. Registration certificates are intended for use with local officials and not for purposes of travel. For this paragraph the author acknowledges his indebtedness to Mr. R. W. Flournoy, Jr. See Consuls, Miscellaneous Duties, *infra*, § 488.

such a certification of American citizens within its domain, objection is raised when the exaction constitutes a discrimination against such individuals.[1]

According to the existing law the right to issue passports in the United States is lodged solely in the Secretary of State, who is also empowered to permit the issuance and verification of passports in foreign countries by American diplomatic and consular officers, and by the chief or other executive officer in the insular possessions of the United States, and under such rules as the President may designate and prescribe.[2]

The Act of June 15, 1917, established as a condition precedent to the issuance of a passport to any person by or under the authority of the United States, the subscription to and submission by the applicant of a written application duly verified by his oath before a person authorized and empowered to administer oaths, and required that such application should contain a true recital of each and every matter of fact which might be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of a passport.[3]

Passports are not issued by American diplomatic and consular officers abroad, except in cases of emergency. A citizen who is abroad and desires to procure a passport must apply therefor through the nearest diplomatic or consular officer to the Secretary of State.[4] Where, however, inconvenience or hardship would result from failure of the applicant entitled to a passport to receive one at once, a diplomatic officer, or a consular officer duly authorized by the Secretary of State, may issue an emergency passport good for a period not to exceed six months, and to be used for a stated purpose. Such a passport may be issued only when it is clearly shown that the person applying therefor is

[1] Mr. Bayard, Secy. of State, to Mr. Muruaga, Spanish Minister, May 19, 1886, MS. Notes to Spain, X, 420, Moore, Dig., III, 859.

[2] Rev. Stat. § 4075, as amended by the Act of June 14, 1902, 32 Stat. 386, U. S. Comp. Stat. 1918, § 7623; also Rev. Stat. § 4078. See, also, Rules Governing the Granting and Issuing of Passports in the United States, Jan. 12, 1915, enclosed in circular to American Diplomatic and Consular Officers, Feb. 8, 1915, American White Book, European War, II, 158–161; Dept. of State, Circulars Relating to Citizenship, 1916, 52.

[3] Chap. 30, title IX, § 1, 40 Stat. 227, U. S. Comp. Stat. 1918, § 7628a.

According to the Act of June 4, 1920, the validity of a passport or of a *visa* is limited to two years, unless the Secretary of State limits the validity of either of such documents to a shorter period. 66 Cong., 2 Sess., Chap. 223.

[4] Rules Governing the Granting and Issuing of Passports in the United States, January 12, 1915, American White Book, European War, II, 160.

Concerning Applications for Passports, see, *id.*; also Rules Governing the Granting and Issuing of Passports to Those Who Have Declared Their Intention to Become Citizens of the United States, June 1, 1915, *id.*, II, 164.

about to proceed to a country to obtain admission into which a passport is obligatory.[1]

Upon the outbreak of The World War the Department of State authorized American embassies and legations in Europe "to issue emergency passports to American citizens who request them." [2] Such agencies were later instructed to exercise greatest caution in issuing such passports, and to require of each applicant "unquestionable evidence of his citizenship and identity." [3]

In accordance with an executive order of January 12, 1915, the Department of State duly announced that a passport expires six months from the date of its issuance, but that a new passport would be issued upon a new application, accompanied by the old passport. Passports, it was said, were not renewed by the Department, but might be renewed for a period of six months by presentation, when about to expire, to a diplomatic or principal consular officer of the United States, together with a sworn statement of the countries which the holder expected to visit and the objects of his visits thereto. No passport was to be renewed more than twice.[4]

[1] Circular Instructions to American Diplomatic and Consular Officers, April 19, 1907, pursuant to an executive order of April 6, 1907, For. Rel. 1907, I, 13–15.

The same instructions provide that emergency passports "may be issued for use with the local authorities only in case such authorities will not accept as evidence of a right to recognition as an American citizen the certificate of registration provided for in paragraph 172 of the Consular Regulations, as prescribed in the executive order of April 8, 1907." Concerning the Registration of American citizens, see Instructions to American Diplomatic and Consular Officers, April 19, 1907, For. Rel. 1907, I, 6.

See, also, concerning emergency passports, Mr. Bacon, Acting Secy. of State, to Mr. Egan, Minister to Denmark, July 8, 1908, For. Rel. 1908, 255.

It may be observed that § 4075, Rev. Stat. provides that "when a legation of the United States is established in any country, no person other than the diplomatic representative of the United States at such place shall be permitted to grant or issue any passport, except in the absence therefrom of such representative."

[2] Telegram of Mr. Bryan, Secy. of State, to the American Embassies and Legations in Europe, Aug. 1, 1914, American White Book, European War, II, 155.

Shortly after the outbreak of The World War in 1914, it was in many cases difficult for American citizens to go to embassies or legations in order to obtain emergency passports. For that reason consular officers were given authority to issue them. That authority was subsequently withdrawn. Consuls, Miscellaneous Duties, *infra*, § 488.

[3] Circular Instructions to American Diplomatic and Consular Officers, Dec. 21, 1914, American White Book, European War, II, 156; also telegram of Mr. Lansing, Acting Secy. of State, to the American Embassies and Legations in Europe, Sept. 12, 1914, *id.*, II, 155.

[4] Circular Instructions to American Diplomatic and Consular Officers, Feb. 8, 1915, American White Book, European War, II, 158.

"When a holder of a passport finds it necessary, after leaving the United States, to visit a country or countries not named in the passport, he may have it amended by a diplomatic or consular officer of the United States." Notice

2

§ 400. To Whom Issued.

Passports are furnished for the use of native citizens, naturalized citizens, persons claiming citizenship through the naturalization of parent or husband, as well as persons residing in the insular possessions of the United States and owing allegiance to it.[1]

Section 4076, Revised Statutes, as amended by the Act of Congress of July 14, 1902, forbade the issuance of passports to persons other than those owing allegiance, whether citizens or not, to the United States.[2] The Act of March 2, 1907, effected a slight change, in clothing the Secretary of State with discretionary power to issue passports under special circumstances to persons not citizens of the United States, who had made a declaration of intention to become such, and had resided within the United States three years.[3] The occasions for the issuance of passports under this Act, which was repealed June 4, 1920, have been observed.[4]

American passports may be issued to women;[5] also to minor children.[6]

of Department of State, May 20, 1915, *id.*, II, 164; Consuls, Miscellaneous Duties, *infra*, § 488.

[1] Concerning the conditions precedent to the granting of passports to persons within the foregoing classes, see Rules of Jan. 12, 1915, American White Book, European War, II, 160; also Circular Instructions to American Diplomatic and Consular Officers, Dec. 21, 1914, *id.*, II, 156; Rules Governing the Granting and Issuing of Passports in the United States, Jan. 24, 1917.

See, also, Double Allegiance, *supra*, §§ 372–375; Effect of Parents' Naturalization on Infants, *supra*, § 367; Residence of a Naturalized American Citizen in a Foreign Country, *supra*, § 384; Loss of Right to National Protection, *supra*, §§ 388–393.

[2] 32 Stat. 386. Rules Governing the Granting and Issuing of Passports in the United States, Jan. 24, 1917.

[3] § 1, 34 Stat. 1228.

[4] Concerning the granting of passports under this section, see The Act of March 2, 1907, *supra*, § 397; also Rules Governing the Granting and Issuing of Passports to Those who have Declared Their Intention to Become Citizens of the United States, June 1, 1915, American White Book, European War, II, 164.

[5] "While a wife may, as is shown in the previous section, be, for convenience, included in her husband's passport, a woman, whether unmarried or married, or a widow, may, if a citizen of the United States, obtain a passport on her own account." Moore, Dig., III, 882.

See, also, § 8, Rules of Jan. 12, 1915 American White Book, European War, II, 161. According to § 12, it is declared "When the applicant is accompanied by his wife, minor children, and maid-servant who is a citizen of the United States, it will be sufficient to state the fact, giving their names in full, the dates, and places of their births, and the allegiance of the servant, when one passport will suffice for all. For a man-servant or any other person in the party a separate passport will be required. A woman's passport may include her minor children and maid-servant under the above named conditions. (The term 'maid-servant' does not include governess, tutor, pupil, companion, or person holding like relation to the applicant for a passport.)" Also § 9 of Rules of Jan. 24, 1917.

[6] Mr. White, American Ambassador to Italy, to the Secretary of State,

3

§ 401. Grounds of Refusal.

The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe he will put the passport to an unlawful use.[1] A passport has been refused where the evidence showed that the applicant was engaged in "blackmailing projects, and was disturbing, or endeavoring to disturb, the relations of this Country with the representatives of foreign countries." [2]

In the course of The World War the Secretary of State exercised more extensively than before his discretionary authority to refuse passports. During the earlier part of the conflict, the obtaining of, and the attempting to obtain, American passports for purposes of espionage and participation in belligerent activities rendered imperative the taking of great precautions in the issuance of such documents. Among those taken was the establishment of a rule not to issue passports for use in the belligerent countries except in cases of reasonable necessity. When the United States itself became a belligerent, more stringent rules were made and passports not issued for use in any country except in cases of such necessity.[3]

A passport is necessarily refused when the applicant is deemed to have expatriated himself. Again, a passport is withheld from a native or naturalized citizen who, on account of his domicile abroad, or for any other reason, is deemed to have lost his right to protection by the United States.[4]

April 11, 1906, For. Rel. 1906, II, 912; also important statement in Moore, Dig., III, 883. See Grounds of Refusal, *infra*, § 401; Double Allegiance, *supra*, §§ 372–375.

[1] The language of the text is that of Mr. Wilson, Acting Secy. of State, to Mr. Beaupré, Minister to the Argentine Republic, No. 120, April 27, 1907, For. Rel. 1907, II, 1082.

[2] *Id.* Also same to Mr. Giddings, Consul-General at Cairo, Jan. 31, 1907, *id.*, II, 1081; Memorandum of the Solicitor of the Dept. of State, respecting the same case, Jan. 2, 1907, *id.*, II, 1079. See, also, instructive note of Mr. Adee, Acting Secy. of State, to Mr. Conger, Minister to China, Aug. 24, 1899, For. Rel. 1899, 186–187, Moore, Dig., III, 922–923; Opinion of Mr. Knox, Atty.-Gen., 23 Ops. Attys.-Gen., 509, Moore, Dig., III, 921.

[3] For the paragraph in the text the author acknowledges his indebtedness to Mr. R. W. Flournoy, Jr.

[4] Loss of Right to National Protection, *supra*, §§ 388–393. Concerning the *Cancellation of Passports* procured by false representations or under circumstances when the retention of American citizenship at the time of issuance was doubtful, see documents in Moore, Dig., III, 983–984.

4

INTERNATIONAL EFFECT

a

§ 402. Evidential Force.

On the theory that a State is the sole and ultimate judge of the "citizenship of its own dependents, and is, in its sovereign capacity, competent to certify to the fact", the United States demands that an American passport be respected abroad as *prima facie* evidence of the citizenship of the bearer.[1] Thus the Department of State asserts that it is not, in the first instance, incumbent upon the bearer to prove his citizenship by extraneous evidence at the will of the country of sojourn, nor upon the United States to support its official attestation of the fact of citizenship by collateral proof.[2] In case a foreign government has reason to believe that a passport has been fraudulently issued, or is held by a person other than the one to whom it was issued, or that the holder was fraudulently naturalized within the United States, it is declared that the matter should be brought to the attention of the American diplomatic officer accredited to the State making complaint, who will render the necessary assistance (if need be in conjunction with the Department of State), in examining the authenticity of the document.[3] It is believed that upon proof of fraud, there would be no disposition on the part of the United States to regard the passport other than as a nullity.[4]

[1] Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, in the Case of John Benich, For. Rel. 1893, 23, 24, Moore, Dig., III, 987; Case of Solomon Czosnek, For. Rel. 1895, I, 13–20, Moore, Dig., III, 989–991; Mr. Olney, Secy. of State, to Mr. Risley, Minister to Denmark, Nov. 28, 1896, For. Rel. 1897, 118, Moore, Dig., III, 986.

It may be observed that an American passport does not purport to certify that the bearer is an American citizen. It simply attests the citizenship of the person named and described therein and whose signature is appended thereto.

In a case decided by the Supreme Court of the United States in 1835, Urtetiqui *v.* D'Arbel, 9 Pet. 692, 699, when there were no laws regulating the issuance of passports, it was declared that a passport issued by the Secretary of State was not evidence in an American court that the person to whom it was given was a citizen of the United States. See, also, In re Gee Hop, 71 Fed. 274.

[2] Mr. Gresham, Secy. of State, to Mr. Tripp, Minister to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 24, Moore, Dig., III, 987.

[3] *Id.* See, also, Mr. Foster, Secy. of State, to Mr. White, Minister to Russia, Nov. 26, 1892, For. Rel. 1893, 530, Moore, Dig., III, 986; Mr. Uhl, Acting Secy. of State, to Mr. Hengelmüller, Austrian-Hungarian Minister, May 22, 1895, MS. Notes to Austrian Legation, IX, 217, Moore, Dig., III, 1000.

[4] Mr. Marcy, Secy. of State, to Mr. Jackson, Jan. 10, 1854, MS. Inst. Austria, I, 89, Moore, Dig., III, 1000. Also Impeachment of Naturalization, *supra*, §§ 370–371.

When, according to a naturalization treaty, recognition of a change of allegiance is made dependent upon both naturalization and a residence of five years within the domain of the State of adoption, the Department of State has admitted, that in the absence of disrespect to a passport as *prima facie* evidence of citizenship, it is not easy to dispute the claim of a contracting State of a right to ascertain by some separate process whether the requirement as to residence has been fulfilled, in the case of a person capable of acquiring citizenship in less time than five years, and in view of the fact that a passport does not disclose the statute under which naturalization was effected.[1]

b

§ 403. Visa.

Mr. Gaillard Hunt has said that

> Some foreign countries, before recognizing the validity of a passport, require that a visa, or *visé*, shall be, or shall have been, affixed to it. This is an endorsement denoting that the passport has been examined and is authentic, and that the bearer may be permitted to proceed on his journey. Sometimes it is required that the visa be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought. It may even be required from a diplomatic or consular officer of the government which issued the passport.[2]

While the United States does not dispute the right of a foreign State to require that a visa be affixed to an American passport, objection is made if American citizens are subjected to discrimination in the amount of the charge exacted.[3] The Department

[1] Mr. Olney, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 544, Feb. 13, 1896, For. Rel. 1895, I, 520, 522–523, Moore, Dig., III, 993. The class of persons especially referred to were minors, honorably discharged soldiers, merchant seamen, naturalized under special provisions of law on less than five years' residence.

[2] The American Passport, 5, quoted in Moore, Dig., III, 994, and *citing* Dana's Wheaton, p. 298, note.

See, also, notice respecting the visas of passports issued by the Department of State, May 20, 1915, American White Book, European War, II, 163.

[3] Mr. Frelinghuysen, Secy. of State, to Mr. Foster, Minister to Spain, March 12, 1884, MS. Inst. Spain, XIX, 504, Moore, Dig., III, 999; Mr. Bayard, Secy. of State, to Mr. Muruaga, Spanish Minister, May 19, 1886, MS. Notes to Spain, X, 420, Moore, Dig., III, 999.

By the Act of June 4, 1920, 66 Cong., 2 Sess., Chap. 223, from and after July 1, 1920, the fee for executing each application for a passport was fixed

of State objects, moreover, to any indorsement on a passport serving to deface it or to impair its usefulness, by a representative of a foreign government who, for any reason, declines to affix a visa to the document.[1]

The Department of State at one time lodged vigorous protest against the practice of Russian consuls in the United States, of interrogating American citizens as to their race and religion, and, upon the ascertainment thereof, of denying to persons of Jewish faith the authentication of passports for use in Russia.[2]

5

§ 404. Local Papers.

Certain foreign countries require an alien, upon entering the national domain, to deposit his passport with the local authorities or with his diplomatic or consular representative, and thereupon to secure a permit to sojourn or travel. Such a permit was given in Russia under imperial authority to the holder of a passport duly visaed when entering the empire.[3] In Turkey a so-called *tezkéréh* is issued which is considered as a *safe-conduct*.[4]

When, as sometimes happens in Latin-American countries, an American citizen is obliged to deposit his passport with his legation or consulate, and receive a certificate of registry, in the native tongue, the Department of State has announced that the

at one dollar, and the fee for each passport issued to a citizen or person owing allegiance to or entitled to the protection of the United States was fixed at nine dollars.

[1] Mr. Runyon, Ambassador to Germany, to Baron Rotenhan, Sept. 2, 1895, For. Rel. 1895, I, 540, Moore, Dig., III, 997–998; also For. Rel. 1896, 517–519.

[2] President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxxii, Moore, Dig., III, 996; see, also, documents in Moore, Dig., II, 8–12, especially Mr. Adee, Acting Secy. of State, to Mr. Breckinridge, Minister to Russia, Aug. 22, 1895, For. Rel. 1895, II, 1067, Moore, Dig., II, 11.

It may be observed that the refusal of Russia to honor passports of American citizens of Jewish faith was a reason which caused President Taft to have the American Ambassador at St. Petersburg notify the Russian Government, Dec. 17, 1911, of the intention of the United States to terminate the operation of the treaty of commerce and navigation with Russia of Dec. 18, 1832, and which caused the Congress to pass a joint resolution ratifying the action taken by the President. The resolution was approved by President Taft, Dec. 21, 1911. See editorial comment, *Am. J.*, VI, 186–191.

[3] Notice of Department of State, Aug. 1, 1901, in which it is also stated that at least twenty-four hours before departure from Russia the permit of sojourn should be presented to the authorities, whereupon "a passport of departure will be granted and the original passport returned." For. Rel. 1901, 453, Moore, Dig., III, 994.

[4] Documents in Moore, Dig., III, 1004–1006, especially Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, No. 14, May 10, 1887, MS. Inst. Turkey, IV, 573.

certification must in no sense partake of the nature of a passport, attesting the nationality of the bearer, but must be simply either a certificate of the deposit of the passport and of the registration of the individual, or an indorsement on the passport itself certifying what that document purports to attest. Whatever certificate is given must be predicated upon a regular passport and not issued in lieu thereof.[1]

6

WAR REGULATIONS

a

§ 405. In General.

A State engaged in war may with reason adopt extraordinary precautions respecting the entering and departing from its territory of both aliens and nationals.[2] Passports duly visaed may be required of all persons seeking admission from a foreign

[1] Mr. Gresham, Secy. of State, to Mr. Buchanan, Minister to the Argentine Republic, No. 24, Aug. 15, 1894, For. Rel. 1894, 19, Moore, Dig., III, 1007; Mr. Sherman, Secy. of State, to Mr. Stuart, Minister to Uruguay, May 25, 1897, For. Rel. 1897, 593, 594, Moore, Dig., III, 1008.

Respecting the use in China of travel certificates and transit passes as well as passports, see Moore, Dig., III, 1009–1015 and documents there cited.

Respecting the certification by American consular officers in Italy of Italian or French translations of American passports, and the desirability that American travelers in that country provide themselves with *livrets d'identité*, see For. Rel. 1908, 482–483.

Concerning the *Registration of American Citizens Abroad*, see Consuls, Miscellaneous Duties, *infra*, § 488.

Special Passports. A special passport limited to the case of a person going abroad in the fulfillment of some official trust or duty, and necessary as a certification of the individual's public character is, on appropriate occasions, issued by the Secretary of State, but not by American agents abroad. Mr. Olney, Secy. of State, to Mr. Wagner, Nov. 25, 1895, 206 MS. Dom. Let. 200, Moore, Dig., III, 1002; Mr. Hay, Secy. of State, to Mr. Storer, No. 313, March 25, 1901, MS. Inst. Spain, XXIII, 117, Moore, Dig., III, 1003; also statement, *id.*, 1001.

"Safe conducts, in a form similar to that of special passports, have also been issued to aliens, especially as bearers of despatches.

"So, also, letters of safe conduct, commonly called passports, are given to foreign ministers traveling in or departing from the United States." Moore, Dig., III, 1002, *citing* Hunt, American Passports, 7–35.

"During the recent war the Department of State adopted the practice of European Governments in issuing to diplomatic and principal consular officers documents known as 'diplomatic passports.' They are in form similar to 'special passports', but bear the heading '*Passeport Diplomatique*' in red ink, according to the European custom. These documents insure to the bearers unusual courtesies and facilities." Communication of Mr. R. W. Flournoy, Jr., to the author, Sept. 20, 1920.

[2] The rigor of the regulations of the United States during the Civil War is fully narrated in Moore, Dig., III, 1015–1021.

See, also, War, Pacific Intercourse of Belligerents, Passports. Safe Conducts, *infra*, §§ 640–641.

country.[1] The departure of aliens may be conditioned upon their obtaining passports from their own governments or the representatives thereof, and upon the countersigning of such documents by the foreign office of the belligerent.[2] Aliens who, for any reason, have become subject to military service may be compelled to obtain local permits in order to quit the country.[3]

Rigid regulations may be prescribed as to the movements of naturalized citizens of a neutral State, with whose State of origin the country of sojourn is at war, especially when, according to the law of the enemy State, such persons are not deemed to have expatriated themselves, or are not regarded as exempt from military service. Restraint of such individuals, if naturalized American citizens, would not necessarily indicate disregard of the change of their allegiance or of the validity of their passports, but would rather betoken an appreciation by the belligerent State of sojourn of the consequences to be anticipated, should such persons be subjected to the control of their former sovereign.[4] Their departure, therefore, from belligerent soil might be fairly conditioned upon their return to the United States.

[1] Mr. Seward, Secy. of State, to Diplomatic & Consular Officers, circular, May 25, 1864, MS. Circulars, I, 270, Moore, Dig., III, 1019; Circular of Dec. 17, 1864, No. 55, MS. Circulars, I, 281, Moore, Dig., III, 1019.

[2] Statement in Moore, Dig., III, 1016, with reference to the practice of the United States during the Civil War prior to the enactment of the Act of March 3, 1863; also Mr. Fish, Secy. of State, to Mr. Williamson, No. 97, July 24, 1874, MS. Inst. Costa Rica, XVII, 190, Moore, Dig., III, 1022.

[3] Mr. F. W. Seward, Acting Secy. of State, to Mr. Irving, Aug. 18, 1863, acting under the authority of the Act of March 3, 1863, 61 MS. Dom. Let. 412, Moore, Dig., III, 1018.

[4] On April 17, 1915, the Department of State issued the following notice to American citizens who contemplated visiting belligerent countries:

"All American citizens who go abroad should carry American passports, and should inquire of diplomatic or consular officers of the countries which they expect to visit concerning the necessity of having the passports visaed therefor.

"American citizens are advised to avoid visiting unnecessarily countries which are at war, and particularly to avoid, if possible, passing through or from a belligerent country to a country which is at war therewith.

"It is especially important that naturalized American citizens refrain from visiting their countries of origin and countries which are at war therewith.

"As belligerent countries are accustomed, for self-protection, to scrutinize carefully aliens who enter their territories, American citizens who find it necessary to visit such countries should, as a matter of precaution and in order to avoid detention, provide themselves with letters or other documents, in addition to their passports, showing definitely the object of their visits. In particular it is advisable for persons who go to belligerent countries as representatives of commercial concerns to carry letters of identification or introduction from such concerns.

"American citizens sojourning in countries which are at war are warned to refrain from any conduct or utterance which might be considered offensive or contrary to the principles of strict neutrality." American White Book, European War, II, 162.

See, also, Grounds of Refusal, *supra*, § 401.

b

§ 406. Regulations of the United States as a Belligerent.

A joint order of July 26, 1917, issued by the Secretary of State and the Secretary of Labor, required aliens coming to the United States to bear passports visaed by consular officers of the United States. Before being granted visas, the holders of passports were obliged to fill out a *questionnaire* on a prescribed form, disclosing such information as to their antecedents, nationality, residence, occupation and purpose of coming to the United States as the Government deemed necessary. A circular instruction to diplomatic and consular officers was issued on the same date. Those officers had been instructed by telegraph shortly after the United States became a belligerent, to require aliens seeking to enter the United States to have their passports visaed, and to scrutinize applicants carefully before granting visas; but the joint order of July 26, 1917, made the visa regulations much more thorough and effective.[1]

By virtue of authority vested in him by an Act of May 22, 1918, to prevent in time of war departure from or entry into the United States contrary to the public safety,[2] the President, by proclamation of August 8, 1918, and by an executive order of the

[1] The paragraph in the text is taken from a memorandum by Mr. R. W. Flournoy, Jr., addressed to the author, Sept. 21, 1920, where it is added: "In the meantime the Department of State had already made informal arrangements with the Departments of the Treasury and of Commerce under which all persons boarding vessels for foreign countries were required to submit passports. Steamship companies were notified that clearances would be withheld from their vessels unless there was strict compliance with the passport regulations.

"The above mentioned action was taken without waiting for special authorization by Congress. It was a case where practical necessity and common sense seemed to dictate prompt and vigorous action without awaiting special legislative authorization."

It may be observed that by the executive order of Aug. 8, 1918, in pursuance of the Act of May 22, 1918, the joint order of July 26, 1917, was confirmed and continued in effect. It is printed with the executive order as Appendix A thereof.

[2] Chap. 81, 40 Stat. 559. The President adverted in his proclamation to the provisions of other laws relating to departure from and entry into the United States, as contained in § 3, subsection (*b*), of the Trading with the Enemy Act of Oct. 6, 1917, and in § 4067, Rev. Stat., as amended by the Act of April 16, 1918, and §§ 4068, 4069, 4070, Rev. Stat., and to regulations prescribed in his own proclamations of April 6, 1917, Nov. 16, 1917, Dec. 11, 1917, and April 19, 1918.

The Act of May 22, 1918, declared that when the United States was at war, if the President should find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by the Act be imposed upon the departure of persons from, and their entry into, the United States, and should make public proclamation thereof, it should, until otherwise ordered by the President or Congress, be unlawful (among other things) "for any alien to depart from or enter or attempt to depart from or

same date, established a series of rules governing the issuance of passports and the granting of permits to depart from and enter the United States.[1] According to the proclamation, no citizen of the United States was to receive a passport entitling him to leave or enter the United States, unless it should affirmatively appear that there were adequate reasons for such departure or entry, and that such movements were not prejudicial to the interests of the United States. No alien was to receive permission to depart from or enter the United States unless it should affirmatively appear that there was a reasonable necessity for such departure or entry, and that such movements were not prejudicial to the interests of the United States.

According to the rules and regulations of August 8, 1918, no passports or permits to depart from or enter the United States were required of persons "*other than hostile aliens*" traveling between ports of the continental United States on vessels making no intermediate calls at foreign or non-continental ports,[2] or between points in the continental United States and points in Canada or Bermuda, or passing through Canada on a trip between two points in the continental United States (except in the case of persons liable to military service).[3] Nor were passports or permits to depart from or enter the United States required of persons attached to the military or naval forces of the United States, "or of any nation associated with the United States in the prosecution of the war", under conditions specified.[4]

No permits to depart from or enter the United States were required of "officials or representatives of foreign countries duly accredited to the United States or a friendly country", provided that they bore valid passports and provided the Department of State was notified in advance of the movements of such individuals and consented thereto.[5]

enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

[1] The proclamation and the executive order embracing the rules and regulations governing the issuance of passports and the granting of permits to enter and leave the United States were published as a single document in 1918.

[2] Section 9 (*a*). [3] Section 9 (*b*).

[4] Section 9 (*c*). Special provision was made for the issuance to aliens of so-called "border permits" for the crossing and recrossing of the Mexican border. Section 10 (*a*).

Arrangement was made for the granting of permission to aliens passing through the United States en route between two foreign points, and not remaining in the United States more than thirty days. Section 10 (*f*).

[5] Section 10 (*g*). It was required, however, that such officials, when desiring to enter the United States, should have their passports visaed by a

Citizens of the United States traveling between American ports not within the continental United States, or between such ports and ports within the continental United States, on vessels making no intermediate calls at foreign ports other than those of Canada or Bermuda, were not required to bear passports provided they should have received from the immigrant inspector at the port of departure "United States citizens' identity cards." [1] Such cards were also permitted to suffice for such citizens traveling across the Mexican border, unless otherwise ordered by the Secretary of State.[2] Citizens of the United States who were seamen on vessels entering or leaving ports of the United States were not required to bear passports provided they bore seamen's certificates of American citizenship, issued by collectors of the ports of the United States in accordance with the statutory law.[3]

It was declared that no person registered or enrolled or subject to registry or enrollment for military service in the United States should depart from the United States without the previous consent of the Secretary of War or of such persons as he might appoint to give it. The Secretary of State was enjoined to issue no passport or permit entitling such person to depart without securing satisfactory evidence of such consent.[4]

Elaborate arrangements were made for the issuance of permits to aliens to depart from and enter the United States.[5] A general system of control at points of entry and departure was established.[6] It is not believed that the regulations of the United

diplomatic or consular officer of the United States in the country from which they came and in the country from which they embarked for or entered the United States. Such officials desiring to depart from the United States were required to have their passports visaed by the Department of State.

[1] Section 11 (*a*). [2] Section 11 (*b*). [3] Section 11 (*c*).

[4] Section 12.

It was declared in Section 14 that passports were not valid for return to the United States unless verified in the country from which the holder started on his journey thereto, and further verified in the foreign country from which he embarked for or entered the United States.

[5] Sections 15–39.

[6] Sections 36–38.

On Aug. 25, 1919, the President, upon the suggestion of the Secretary of State, recommended to the Congress that the passport-control system under the Act of May 22, 1918, be extended for one year after peace should be concluded between the United States and the Central Powers of Europe. Senate Doc No. 79, 66 Cong., 1 Sess By an Act received by the President Oct. 29, 1919, and which became a law without his approval, in November following, it was provided that if the President should find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by the Act, be imposed upon the entry of aliens in the United States, and should make public proclamation thereof, it should (among other things), until otherwise ordered by the President or Congress, be unlawful "for any alien to enter or attempt to enter the United States except under such reason-

States in relation to alien persons betokened an abuse of power. The extraordinary conditions confronting the nation appeared to justify amply the measures adopted.[1]

able rules, regulations, and orders, and subject to such passport, visé, or other limitations and exceptions as the President shall prescribe." This Act was to take effect upon the date when the Act of May 22, 1918, should cease to be operative, and was to continue in force and effect until and including March 4, 1921. Public, No. 79, 66 Cong. [H. R. 9782].

[1] Mr. Lansing, Secy. of State, to the President, Aug. 20, 1919, Senate Doc. No. 79, 66 Cong., 1 Sess., 3.

By an executive order of June 27, 1920, amending that of Aug. 8, 1918, persons defined by statute or proclamation as hostile or enemy aliens, and who might be desirous of departing from the United States were not, unless the Secretary of State might so order, to be required to obtain a permit of the Government prior to such departure. It was declared that such persons would be permitted to depart upon presentation of passports issued, renewed or visaed by representatives of their respective Governments within one year prior to the proposed date of departure, accompanied by certificates of compliance with the income tax law.

PART III

DIPLOMATIC INTERCOURSE OF STATES

TITLE A

§ 407. In General.

The practice of enlightened States has revealed the fact that both the processes and instrumentalities of diplomatic intercourse are matters requiring, for sake of mutual convenience, adherence to certain principles designed to promote justice. It is significant, moreover, that among the earliest rules in which States were ready to acquiesce, in token of recognition of the need of a law of nations, were those pertaining to the treatment to be accorded diplomatic officers.

When the United States came into being many of these rules were well established. During the interval that has since elapsed some have been modified. It seems important to observe those on which the United States has placed reliance and laid special emphasis.

It must be constantly borne in mind that the canons of international law restraining the action of States are distinct from and may in fact oppose theories of diplomacy to which particular powers may be committed. The conflict between law and policy is vividly illustrated in the nature of the tasks too frequently imposed upon public ministers. Because the method of fulfillment of essentially legal obligations pertaining to diplomatic intercourse rests largely with the discretion of the individual State, the nature and scope of its duties may have been at times obscured. The success, therefore, of any attempt to ascertain what, in the light of American opinion, they entail, and wherein they should be modified, must depend upon the care taken to distinguish that which by common consent is assigned to local regulation according to domestic policy, from that which is demanded as of right by the international society from each of its members.

TITLE B

AGENTS OF A STATE

1

§ 408. The President of the United States.

The foreign relations of a State are necessarily conducted by an agent or agents who act either directly or through subordinates.[1] Each member of the family of nations enjoys a large freedom in

[1] Respecting American diplomatic officers, see Instructions to the Diplomatic Officers of the United States, 1897, and continuations thereof; Documents in Moore, Dig., IV, 425–806.

See, also, generally, Bonfils-Fauchille, 7 ed., §§ 652–732, with bibliography; Edward S. Corwin, The President's Control of Foreign Relations, Princeton, 1917; bibliography in Clunet, *Tables Générales*, I, 449–451, 875–876; A. de Clercq and C. de Vallat, *Formulaire des chancelleries diplomatiques et consulaires*, 7 ed., Paris, 1909; John W. Foster, A Century of American Diplomacy, Boston, 1901; American Diplomacy in the Orient, 1903; The Practice of Diplomacy, Boston, 1906; Diplomatic Memoirs, Boston, 1909; Hall, Higgins' 7 ed., 306–333; Hershey, Int. L., 275–297, with bibliography; David Jayne Hill, History of Diplomacy in the International Development of Europe, New York, 1905–1914; Gaillard Hunt, A History of the Department of State, New Haven, 1914; H. C. R. Lisboa, *Les Fonctions Diplomatiques en Temps de Paix*, Santiago de Chile, 1908; Baron Charles de Martens, *Causes Célèbres*, Leipzig, 1827; Denys P. Myers, Notes on the Control of Foreign Relations, The Hague, 1917; J. B. Moore, Principles of American Diplomacy, New York, 1918; Charles Ozanam, *L'Immunité Civile de Juridiction des Agents Diplomatiques*, Paris, 1912; C. Oscar Paullin, Diplomatic Negotiations of American Naval Officers: 1778–1883, Baltimore, 1912; Phillimore, II, §§ 94–242; Walter Alison Phillips, "Diplomacy", in Encyc. Brit. Eleventh ed., VIII, 294; Coleman Phillipson, International Law and Custom of Ancient Greece and Rome, London, 1911; P. Pradier-Fodéré, *Cours de Droit Diplomatique*, Paris, 1899; E. T. Rayneli, *Derecho Diplomático Moderno*, Buenos Aires, 1914; Jean Roederer, *De l'Application des Immunités de l'Ambassadeur au Personnel de l'Ambassade*, Paris, 1904; Sir Ernest Satow, Guide to Diplomatic Practice, London, 1917; Eugene Schuyler, American Diplomacy, New York, 1895, 105–190; Charlemagne Tower, Essays Political and Historical, Philadelphia, 1914; Frederick Van Dyne, Our Foreign Service: The "A B C" of American Diplomacy, with bibliography, Rochester, 1909; T. A. Walker, History of the Law of Nations, London, 1899; R. P. Ward, An Inquiry into the Foundation and History of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius, Dublin, 1795; Dana's Wheaton, §§ 206–251, also Dana's Note, No. 129; G. G. Wilson, Int. L., 159–180; Woolsey, 6 ed., §§ 86–98.

determining through what instrumentalities it will hold intercourse with the outside world.[1]

The Constitution of the United States confides the direction of its foreign affairs to the President, whose freedom of action is, however, in certain matters, made dependent upon the approval of the Senate.[2] The President is, therefore, the representative of the nation in its official correspondence with foreign powers. It has been deemed improper for a foreign diplomatic officer to attempt to make official communication to the Government through any channel other than the executive.[3]

[1] It is not without interest that following the so-called "Boxer" trouble in China in 1900, the Imperial Government of that State was obliged by the Powers to reform its Office of Foreign Affairs (*Tsungli Yamen*) and to transform it into a Ministry of Foreign Affairs (*Wai-wu Pu*) which should take precedence over the six other Ministries of State. Art. XII of protocol of Sept. 7, 1901, Malloy's Treaties, II, 2011; also Imperial Edict of July 24, 1901, For. Rel. 1901, Appendix (Affairs in China), 337.

[2] According to paragraph 2, Section 2, Art. II, the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." According to paragraph 11, Section 8, Art. I, the power "to declare war" is entrusted to the Congress.

[3] Declared Mr. Jefferson, Secy. of State, to Mr. Genet, the French Minister, Nov. 22, 1793, "In my letter of October 2, I took the liberty of noticing to you, that the commission of consul to M. Dannery ought to have been addressed to the President of the United States. He being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it, to interpose between him and any other branch of Government, under the pretext of either's transgressing their functions, nor to make himself the umpire and final judge between them." Am. State Pap., For. Rel. I, 184. See, also, Moore, Dig., IV, 680–682, and documents there cited.

In December, 1920, the Guatemalan Minister at Washington, and also the Secretary of the British Embassy sought to communicate information (the former, in a personal conference, and the latter, by writing) to members of the Senate respecting matters of international import and bearing upon the foreign relations of the United States. It is understood that in both instances, the Department of State made known the incorrectness of this procedure to the foreign governmental agencies which doubtless inadvertently had recourse to it.

The communications of the President to the Congress in relation to foreign affairs are not regarded as justifying any demand for explanation from abroad, or as an appropriate subject for diplomatic discussion. See documents in Moore, Dig., IV, 683–686, especially Mr. Forsyth, Secy. of State, to Mr. Livingston, Minister to France, March 5, 1835, MS. Inst. France, XIV, 191, 193.

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." John Marshall, in House of Representatives, March 7, 1800, 6 Cong., Annals, 613, quoted in Crandall, Treaties, 2 ed., § 47.

2

§ 409. Communications through Non-Governmental Channels.

The government of a State may in fact communicate information to that of another through the public press rather than the diplomatic channel. The propriety of such action may be regarded as dependent upon the circumstances of the particular case. If the design is to advise the people of the State thus sought to be informed of conditions calculated to arouse popular opposition to its own government in a matter of international concern, that government must be expected to take offense.[1]

Until very recent times it was not assumed in intercourse between friendly States that the governments constitutionally entrusted with the management of foreign affairs were to be regarded as other than identical with the States which they purported to represent. Therefore, it was not supposed that a government could win the acquiescence or approval of a foreign State whose government was in any sense sought to be overridden. The theory of an essential agreement or of singleness of purpose between States in opposition to the government of either did not obtain, and thus found little room for application in practice. Impressive invocation of such a theory appears, however, lately to have been observed by high representatives (if not the Governments) of the United States and Great Britain.[2]

On April 23, 1919, when the subject was under discussion between representatives of the United States and Italy, at the Peace Conference, President Wilson permitted the publication in the press of a statement indicating what in his judgment was the sole basis of the just solution of the controversy concerning Fiume, and which opposed the position taken by the Italian plenipotentiaries.[3] In his guarded reply, Premier Orlando adverted to the procedure as constituting an innovation in international relations. Without charging that such was the case, he declared that if such appeals were to be "considered as addressed to the nations outside of the governments which represent them (I might even say

[1] The necessary implication in such case is that the employment of such a channel of communication was due to a belief that possibly the information would not have been revealed to the people had it been communicated through the customary diplomatic agencies, and that fear of such a contingency induced recourse to a more direct procedure.

[2] See, in connection with this subject, as supplementary thereto, Official Negotiations, The Diplomatic Channel, *infra*, § 454.

[3] For the text of President Wilson's statement, see *Current History*, June, 1919, X, Part I, p. 405.

against the governments)," he would feel deep regret in recalling that such process, previously applied to enemy governments, was then applied for the first time to a government which had been and intended to remain a loyal ally of the great American Republic, namely, the Italian Government.[1]

On January 31, 1920, Lord Grey, British Ambassador to the United States, while in England, permitted the publication in the London *Times* of an unofficial communication from himself, in which he expressed sympathy for those who in the United States sought to attach reservations to the pending treaty of peace with Germany, and announced that Great Britain might be disposed to acquiesce should the United States ratify the treaty with reservations.[2] This information was deemed to possess unusual significance in view of the existing conflict of opinion as to the terms, if any, on which the Senate should advise and consent to ratification, and at a time when it was not generally known in the United States how an Associated Power such as Great Britain would regard reservations such as had been proposed.

The foregoing instances illustrate more than the innovation which they record. They reveal the fact that at the present time information of such vital concern to a foreign State as to be likely to influence its conduct will necessarily be brought home to it by the straightest path and through the simplest means; and that when any conventional channel seems for any reason to obstruct rather than facilitate the communication of intelligence of such a kind, other means of enlightenment will be employed. In a word, govern-

[1] *Current History*, June, 1919, X, Part I, p. 407. Premier Orlando added: "To place the Italian people in opposition to the Government would be to admit that this great free nation would submit to the yoke of a will other than its own, and I should be forced to protest strongly against suppositions justly offensive to my country."

[2] This communication was published in the Philadelphia *Public Ledger*, and in the New York *Times* Feb. 1, 1920. No opinion is ventured as to the propriety of the discussion by a diplomatic officer accredited to the United States of a matter of political importance to it, and calling for possible action on the part of one branch of the Congress. It may be observed, however, in this connection, that the distinguished Ambassador gave expression to his views while in his own country, and that his action in so doing doubtless had the warm approval of his Government. Had the Government of the United States expressed disapproval of Lord Grey's course as at variance with the traditional obligations of a minister to abstain from interference in the domestic politics of the State to which he is accredited, the British Government might have evinced readiness to ratify the statement and to assume themselves responsibility for recourse to the procedure followed. The case raised a larger question than one concerning the propriety of conduct of a particular diplomatic officer, involving rather the issue whether a government such as that of Great Britain might not reasonably, under the circumstances, make known to the people of the United States and incidentally to the Senate, information deemed to be of vital concern to both.

mental agencies established for the management of foreign affairs no longer appear to perform adequately their proper functions if they endeavor or incline to withhold from the people in times of public stress information which if known would control the foreign policies of the State. For that reason it is to be anticipated that such agencies, both in the United States and elsewhere, will hereafter, as a means of retaining power and of directing securely the control of foreign affairs, become increasingly disposed to enlighten public opinion, on matters pertaining to the outside world.

All negotiations between States must be carried on through the medium of governmental agencies constitutionally or legally established for the purpose. Effective diplomatic intercourse demands, therefore, mutual respect for them. In token thereof it must be assumed, under normal circumstances, that a government of a foreign State with which diplomatic relations are maintained will fail in no obligation which it owes to the people of its own country. Consequently, action based on a different assumption must be regarded with hostility by the government which is denied this customary imputation of efficiency or loyalty to its domestic institutions and constituents.[1] The fact of such hostility must weigh heavily against the winning of popular approval in the State to whose people a direct appeal is taken. It thus requires an extraordinary combination of circumstances to cause the communication of intelligence to a foreign State by a process which designedly evades official channels to meet with a friendly response and so to achieve the end desired. For that reason recourse to such procedure is not likely to be a frequent occurrence.

[1] The Interparliamentary Union "has for its aim the uniting in common action the Members of all parliaments constituted in National Groups in order to bring about the acceptance in their respective countries, either by legislation or by international treaties, of the principle that differences between nations should be settled by arbitration or in other ways either amicable or judicial." Constitution, Revision of 1912, Art. I. The Union is declared to expect of its members that they, "as far as possible, see that the resolutions passed at the Interparliamentary Conferences be brought to the attention of their respective parliaments." *Id.*, Art. V. The organization although made up chiefly of responsible statesmen belonging to the legislative departments of numerous States embracing the United States, does not undertake to communicate information from one government to the legislature of another It is not understood that the views which are communicated as among various legislatures are more than those of the several National Groups constituting the Union. According to the statement of Dr. C. L. Lange, Secretary General, published by the American Group in 1914, the Union had up to that time always limited itself to the discussion of questions relating to international law, refraining from the discussion of economic questions, and from pronouncements of a political nature, in which the interests of different States might be opposed. See The Interparliamentary Union Hand Book of the American Group, 1914. 14. Also *Annual Report for 1914* submitted by the Secretary General, Kristiania, 1915.

3

§ 410. The Secretary of State as Organ of Correspondence.

As early as 1789, the Congress created an executive department to be known as the Department of State, and a Secretary of State who was to be its head.[1] It was provided that that officer should perform such duties as the President might enjoin on or entrust to him relative to correspondence, commissions or instructions to or with diplomatic or consular officers of the United States, or to negotiations with foreign public ministers, or to memorials or to other applications from such officials or other foreigners, or to such other matters respecting foreign affairs as the President might assign to the Department. It was expressly declared that the business of the Department should be conducted by the Secretary in such manner as the President should direct.[2]

In early days of the Republic it was regarded as "not the established course" for diplomatic officers to have direct correspondence with the President;[3] and as late as 1888, Secretary Bayard declared that "all the acts of the President, in his official capacity, pass through the constitutional and statutory channel of the Secretary of State."[4] In more recent years the President has, on numerous occasions, addressed himself directly to the heads of foreign States, from whom also he has himself been the recipient of communications.[5] Foreign ambassadors have, more-

[1] Rev. Stat. § 199, Moore, Dig., IV, 780.

Before the adoption of the Constitution, the foreign affairs of the United States were conducted by the Congress, which at first endeavored to perform certain of its duties through committees. In 1781, it established a Department of Foreign Affairs in charge of a "Secretary for Foreign Affairs", who in 1785 was declared to be the medium of all communications to and from the Congress in respect to foreign relations. Gaillard Hunt, History of the Department of State, Chap. I, and documents there cited.

[2] Rev. Stat. § 202, Moore, Dig., IV, 781.

The acts of the Department of State with respect to foreign affairs "are in legal contemplation the acts of the President." Gray, J., in Jones *v.* United State, 137 U. S. 202, 217.

[3] Mr. Jefferson, Secy. of State, to M. Genet, French Minister, Aug. 16, 1793, 5 MS. Dom. Let. 231, Moore, Dig., IV, 686.

[4] Communication to Mr. Pratt, Minister to Persia, No. 104, Dip. Series, April 5, 1888, MS. Inst. Persia, I, 208, Moore, Dig., IV, 687, 688.

[5] See statement in Moore, Dig., IV, 689; telegram of condolence from President Roosevelt, to the King of Portugal Feb. 3, 1908, in respect to the assassination of the King and Crown Prince of that State, For. Rel. 1908, 687. Correspondence between President Roosevelt and the Emperor of Japan in 1905, respecting the services of the former in the cause of peace between Japan and Russia, For. Rel. 1905, 823–824.

President Taft, to Prince Chun, Regent of the Chinese Empire, July 15, 1909, respecting the participation by American capital in a railway loan, For.

over, availed themselves on occasion of the privilege of conferring with the President.[1]

In the course of The World War, both before and after the United States became a belligerent, the President himself undertook to make suggestions in relation to the terms of peace. In December, 1916, certain of them were communicated to both belligerent and neutral powers through the medium of the Department of State.[2] In January, 1918, others were announced in an address to the Congress,[3] and thereby attained wide publicity abroad regardless of the official channels through which they were brought to the attention of foreign powers.[4] Later, the President, "acting in his own name and by his own proper authority", became the head of the American Commission for the conclusion, in conjunction with the Allied and Associated Powers, of a treaty of peace with Germany.[5] In that capacity he became the direct spokesman of the United States in the matter of negotiation. In assuming in person the conduct of negotiations which are normally confided to the Secretary of State or to diplomatic representatives, the President does not appear to be restricted by the statutory law. Such action on his part is, moreover, without international significance.

4

DIPLOMATIC MISSIONS

a

§ 411. Classification of Ministers.

In determining the relative rank and precedence of diplomatic representatives, the Department of State has adopted and pre-

Rel. 1909, 178; same, to the President of Cuba, Aug. 2, 1911, referring to European claims against that State, For. Rel. 1911, 129.

President Wilson, to the Provisional Government of Russia, Official Bulletin, June 9, 1917, I, No. 26; same, to the American Consul General at Moscow, for communication through the Soviet Congress to the people of Russia, Official Bulletin, March 12, 1918, II, No. 255.

[1] Ambassadorial Privileges, *infra*, § 459.

[2] Communication of Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Dec. 18, 1916, American White Book, European War, IV, 321.

[3] President Wilson, address to the Congress, Jan. 8, 1918, announcing a proposed basis for a program of peace, Official Bulletin, Jan. 8, 1918, II, No. 202; J. B. Scott, President Wilson's Foreign Policy, 354.

[4] It is to be noted that at the time of this address, responsible statesmen of Europe were making known their views in relation to peace through the medium of public speeches which were given widest circulation in America and elsewhere.

[5] Senate Doc. No. 49, 66 Cong., 1 Sess., p. 3.

scribed the seven rules of the Congress of Vienna, found in the protocol of the session of March 19, 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of November 21, 1818.[1] They are as follows:

Article I. Diplomatic agents are divided into three classes: That of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs.

Art. II. Ambassadors, legates, or nuncios only have the representative character.

Art. III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

Art. IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

Art. V. A uniform mode shall be determined in each State for the reception of diplomatic agents of each class.

Art. VI. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

Art. VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

Art. VIII. It is agreed that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.

The diplomatic representatives of the United States are of the first, the second, the intermediate and the third of the foregoing classes as follows:

(*a*) Ambassadors extraordinary and plenipotentiary.

(*b*) Envoys extraordinary and ministers plenipotentiary, and special commissioners, when styled as having the rank of envoy extraordinary and minister plenipotentiary.

(*c*) Ministers resident.

These grades of representatives are accredited by the President.

[1] Instructions to Diplomatic Officers of the United States (1897), § 18, Moore, Dig., IV, 430.
The rules of the Congress of Vienna are contained in *Nouv. Rec.*, II, 449; the supplementary rule of the Congress of Aix-la-Chapelle, *id.*, IV, 648.

(*d*) Chargés d'affaires, commissioned by the President as such, and accredited by the Secretary of State to the minister for foreign affairs of the government to which they are sent.[1]

It is declared by the Department of State that in the absence of the head of the mission the secretary acts *ex officio* as chargé d'affaires *ad interim*, requiring no special letter of credence; but that in the absence of a secretary and second secretary, the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.[2]

Sometimes the office of consul-general is superadded to the diplomatic office filled by a single individual.[3] In such case the diplomatic rank is regarded as superior to and independent of the consular rank. The officer is, moreover, instructed to fulfill his consular duties in accordance with the consular regulations of the United States, and to keep them in every sense distinct from those pertaining to the diplomatic service.[4]

[1] Instructions to Diplomatic Officers of the United States (1897), § 19, Moore, Dig., IV, 430–431.

According to the existing statutory law, a "Diplomatic officer" is "deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, counselors, agents, secretaries of embassy and legation, and secretaries in the Diplomatic Service, and none others." Chap. 208, 39 Stat. 252, U. S. Comp. Stat. 1918, § 3116.

As to the use of the office of chargé d'affaires in the earlier part of the nineteenth century, see Mr. Clay, Secy. of State, to the President, Jan. 31, 1827, Am. State Pap., For Rel., VI, 554; also documents in Moore, Dig.. IV, 432–433.

Declared Mr. Cushing, Attorney-General, in the course of an opinion, May 25, 1855: "The title chargé d'affaires, which is in itself quite as generic and comprehensive as any of the others, and may be and often is borne by persons exercising as ample and high functions as any of the others, has settled into the designation of a mere provisional officer, and in dignity of the lowest rank." 7 Ops. Attys.-Gen., 186, 192.

[2] Instructions to Diplomatic Officers of the United States (1897), § 19, Moore, Dig., IV, 431. See, also, Circular Instruction to Diplomatic Officers of the United States, March 25, 1902.

[3] Thus, under the existing law, the American diplomatic representative to Liberia is accredited as minister resident and consul general. Rev. Stat. § 1683, U. S. Comp. Stat. 1918, § 3129; also Diplomatic and Consular Service of the United States (corrected to July 26, 1919).

[4] Instructions to Diplomatic Officers of the United States (1897), § 20, Moore, Dig., IV, 431.

Some foreign governments do not recognize the union of consular with diplomatic functions. See President Cleveland, Annual Message, Dec. 8, 1885, For. Rel. 1885, xvii, Moore, Dig., IV, 445, also documents, *id.*, respecting difficulties with Italy and Venezuela.

Declared Mr. Foster, Secy. of State: "So far as the rule of this government is concerned, the diplomatic function of a consular officer is only recognized when he bears a special letter of credence addressed to the Secretary of State; and conversely a consular officer of the United States, even when left in custody of a legation, has no diplomatic rank, function or immunities, unless

b

§ 412. Secretaries of Embassy or Legation. Counselors of Embassy or Legation.

The Secretary of a mission is according to international law a "public minister." His personal privileges, immunities, domiciliary privileges and exemptions are generally those of the diplomatic representative of whose official household he forms a part.[1] As long as the head of the mission is present, the secretary is not recognized by any foreign government as being authorized to perform a single official act otherwise than as directed by the head of the mission; and it is said to follow, as a necessary consequence, that in his official conduct the secretary is under the direction, and subordinate to the control, of his immediate superior.[2]

An Act of July 1, 1916, authorized the President, "whenever he considers it advisable so to do" to designate and assign any secretary (of class one) as counselor of embassy or legation.[3] This authority is utilized. In numerous instances the secretary of highest grade is so designated.[4] This action on the part of the United States corresponds with the practice observed by other powers.[5]

c

§ 413. Attachés.

In the diplomatic service of the United States there are, in addition to heads of missions, the offices of "secretary" (of embassy

he be expressly accredited to the minister for foreign affairs." Communication to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 445. Also In re Baiz, 135 U. S. 403.

See Consuls, Privileges and Immunities under International Law and Treaty, *infra*, § 464.

[1] Instructions to Diplomatic Officers of the United States, § 52.

[2] The statement in the text is embodied in § 31 of the Instructions to Diplomatic Officers of the United States (1897).

Under the existing law appointments of secretaries in the diplomatic service are by commission to the office of secretary of embassy or legation; and such officers are to be assigned to posts and transferred from one post to another by order of the President as the interests of the service may require. Act of Feb. 5, 1915. Chap. 23, § 1, 38 Stat. 805, U. S. Comp. Stat. 1918, § 3130a. Secretaries are graded according to a classification which divides them into five classes, each class having the salary affixed thereto by the statute. *Id.*, § 2.

[3] Chap. 208, 39 Stat. 252, U. S. Comp. Stat. 1918, § 3130aa.

[4] According to the Diplomatic and Consular Service of the United States, corrected to July 26, 1919, there were two persons designated as counselor and attached to the Embassy at Paris. In the case of the Embassy at Archangel, a consular officer was given the "rank of counselor" although apparently not otherwise designated as such an official.

[5] Documents in Moore, Dig., IV, 434–436.

or legation, as the case may be), "second secretary", "third secretary", "Chinese secretary", "Japanese secretary", "assistant Japanese secretary", "student interpreter", "military attaché", "commercial attaché." [1]

A military or naval attaché, and doubtless likewise any other attaché of an American mission, except a secretary of embassy or legation, although without diplomatic rank "in the sense of being in the line of representative succession, so as to act as chargé d'affaires *ad interim*, is regarded as being attached to the mission." His name appears as a member of its staff in the diplomatic list.[2]

A foreign military or naval attaché is presented by his chief to the President and to the Secretary of War or of the Navy, and is thereafter introduced as occasion offers to other high officers of the Government of the United States. In 1906, Secretary Root declared that

> The peculiar and delicate functions of military and naval attachés, combining membership of the official diplomatic representation of their own government with the added privilege of direct intercourse with other than the diplomatic branches of the foreign administration and even of official association, on some occasions, with the Head of the State and with the highest officers of its military establishment, make it desirable that

[1] The statement in the text is based upon the Diplomatic and Consular Service of the United States, corrected to July 26, 1919.

According to the Diplomatic and Consular Service of the United States, corrected to Jan. 23, 1915, there were also the offices of "Turkish secretary", "assistant Turkish secretary", and "interpreter."

That the relation of a scientific expert attached to the American Embassy in Berlin in 1898 was similar to that of a military or naval attaché, see Mr. Moore, Acting Secy. of State, to Freiherr Speck von Sternburg, June 2, 1898, MS. Notes to German Legation, XII, 139, Moore, Dig., IV, 439.

Local counsel acting in behalf of a diplomatic mission is not regarded as an official representative or as an attaché thereof. Mr. Rockhill, Assist. Secy. of State, to Mr. Coudert, June 17, 1896, 210 MS. Dom. Let. 666, enclosing copy of instruction to Mr. Eustis, Ambassador to France, No. 610, April 30, 1896, Moore, Dig., IV, 439.

[2] Mr. Moore, Acting Secy. of State, to Freiherr Speck von Sternburg, June 2, 1898, MS. Notes to German Legation, XII, 139, Moore, Dig., IV, 439.

"Section 1744 Rev. Stat. requires that all the officers in the diplomatic and consular service who are mentioned in Section 1675 shall be citizens of the United States. This is the plain implication of the section, which forbids payment of salaries to those officers unless they be such citizens. The officers, thus mentioned, range from ambassadors down to second secretaries of legation, and do not include marshals, interpreters, or other subordinate officers." Opinion of Mr. Knox, Atty.-Gen., Jan. 3, 1902, 23 Ops. Attys.-Gen. 608, 612.

It may be noted that by the Act of April 15, 1918, Chap. 52, making appropriation for the Diplomatic and Consular Service, for the fiscal year ending June 30, 1919, provision was made for the employment of necessary clerks at embassies and legations, "who, whenever hereafter appointed, shall be citizens of the United States." 40 Stat. 519, 520.

American officers serving in those capacities shall enjoy no less privileges than their colleagues of other nationalities.[1]

Under the existing law, commercial attachés of the United States are appointed by the Secretary of Commerce, and accredited through the Department of State. Their duties are to investigate and report upon such conditions in the manufacturing industries and trade of foreign countries as may be of interest to the United States.[2]

d

§ 414. Commissioners and Special Envoys.

When persons designated as commissioners have been appointed to perform diplomatic functions in behalf of the United States, they have been regarded by it as diplomatic officers.[3] The title is, nevertheless, vague, and as Secretary Foster declared in 1892, "only the language and purport of the encumbent's commission and credential letters can determine whether it possesses a diplomatic character."[4] In clothing a commissioner with such a character, the fact has commonly been announced in his commission, and oftentimes also his rank.[5] Commissioners are not, at the present time, accredited as the heads of permanent missions of the United States.[6]

Special envoys are appointed for particular purposes, such as the negotiation of treaties,[7] or participation in international con-

[1] Circular Instruction to American Diplomatic Officers, Feb. 14, 1906.

[2] Chap. 163, § 1, Act of March 3, 1917, 39 Stat. 1113, U. S. Comp. Stat. 1918, § 854*a*.

[3] See in this connection, opinion of Mr. Cushing, Atty.-Gen., 7 Ops. Attys. Gen., 186, 192.

[4] Communication to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 440.

[5] Mr. Hay, Secy. of State, to Secy. of the Navy, July 20, 1900, relative to the commission of Mr. W. W. Rockhill, who was appointed "commissioner of the United States to China, with diplomatic privileges and immunities", 246 MS. Dom. Let. 485, Moore, Dig., IV, 440.

[6] The Diplomatic and Consular Service of the United States corrected July 26, 1919, makes mention of no official designated as commissioner.

In the treaty with China of July 3, 1844, the representative of the United States, Mr. Caleb Cushing, was described as "Commissioner, . . . Envoy Extraordinary and Minister Plenipotentiary." Malloy's Treaties, I, 196.

[7] Thus in December, 1908, Mr. William I. Buchanan was commissioned a special commissioner to represent the President with full power to confer with the Government of Venezuela in all matters relating to the reëstablishment of diplomatic relations between the United States and that country. Mr. Root, Secy. of State, to Special Commissioner Buchanan, Dec. 21, 1908, For. Rel. 1909, 609. See, also, numerous earlier instances given in John W. Foster, The Practice of Diplomacy, Chap. X.

ferences,[1] or to attend ceremonies deemed to possess significance, such as the marriage of a foreign monarch.[2] Early in 1917, a High Commission, headed by Mr. Elihu Root, was sent to Russia.[3]

Special envoys, of whatsoever rank, appointed as delegates to an international conference bear credentials not necessarily addressed to any one of the governments taking part therein, but rather such as are capable of exhibition by the delegates to their colleagues from other States, in proof of the powers given to confer and conclude agreements in respect to matters of mutual concern and interest.[4]

e

§ 415. Agents.

The United States does not at the present time seek diplomatic representation in independent States through persons designated

[1] Thus, for example, the President appointed three ambassadors extraordinary (Messrs. Joseph H. Choate, Horace Porter and Uriah M. Rose), and four ministers plenipotentiaries (Mr. David J. Hill, Rear-Admiral Charles S. Sperry, Brig.-Gen. George B. Davis and Mr. William I. Buchanan), all of whom were described as delegates plenipotentiaries, as well as two technical delegates (Messrs. James Brown Scott and Charles Henry Butler) to represent the United States at the Second Hague Peace Conference in 1907. See Final Act of Oct. 18, 1907, Malloy's Treaties, II, 2369.

The commissioning of a special representative to attend an international conference, take part in its proceedings and even sign an international convention resulting from its deliberations, does not necessarily indicate that the delegate is regarded by the State appointing him as a diplomatic officer, or as one entitled, while engaged on his mission, to the privileges of such an officer. The view of his own country respecting his status is to be derived from the form or language of his commission, and is likely to be reflected also in the description of himself embodied in the convention to which he attaches his signature. The representatives of the United States (Rear-Admiral Charles H. Stockton and Professor George G. Wilson) at the International Naval Conference of 1908 and 1909 were appointed delegates plenipotentiaries. Instructions of Mr. Root, Secy. of State, Nov. 21, 1908, Charles' Treaties, 327. The Declaration of London — the product of the Conference — described the several representatives who signed that document as "plenipotentiaries." *Id.*, 282. On the other hand, the representatives of the United States at the Fourth International Conference of American States at Buenos Aires in 1910, appeared to have been commissioned merely as "delegates." Instructions of Mr. Knox, Secy. of State, June 14, 1910, For. Rel. 1910, 14. In the preambles of the conventions adopted at the Conference, the several negotiators were described as "delegates", while the same individuals were described in relation to their signing the conventions, either as "plenipotentiaries", or as "plenipotentiaries and delegates." *Id.*, 50–56.

[2] See, for example, For. Rel. 1906, II, 1344–1347, concerning the special embassy sent by the United States to attend the celebration of the marriage of the King of Spain to Princess Victoria Eugenia of Battenberg, in May, 1906; Frederick Van Dyne, Our Foreign Service, 52–53.

[3] Address of Mr. Root as head of the Commission, at Petrograd, Official Bulletin, June 21, 1917, I, No. 36.

[4] Mr. Adee, Acting Secy. of State, to Señor Don Pedro y Zeledon, Sept. 24, 1889, MS. Notes to Costa Rica, II, 115, Moore, Dig., IV, 463, in reference to an autograph letter from the President of Costa Rica to the President of the United States, accrediting one Mr. Aragon as the delegate of

as agents. The Department of State has, however, expressed the opinion that such officials would come within the second class of public ministers described in the first rule of the Congress of Vienna as "envoys, ministers, or other persons accredited to sovereigns." [1]

The diplomatic representative of the United States in Egypt has long been designated as "agent and consul general." [2] Nor has the protection of Egypt by Great Britain served as yet to cause the United States to relinquish diplomatic representation or to change the title of its officer.

f

§ 416. **Non-Diplomatic Missions.**

The United States has on several occasions sent representatives abroad upon missions in which the service involved called for the exercise of no diplomatic functions. Such individuals have, accordingly, not been clothed with a diplomatic character.[3] This was true even with respect to the secret and confidential mission sent to Europe in 1861, by Secretary Seward, for the purpose of influencing sentiment in regard to the Civil War.[4] Commissions sent to investigate political conditions in foreign States have been similarly regarded.

In 1902, Mr. William H. Taft, Civil Governor of the Philippines, was commissioned by the Secretary of War to proceed to Rome, and there ascertain what authorities of the Roman Catholic Church were empowered to sell to the Government of the United States lands belonging to the religious orders in the Philippine Islands; and upon finding that the officers of the Church at Rome possessed such power, to endeavor to reach a basis of negotiation. The Secretary of War declared that the errand would "not be in any

Costa Rica to the Conference of American States, and respecting the request for the designation of a day for the formal presentation to the President by Mr. Aragon of his letter. See, also, Oppenheim, 2 ed., I, § 377.

[1] Mr. Evarts, Secy. of State, to Mr. Schuyler, June 28, 1880, MS. Inst. Roumania, I, 1, 5–6, Moore, Dig., IV, 444, concerning the appointment of Mr. Schuyler as diplomatic agent and consul-general of the United States to Roumania. Also documents in Moore, Dig., IV, 443–445.

Concerning the practical concession and subsequent cessation of the recognition by the United States of the representative capacity of Mr. John Hitz, in 1868, as political agent of the Swiss Confederation, see Moore, Dig., IV, 441–443, and documents there cited.

[2] Rev. Stat. § 1676, amended March 3, 1875, Chap. 153, 18 Stat. 483, U. S. Comp. Stat. 1918, § 3119.

[3] At times American diplomatic officers have been burdened with the performance of non-diplomatic duties. Such officers while so employed have not ceased to retain their diplomatic character.

[4] Moore, Dig., IV, 446–447, and documents there cited.

sense or degree diplomatic in its nature", but rather "purely a business matter of negotiation."[1] Governor Taft was successful in his mission.

It is not believed that commissioners appointed to fulfill judicial functions through service on mixed claims commissions, joint commissions or courts of arbitration are to be regarded as deriving from their offices a diplomatic character.[2] According to Article XLVI of the Hague Convention of 1907, for the Pacific Settlement

[1] The statement in the text is based upon that contained in Moore, Dig. IV, 447–448, in which the facts stated are taken from a paper by Hon. Simeon E. Baldwin, in the *Yale Law Journal* for Nov. 1902, xii, 1.

Self-constituted Missions. The United States has strongly condemned, and by Act of Congress declared to be illegal, self-constituted missions. Act of Jan. 30, 1799. 1 Stat. 613, reproduced in § 5, Chap. 321. 35 Stat. 1088. Rev. Stat. § 5335. By the terms of this Act every citizen of the United States, wheresoever residing, who, without the consent of the Government, "directly or indirectly commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States", and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, who counsels, advises or assists in any such correspondence with such intent, subjects himself to fine and imprisonment. Respecting the Act see Moore, Dig., IV, 448–450, and documents there cited, with reference especially to the mission of Dr. George Logan in 1798; also Lindell T. Bates, Unauthorized Diplomatic Intercourse by American Citizens with Foreign Powers as a Criminal Offense under the Laws of the United States, New York, 1915; Charles Warren, History of Laws Prohibiting Correspondence with a Foreign Government and Acceptance of a Commission, 1917, Senate Doc. No. 696, 64 Cong., 2 Sess.

According to Title VIII, of the so-called Espionage Act of June 15, 1917, 40 Stat. 226, § 1, it is rendered a criminal offense for any person, in relation to any dispute or controversy between a foreign government and the United States, willfully and knowingly to make any untrue statement, either orally or in writing, under oath before any persons authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the Government of the United States, or of any branch thereof, to the injury of the United States. § 3 of the same Title declares that "Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State," shall be subjected to punishment.

[2] Mr. Monroe, Secy. of State, to Mr. Harris, Chargé d'Affaires at St. Petersburg, July 31, 1816, MS. Inst. United States Ministers, VIII, 89, Moore, Dig., IV, 428. Also Moore, Arbitrations, 345–349, respecting the question as to the immunities claimed in 1796 by Messrs. Gore and Pinkney, American commissioners under Art. VII, of the Jay Treaty with Great Britain of Nov. 19, 1794.

Mexico invested its commissioners serving on the Mixed Claims Commission under the convention with the United States of April 11, 1839, Malloy's Treaties, I, 1101, with a diplomatic character. "By their respective commissions each of them was appointed 'a plenipotentiary of the Mexican Republic' as well as a commissioner." Moore, Arbitrations, 1220.

of International Disputes, it is provided that members of a tribunal selected from the Permanent Court shall, "in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities." [1] Such a provision is for the purpose both of safeguarding a judicial officer from interference in the performance of his duties, and of enhancing respect for the office which he holds. It purports to confer upon an arbitrator certain rights possessed by a public minister without suggesting that the former is in any sense a diplomatic representative of the State appointing him, or that he is engaged in any diplomatic service in its behalf.

It must be clear that a general agreement to clothe an administrative officer with diplomatic privileges and immunities is not decisive that the individual is regarded as possessed of a diplomatic character.[2]

g

§ 417. Foreign Diplomatic Missions in the United States.

Following the outbreak of The World War, and notably after the participation by the United States therein as a belligerent, foreign diplomatic missions at Washington were enlarged not only in personnel, but also in the functions entrusted to the officials accredited. Thus, Lord Reading presented credentials as British High Commissioner, as well as Ambassador Extraordinary and Plenipotentiary.[3] The British Government, moreover, found it expedient to accredit also an officer with the rank of Minister Plenipotentiary as an aide to the Ambassador.[4] Attached to certain embassies were also special missions for financial or other purposes and headed by an officer of specified diplomatic rank, and given a particular designation such as "Financial Commissioner General." [5] These special supplementary missions attached

[1] Malloy's Treaties, II, 2236.

[2] According to Art. VII of the Covenant of the League of Nations, "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

[3] Official Bulletin, Feb. 14, 1918, No. 234, p. 5.

[4] Thus in October, 1919, Sir William Tyrrell was appointed Minister Plenipotentiary, on the staff of Viscount Grey, the Ambassador. It may be observed that other States were not reluctant to pursue, upon occasion, a similar course, especially where it was deemed wise to attach a special mission of importance to an embassy.

Thus in 1919, the Italian Government supplemented its Embassy at Washington with a special mission headed by an officer with the rank of Envoy Extraordinary and Minister Plenipotentiary, and designated as "Financial Commissioner General", and whose headquarters were established at New York. Diplomatic List, January, 1920.

to permanent embassies or legations doubtless possessed an essentially diplomatic character, although the functions of the individuals composing them were in large degree of a commercial character, pertaining to the purchase of supplies and war material, or to the negotiation of loans and the extension of credit.

TITLE C

BEGINNING AND END OF MISSION

1

§ 418. Appointments.

"The power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government." [1]

The President has, on numerous occasions, without the advice or consent of the Senate, employed such agencies as he has seen fit, for the negotiation of treaties or the making of investigations.[2] The names of the plenipotentiaries to adjust the existing controversies with France in 1799, and to conclude a treaty of peace

[1] The language quoted is that of Mr. Cushing, Attorney-General, May 25, 1855, in an exhaustive opinion respecting ambassadors and other public ministers of the United States, 7 Ops. Attys.-Gen. 186, 193. See, also, statement in Moore, Dig., IV, 451.

[2] Declared Mr. Sherman, Chairman of the Senate Committee on Foreign Relations, in the course of a debate upon a treaty concluded with Great Britain Feb. 15, 1888, by representatives appointed by the President without the advice and consent of the Senate: "The President of the United States has the power to propose treaties, subject to ratification by the Senate, and he may use such agencies as he chooses to employ, except that he cannot take any money from the Treasury to pay those agents without an appropriation by law. He can use such instruments as he pleases. . . . In my judgment, he has a right to use such means as are necessary to bring about any treaty." Congressional Record, Aug. 7, 1888, pp. 7285, 7287, Moore, Dig., IV, 455–456. For the report of the Senate Committee on Foreign Relations adverse to the treaty, see Reports of Senate Committee on Foreign Relations, VI, 259. For a minority report sanctioning the method of negotiating the treaty, *id.*, VI, 286, 332–333.

In 1913 President Wilson sent Mr. John Lind, formerly Governor of Minnesota, as his "personal spokesman and representative" to Mexico to negotiate with parties exercising authority in that country. Address of President Wilson to the Congress Aug. 27, 1913, *Am. J.*, VII, Supp., 279, 281.

See list of instances of appointments in Moore, Dig., IV, 452–457, indicating the discussion that has at times arisen respecting the constitutionality of executive appointments lacking Senatorial approval. Also E. S. Corwin, The President's Control of Foreign Relations, 49–70.

with Great Britain to terminate the War of 1812, were submitted to the Senate for its approval.[1] It does not appear that President Polk pursued such a course in appointing Mr. Trist, to negotiate a treaty of peace with Mexico.[2] The commissioners plenipotentiary chosen by President McKinley to negotiate a treaty of peace with Spain in 1898,[3] and likewise those selected by President Wilson in 1918, to conclude such a treaty with Germany, were appointed without the approval of the Senate.

It seems to be the accepted view that the provisions of the Constitution forbid the permanent appointment of an individual to the regular diplomatic service of the United States without the approval of the Senate.[4]

2

§ 419. Reciprocity of Treatment.

As a general rule, no government sends to, or at least continues in, another country a minister of a higher grade than that country may reciprocate.[5]

An Act of Congress of March 1, 1893, authorized the President when advised that any foreign government was or was about to be represented in the United States by an ambassador, envoy

[1] United States Peace Commissions, statement showing all commissioners appointed by the President to negotiate terms of peace upon the conclusion of the various wars in which the United States has been engaged, 1775–1898 Senate Doc. No. 311, 65 Cong., 3 Sess.

[2] *Id.*, where it is declared that the commission of Mr. Trist does not appear in the Senate Executive Journal.

Concerning the secrecy attending Mr. Trist's appointment, see Polk's Diary, II, 465–467, quoted in Geo. L. Rives, United States and Mexico, II, 423–424.

[3] The commissions of these plenipotentiaries were issued Sept. 13, 1898, when the Senate was not in session. See, also, S. B. Crandall, Treaties, Their Making and Enforcement, 2 ed., 1916, §§ 37–38.

[4] Constitution, Art. II, Section 2, paragraph 2, where it is provided that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls."

This provision is not regarded as forbidding a recess appointment when the Senate is not in session, enabling the appointee to act temporarily, pending his nomination and confirmation when the Senate convenes.

[5] The language of the text is that of Mr. Marcy, Secy. of State, to Mr. [illegible] Chairman of the Committee on [illegible] Affairs [illegible]

various reasons it seems to be proper to leave it to the President to determine the cases in which exceptions ought to be made. There are not sufficient advantages in having ministers of the highest grade accredited to all governments — the most inconsiderable as well as the most important — to justify a departure from a long prevalent and common usage, with many good reasons to sustain it."

extraordinary, minister plenipotentiary, minister resident, special envoy, or chargé d'affaires, to direct that the representative of the United States to such government should have the same designation.[1] Shortly thereafter, Great Britain, France, Italy and Germany conferred upon their respective representatives at Washington, the rank and title of ambassador. President Cleveland responded by elevating the representatives of the United States accredited to each of those countries to the same grade.[2] A like elevation of mission reciprocally followed with respect to certain other States. The Act of 1893, was however, repealed in 1909, by an enactment declaring that thereafter no new ambassadorship should be created unless the same should be provided for by act of Congress.[3] Since that time the Congress has, nevertheless, raised the rank of certain missions of the United States to that of the highest grade.[4]

3

CREDENTIALS AND RECEPTION

a

§ 420. Letters of Credence.

Upon arrival at his post, it becomes the duty of a diplomatic representative of the United States to seek, through the actual incumbent of the mission, an informal conference with the minister for foreign affairs or with such other officer of the government to which he is accredited as may be found authorized to act in the premises, and to arrange with him for an official reception. The newly arrived representative should also, in his own name, address a formal note to the minister for foreign affairs, communicating the fact of his appointment and rank, and requesting the designation of a time and place for the presentation of his letter of credence.[5]

Should the representative by reason of his grade bear a letter of credence signed by the President and addressed to the chief

[1] 27 Stat. 496.

[2] President Cleveland, Annual Message, Dec. 4, 1893, For. Rel. 1893, xii, Moore, Dig., IV, 739. Respecting the appointment of the first British Ambassador to the United States, Sir Julian Pauncefote, and of the first American Ambassador to Great Britain, Mr. Thomas F. Bayard, see For. Rel. 1893, 333, 334, and 336.

[3] Act of March 2, 1909, Chap. 235, 35 Stat. 672.

[4] As a recent instance, see Act of March 4, 1919, Chap. 123, making appropriation for the salary of an ambassador extraordinary and plenipotentiary to Peru, 40 Stat. 1325.

[5] Instructions to Diplomatic Officers of the United States (1897), § 7.

of the government, the representative should, upon asking an audience for the purpose of presenting the original letter in person, communicate to the minister for foreign affairs the "open office copy" accompanying the original instructions. The representative is instructed by the Department of State to prepare and retain in the archives of his mission a copy of his letter of credence.[1]

Upon the occasion of presenting ceremonial letters of credence or of recall to the head of the government, it is usual at most capitals for the retiring or incoming diplomatic representative of the United States to make a brief address pertinent to the occasion, to be written and spoken in English. Before the day fixed for his audience or reception or of leave-taking, it is said to be the duty of the representative to furnish the minister for foreign affairs with a copy of the remarks proposed, in order that a suitable reply thereto may be prepared. It is required that a copy of the address and of the reply be sent to the Department of State.[2]

It is the practice of the United States to forward new letters of credence accrediting the minister to the new sovereign or head of the State in case of a change thereof.[3] This is not done, however, in the event of the mere change of the title of the head of the State.[4]

b

§ 421. End of Mission.

The processes whereby a diplomatic mission is ended are distinct from the causes which may set them in operation. The former rather than the latter are here observed.

[1] Instructions to Diplomatic Officers of the United States (1897), § 8. If the diplomatic representative of the United States be of the rank of chargé d'affaires, bearing a letter of credence addressed to the minister for foreign affairs, the former is instructed, upon addressing to the latter the formal note relative to the fact of appointment and rank and respecting the opportunity for the presentation of the letter of credence, to communicate to the minister the office copy of that letter, and to await his pleasure as to receiving the original in a personal interview. *Id.*, § 9.

[2] *Id.*, §10. The text of §§ 7–10 is contained in Moore, Dig., IV, 461.

See, for example, remarks of Mr. Boris Bakhmeteff, upon the presentation of his credentials as Russian Ambassador, July 5, 1917. Official Bulletin, July 6, 1917, I, No. 48. Concerning letters of credence, see Oppenheim, 2 ed., I, 447.

Respecting the presentation of an envoy's credentials when addressed to the President of the United States, see Mr. Bayard, Secy. of State, to Mr. Varas, Feb. 7, 1889, MS. Notes to Chile, VI, 361, Moore, Dig., IV, 467.

[3] Mr. Fish, Secy. of State, to Gen. Schenck, Minister to Great Britain, No. 719, April 27, 1875, MS. Inst. Great Britain, XXIV, 59, Moore, Dig., IV, 462.

[4] Mr. Sherman, Secy. of State, to Mr. Allen, Chargé d'Affaires, Nov. 30, 1897, For. Rel. 1898, 485, Moore, Dig., IV, 463.

The announcement by a government, for whatsoever reason, that the office of a foreign minister is at an end,[1] or of a refusal to hold further official intercourse with him, terminates his mission.[2] According to existing practice in such cases, the actual termination of the diplomatic function of the minister by the State to which he is accredited, is accomplished by the delivery to him of his passports.[3]

The death of a minister puts an end to his mission;[4] likewise, the loss by a State of the power and right to deal with diplomatic representatives, by reason, for example, of its very extinction,[5]

[1] Mr. Knox, Secy. of State, in a communication to the Nicaraguan Chargé d'Affaires, Dec. 1, 1909, respecting the revolution then in progress in Nicaragua, and announcing the unwillingness of the President to maintain thereafter regular diplomatic relations with the Government of President Zelaya, said: "From the foregoing it will be apparent to you that your office of chargé d'affaires is at an end. I have the honor to inclose your passport, for use in case you desire to leave this country. I would add at the same time that, although your diplomatic quality is terminated, I shall be happy to receive you, as I shall be happy to receive the representative of the revolution, each as the unofficial channel of communication between the Government of the United States and the *de facto* authorities to whom I look for the protection of American interests pending the establishment in Nicaragua of a Government with which the United States can maintain diplomatic relations." For. Rel. 1909, 455, 457.

On Aug. 4, 1914, M. Davignon, Belgian Minister for Foreign Affairs, wrote to Herr von Below Saleske, German Minister: "I have the honour to inform your Excellency that from today the Belgian Government are unable to recognize your diplomatic status and cease to have official relations with you. Your Excellency will find enclosed the passports necessary for your departure with the staff of the legation." Diplomatic Correspondence Respecting the War published by the Belgian Government. Misc. No. 12, 1914, Cd. 7627, p. 28.

[2] See, for example, Mr. Bayard, Secy. of State, to Lord Sackville, the British Minister, Oct. 30, 1888, For. Rel. 1888, II, 1672, Moore, Dig., IV, 537; also Dr. Paúl, Venezuelan Minister for Foreign Affairs, to Mr. de Reus, Minister Resident of the Netherlands, July 20, 1908, For. Rel. 1909, 631.

[3] Thus, early on the morning of April 21, 1898, Mr. Woodford, American Minister at Madrid, was notified officially by the Spanish Minister of State that diplomatic relations with the United States had been severed, "all official communication between their respective representatives ceasing." Thereupon Mr. Woodford was obliged to write to the Minister of State requesting his passports and a safe conduct to the French frontier. For. Rel. 1898, 767.

"Letters of safe conduct, commonly called passports, are given to foreign ministers traveling in or departing from the United States." G. Hunt, The American Passport, 35, Moore, Dig., III, 1002.

See Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 18, 1915, respecting the obtaining of safe conducts for the German Military and Naval Attachés who had been recalled, American White Book, European War, III, 327.

[4] Respecting the death of Dr. Azpíroz, Mexican Ambassador, in 1905, and the removal of his remains to Mexico on an American warship, see For. Rel. 1905, 654–655.

[5] See abstract in Moore, Dig., I, 128, of an instruction of Feb. 27, 1795, of Mr. Randolph, Secy. of State, to Mr. Adams, Minister to the Netherlands, MS. Inst. to U. S. Ministers, II, 323, 324, regarding the contingency should the United Netherlands become a dependency of France.

or of the transfer of the control of its foreign affairs to another State.[1]

The change of a head of a State, or the change of its government, is not believed to terminate a foreign mission. The utmost consequence of either event is the suspension of the functions of the minister until the presentation of new letters of credence.[2]

A State may at will put an end to the mission of its own minister, by recalling him, or by removing him or permitting his resignation from its service. The Instructions to the Diplomatic Officers of the United States declare:

> A recall is usually accomplished at the pleasure of the President during a session of the Senate, by sending to that body the nomination of the officer's successor. Upon the confirmation and commission of his successor, the original incumbent's official functions cease. He is, however, expected to remain at his post until duly relieved. If circumstances require otherwise, the case must be governed by the special instructions of the Secretary of State.
>
> In any case, a diplomatic officer's official functions do not cease until he has received notification of the appointment of his successor, either by specific instruction from the Department of State or by the exhibition of his successor's commission. A diplomatic officer may be recalled while on leave of absence and his successor appointed as above. In such case, his incumbency, and with it his leave of absence, ceases on the receipt by him of official notification of the fact.[3]

When the retiring representative is, like his successor, of the grade of ambassador extraordinary and plenipotentiary, envoy extraordinary and minister plenipotentiary, or minister resident, it is said to be customary for him to present his letter of recall in

[1] For. Rel. 1905, 612–616, 631–634, respecting the assumption of supervision by Japan in 1905, over Korean foreign and administrative affairs, and the withdrawal of the American Legation from Korea.

[2] Opinion of Mr. Cushing, Atty.-Gen., 7 Ops. Attys.-Gen., 582, Moore, Dig., IV, 472. Also Agency of Canadian Car & F. Co. *v.* Amer. Can Co., 253 Fed. 152.

[3] Instructions to Diplomatic Officers of the United States (1897), §§ 278–280.

"Letters of credence to permanent ambassadors are now usually given without time limit; but when there is time specified the mission terminates at that time.

"The mission of diplomatic representatives appointed for special purposes usually terminates with the performance of the functions with which they were entrusted. . . .

"When the grade of a diplomatic agent in a State is changed, he presents his letter of recall in his original capacity, which terminated that mission, though he may at the same time present his letter of credence in his new capacity." G. G. Wilson, Int. Law, 179.

the same audience in which his successor presents his letter of credence, unless for some sufficient cause he should be obliged to take formal leave and present his letter of recall before the presentation of his successor.[1] It may happen, however, that the retiring diplomatic representative does not receive his letter of recall in season to present it before his departure. In such cases his successor, or, if need be (after receiving special instructions to that effect), the chargé d'affaires *ad interim*, when there is one, delivers the letter of recall in such manner as is indicated to him by the minister for foreign affairs.[2]

An American diplomatic officer may resign at pleasure from the service of his country.[3]

Upon the severing of diplomatic relations, a minister is commonly instructed to demand, simultaneously, his passports. He may himself, without instructions, demand them, in case the treatment accorded him is such as to render imperative, in his judgment, the ending of his mission.[4] Whether such demand is the means employed by the State of the minister to announce its determination to sever diplomatic relations, or is the consequence of a severance already effected, or is merely the process whereby the minister seeks to put an end to his mission, the diplomatic functions of the officer are not believed to be necessarily terminated or rendered inoperative until the receipt by him of the documents requested.[5]

[1] Instruction to Diplomatic Officers of the United States (1897), § 11.

That the functions of a minister of the United States at his post are not terminated by the appointment of a successor until the latter enters upon his duties, see opinion of Mr. Akerman, Attorney-General, 13 Ops. Attys.-Gen., 300, Moore, Dig., IV, 471.

The departure of Mr. Herrick, the American Ambassador to France, November, 1914, without presenting his letter of recall to the President of the French Republic at Bordeaux, was said to be justified on grounds of expediency arising from the exigencies of the war then in progress.

[2] Instructions to Diplomatic Officers of the United States (1897), § 12.

[3] Respecting the requirements of the United States as to the taking effect of the resignation of a diplomatic officer, see Instructions to Diplomatic Officers of the United States (1897), §§ 272–275, Moore, Dig., IV, 470.

[4] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 8, 1856, MS. Inst. Austria, I, 117, Moore, Dig., IV, 565.

[5] Thus it is believed that the mission of Señor Polo de Bernabé, the Spanish Minister at Washington, who requested his passports of Secretary Sherman during the forenoon of April 20, 1898, was not ended until the latter, pursuant to the request, delivered those documents to the Minister. For. Rel. 1898, 765.

See, also, Sir M. de Bunsen, British Ambassador in Vienna, to Sir Edward Grey, Secy. for Foreign Affairs, Sept. 1, 1914, indicating the relations of the former with the Austro-Hungarian Ministry of Foreign Affairs, after his request for passports, Aug. 13, 1914, and prior to their delivery on the following day. Misc. No. 10 (1914), Cd. 7596.

Mr. Sleeper, American Chargé in Caracas, pursuant to instructions and

It may be observed that the communication of Secretary Lansing to the German Ambassador on February 3, 1917, informing the latter that all diplomatic relations between the United States and the German Empire were severed, announced the delivery also to the Ambassador of his passports.[1]

4

QUESTION OF PERSONAL ACCEPTABILITY

a

§ 422. A Minister Must Be Personally Acceptable. Refusal to Receive.

It is a general rule as widely observed to-day as in 1792, when it was enunciated as such by Mr. Jefferson, that "no nation has a right to keep an agent within the limits of another without the consent of that other."[2] While the consent to the reception of a diplomatic representative from a friendly State respecting the *de jure* government of which no question arises, will not at the present time be withheld,[3] the State to which he is accredited, may, upon inquiry, withhold assurance of the personal acceptability

incidental to the severing of diplomatic relations with Venezuela, requested his passports and a safe conduct, June 20, 1908. In response, Dr. Paúl, Venezuelan Minister for Foreign Affairs, replied on the same day: "As it is your honor's Government which has placed an end to your diplomatic functions in this country and as the Government of Venezuela has no cause for complaint respecting you personally, this Government will preserve you in the enjoyment of your diplomatic immunities and prerogatives until your embarkation in Puerto Cabello on the steamer *Marietta*. Not only for the reason above mentioned, that it is not the Government of Venezuela which bids you leave, but also as our actual situation with the United States is not that of war, in which case it would be proper to issue a safe conduct to the diplomatic agent crossing the territory, my Government does not consider it necessary or fitting to send it to you for your journey to Puerto Cabello, passing as you do through civilized and cultured towns which know how to respect those prerogatives and immunities." By this statement Dr. Paúl disposed of the request of Mr. Sleeper for his passports as well as a safe conduct. For. Rel. 1908, 822 and 823.

[1] Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador, Feb. 3, 1917, American White Book, European War, IV, 407, 409. Also Mr. Grew, American Chargé d'Affaires, to Mr. Lansing, Secy. of State, April 8, 1917, with reference to the action of the Austro-Hungarian Ministry for Foreign Affairs, announcing to the former the severance of diplomatic relations between the United States and Austria-Hungary, and giving to him simultaneously his passports. *Id.*, IV, 445.

[2] Communication to Mr. Carmichael, Oct. 14, 1792, MS. Inst. Ministers, I, 201. Moore, Dig., IV, 473.

[3] *Compare*, however, the treatment accorded the American envoys to France in 1798, indicated in statement in Moore, Dig., IV, 475–477, and documents there cited.

of the particular individual chosen for the post.[1] In such event, it becomes impossible for him to discharge the duties of his office with advantage to his country.[2] As his personal acceptability is indispensable to the success of his mission, a minister should not be pressed upon a State to which he is *persona non grata*, even though it does not formally decline to receive him.[3] If for any reason there is a refusal to receive him, his own State is obliged to acquiesce.[4]

b

Request for Recall. Dismissal

(1)

§ 423. The Principle Involved.

A State has the right to demand the recall of a foreign minister who, for any reason, has become *persona non grata*.[5] A request suggesting such a fact serves in itself to impair his usefulness, and renders, therefore, acquiescence expedient as well as imperative. A State should not, and the United States does not, exercise this right except for cause, when, for example, it has reason to believe that the conduct of the minister has been gravely offensive.[6] While it spares no pains to assure itself of the connection

[1] Mr. J. C. B. Davis, Acting Secy. of State, to Mr. Rublee, Chargé d'Affaires to Switzerland, No. 116, July 29, 1873, MS. Switzerland, I, 303, Moore, Dig., IV, 475.

[2] Mr. Monroe, Secy. of State, to Mr. Phillips, Oct. 26, 1816, 16 MS. Dom. Let. 340, Moore, Dig., IV, 473.

[3] The United States appears to be no longer reluctant to ascertain the disposition of a foreign government towards an individual to be accredited to it as ambassador.

[4] Clemente Case referred to by Mr. Adams, Secy. of State, to Mr. Thompson, Secy. of Navy, May 20, 1819, 17 MS. Dom. Let. 304, Moore, Dig., IV, 479; see, also, Keiley Case in 1885, and correspondence relative thereto in For. Rel. 1885, abstracted in Moore, Dig., IV, 480–484.

[5] Mr. Van Buren, Secy. of State, to Mr. Poinsett, Minister to Mexico, Oct. 16 and 17, 1829, MS. Inst. Am. States, XIV, 141, 148, Moore, Dig., IV, 492; Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, No. 110, Nov. 16, 1871, respecting the case of Mr. Catacazy, Russian Minister, at Washington, S. Ex. Doc. 5, 42 Cong., 2 Sess., 12, Moore, Dig., IV, 502.

Declared Mr. Everett, Secy. of State, to Mr. Marcoleta, Nicaraguan Minister, Dec. 30, 1852, "the President can not consent that any condition whatever should be attached to the compliance of the Nicaraguan Government with a request warranted by the most familiar principles of the public law and the practice of civilized states. He has therefore directed Mr. Kerr to renew the request for your recall and the appointment of another minister, and in the meantime I am instructed to inform you that no communication can hereafter be received from you as the Nicaraguan envoy." MS. Notes to Central America, I, 37, Moore, Dig., IV, 498.

[6] Numerous instances are given in documents contained in Moore, Dig., IV, 484–508.

of the officer with the conduct deemed reprehensible and charged against him,[1] it is not disposed to invite diplomatic discussion respecting the sufficiency of the reasons for requesting his recall.[2] The United States asserts that the reasonableness of such a request depends solely upon the judgment of the offended sovereign as to the culpability of the minister.[3]

On several occasions the United States has dismissed foreign diplomatic agents by formally declining to hold further intercourse with them.[4] Dismissal has usually been the consequence of failure on the part of the government accrediting the minister to relieve the situation by acceding promptly to the request for recall.[5] So long as personal impropriety of conduct rather than the execution of offensive instructions has been the cause of dismissal, the United States has been unwilling to admit that such summary procedure should be regarded as tending to weaken the friendly relations between the States concerned.[6]

[1] See, for example, Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, Feb. 21, 1895, relative to the case of Mr. Thurston, Hawaiian Minister at Washington, For. Rel. 1895, II, 876; also Mr. Sherman, Secy. of State, to Mr. Woodford, Minister to Spain, Feb. 23, 1898, respecting the case of Señor de Lôme, Spanish Minister at Washington, For. Rel. 1898, 1018.

[2] See documents in the Marcoleta Case, Moore, Dig., IV, 497–499; also in the Segur Case, *id.*, IV, 500; Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, No. 110, Nov. 16, 1871, in the Catacazy Case, S. Ex. Doc. 5, 42 Cong., 2 Sess., 12, Moore, Dig., IV, 502.

[3] Mr. Phelps, Minister to Great Britain, to Lord Salisbury, Secy. for Foreign Affairs, Dec. 4, 1888, For. Rel. 1888, II, 1705–1706, Moore, Dig., IV, 544; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 1054, Jan. 30, 1889, *citing* Calvo, III, 213, 4 ed., 1888, For. Rel. 1888, II, 1718, Moore, Dig., IV, 539, 546.

[4] "Papers relating to the case of Lord Sackville", For. Rel. 1888, II, Supp., A, 1667–1729, Moore, Dig., IV, 536–548. See, also, earlier instances given in Moore, Dig., IV, 508–536.

[5] This was not true, however, in the case of Mr. F. J. Jackson, British Minister at Washington, whose language in a communication to Mr. Smith, Secy. of State, Nov. 4, 1809, contained a gross insinuation that the Government of the United States possessed a knowledge that the instructions of the Minister's predecessor did not authorize an arrangement concluded by him with the United States, after Mr. Jackson had been distinctly and explicitly advised that the Government did not possess such knowledge. Am. State Pap., For. Rel., III, 317–319, Moore, Dig., IV, 512.

[6] Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 1054, Jan. 30, 1889, For. Rel. 1888, II, 1718, Moore, Dig., IV, 539. In this despatch, Mr. Bayard distinguished the case in point, that of Lord Sackville, from Sir Henry Bulwer's sudden dismissal from the court of Madrid in 1848, declaring that "The objection of Spain was to the action of Lord Palmerston and presumptively of the ministry of Great Britain, of which Sir Henry Bulwer was but the channel of communication, and throughout the entire transaction Sir Henry Bulwer received the entire approval of his lordship. The offense of Lord Sackville consisted in personal misconduct wholly inconsistent with his official duty and relations, of which no suggestion of approval by his Government has yet been intimated."

See, also, Case of Mr. de Reus, Minister Resident of the Netherlands at

(2)

§ 424. Cases in the United States.

The conduct of foreign ministers deemed by the United States to justify a request for recall or dismissal is worthy of observation. M. Genet, the French Minister, whose recall was requested in 1793, sought to arouse hostility against England, violated the neutrality of the United States, "expressed contempt for the opinions of the President, and questioned his authority." [1] The Marquis of Yrujo, the Spanish Minister, whose recall was sought in 1805, was charged with an attempt to tamper with the press.[2] Mr. F. J. Jackson, the British Minister, dismissed in 1809, grossly insinuated, according to the Secretary of State, that the Government of the United States was guilty of bad faith.[3] M. Poussin, the French Minister, was dismissed in 1849, by reason of the tone of his communications, which were regarded as disrespectful towards the Government.[4] Mr. Marcoleta, the Nicaraguan Minister, with whom Secretary Everett in 1852 declined to hold further official communication, was accused of violating the confidence with which a certain proposition with reference to Costa Rica and Nicaragua was shown to him, and of making ostentatiously offensive efforts to defeat negotiations relative to the same matter.[5] His alleged activity in violating the neutrality laws of the United States led to the dismissal, in 1856, of Mr. Crampton, the British Minister.[6] Similar reasons, which were not, however, stated, caused Secretary Seward to request, in 1863, the recall of Mr. Segur, the Salvadorean Minister.[7] The complaint against Mr. Catacazy, the Russian Minister whose recall was requested in 1871, was due to his violent abuse and vilification of the owners of a claim preferred against Russia, his "publications abusive of

Caracas in 1908, For. Rel. 1909, 630–631; also Case of the Belgian and French Ministers at Caracas in 1895, mentioned in Moore, Dig., IV, 548–549.

Non-Interference in Politics, *infra*, § 452.

[1] Moore, Arbitrations, 4404–4412; Moore, Dig., IV, 485–487.

[2] Moore, Dig., IV, 508–511, and documents there cited.

[3] Am. State Pap., For. Rel., III, 299–323, especially Mr. Smith, Secy. of State, to Mr. Jackson, Nov. 8, 1809, *id.*, 318. See, also, Moore, Dig., IV, 511–530, and documents there cited.

[4] Statement in Moore, Dig., IV, 530–532, based on "MSS. Dept. of State."

[5] Mr. Everett, Secy. of State, to Mr. Kerr, Minister to Central America, No. 19, Jan. 5, 1853, MS. Inst. Am. St., XV, 152, Moore, Dig., IV, 498.

[6] Brit. and For. St. Pap., XLVII, 358–374, Moore, Dig., IV, 533–535. See, also, opinion of Mr. Cushing, Atty.-Gen., Aug. 9, 1855, 7 Ops. Attys.-Gen., 367, 388, Moore, Dig., IV, 535.

[7] Moore, Dig., IV, 500, and documents there cited.

the President", and his efforts to "obstruct, embarrass, and defeat" negotiations between the United States and Great Britain for the adjustment of their mutual differences.[1]

Lord Sackville, the British Minister, was dismissed in 1888, because of what President Cleveland described as "unpardonable conduct in his interference by advice and counsel with the suffrages of American citizens in the very crisis of the presidential election then near at hand, and also in his subsequent public declarations to justify his actions, superadding impugnment of the Executive and Senate."[2] The recall of Mr. Thurston, the Hawaiian Minister, in 1895, was due to his admitted activity in furnishing the press with matter criticizing the policy of the United States in regard to Hawaii.[3] It was proof of his authorship of a private letter published in a newspaper of New York, and derogatory to the character of President McKinley, that led to the request for the recall and resulted in the resignation of Señor de Lôme, the Spanish Minister, in 1898.[4]

In 1915, Mr. Dumba, the Austro-Hungarian Ambassador, admitted that he had proposed to his Government plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war. This proposal, embodied in a letter, had been entrusted by the Ambassador to an American citizen, traveling to Europe under an American passport. On September 8, 1915, Secretary Lansing instructed the American Ambassador at Vienna to inform the Austro-Hungarian Government that by reason of the admitted purpose and intent of Mr. Dumba to conspire to cripple the legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of international propriety in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary, the President deemed Mr. Dumba no longer acceptable to the Government of the United States as the Ambassador of His Imperial Majesty, and that that Government

[1] Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, Sept. 5, 1871, Senate Ex. Doc. No. 5, 42 Cong., 2 Sess., 5; Same to Same, Nov. 16, 1871, *id.*, 12, 17–18. See, also, statement of the case in Moore, Dig., IV, 501–503, and documents cited.

[2] President Cleveland, Annual Message, Dec. 3, 1888, For. Rel. 1888, I, xi, Moore, Dig., IV, 536, 537.

[3] Mr. Gresham, Secy. of State, to Mr. Willis, Minister to Hawaii, Feb. 21, 1895, For. Rel. 1895, II, 876, Moore, Dig., IV, 503.

[4] Mr. Sherman, Secy. of State, to Mr. Woodford, Minister to Spain, Feb. 23, 1898, For. Rel. 1898, 1018. See, also, Moore, Dig., IV, 507–508, and documents there cited.

had no alternative but to request Mr. Dumba's recall.[1] The Austro-Hungarian Government acquiesced.

On December 4, 1915, the German Government was requested to withdraw immediately from their official connection with its embassy at Washington, Captain Boy-Ed, Naval Attaché, and Captain von Papen, Military Attaché, because there had come to the knowledge of the Government of the United States facts and circumstances as to their connection "with the illegal and questionable acts of certain persons within the United States."[2] On December 10, the German Embassy announced the recall of both officers.[3]

c

§ 425. American Nationality as Obstacle to Reception.

The right of any government to decline to receive one of its own citizens as the representative of another government is generally recognized, and has been asserted on several occasions by the Government of the United States. While insisting upon the right in some instances, it has been waived without prejudice in others.[4] Thus in 1880, Señor Comacho, a naturalized American citizen, born in Venezuela, was received by the United States as Chargé d'Affaires of Venezuela.[5] This case must be deemed

[1] Communication of Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Sept. 8, 1915, American White Book, European War, III, 321.

See documents in Moore, Dig., IV, 488–497, in relation to early cases where the recall of American diplomatic officers was requested.

[2] Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 4, 1915, American White Book, European War, III, 325.

[3] See Mr. Lansing, Secy. of State, to the German Ambassador, Dec. 10, 1915, complaining of the failure of the German Government to comply promptly with the request made by the United States, *id.*, 325; also communication of same date, from the German Ambassador, announcing compliance, *id.*, 326.

Concerning the activities of these officers see House Report, Committee on For. Rel., accompanying text of proposed declaration of war, April, 1917, Cong. Rec., LV, No. 1, 319, 320–321, J. B. Scott, Survey of Int. Relations between the United States and Germany, 1917, 505–509.

[4] The language of the text is that of Mr. Adee, Acting Secy. of State, to Mr. Russell, Minister to Venezuela, June 28, 1907, *citing* Moore, Dig., IV, 549–553, For. Rel. 1907, II, 1092–1093. See, also, Mr. Hay, Secy. of State, to the President, Jan. 22, 1900, S. Doc. 113, 56 Cong., 1 Sess., Moore, Dig., IV, 553; Mr. Fish, Secy. of State, to Mr. Schieffelin, June 6, 1874, MS. Notes to Liberia, I, 21, Moore, Dig., IV, 551.

According to an announcement of Mr. Bacon, Acting Secy. of State, to the Diplomatic Corps at Washington, Jan. 27, 1906, it was said that future diplomatic lists would contain the names of only such officers and attachés of foreign missions in the United States as were not citizens thereof.

[5] Mr. Evarts, Secy. of State, to Mr. Baker, Minister to Venezuela, April 27, 1880, MS. Inst. Venezuela, III, 99, Moore, Dig., IV, 552; Same to Mr.

exceptional, however, and limited as a precedent to the special circumstances connected with it. The Department of State is not averse to having dealings with American citizens appointed by foreign States as plenipotentiaries for special service such as the negotiation of treaties.[1]

Comacho, April 20, 1880, MS. Notes to Venezuela, I, 197, Moore, Dig., IV, 552. See, also, Mr. Adee, Acting Secy. of State, to Mr. Russell, Minister to Venezuela, June 28, 1907, For. Rel. 1907, II, 1092, 1093, in which attention was called to the fact that notwithstanding Mr. Comacho's American naturalization, he was still regarded by Venezuela, in virtue of its laws, as a citizen of that State.

[1] Mr. Anson Burlingame, an American citizen, as envoy of China for the purpose of negotiating a treaty, was received by the President as a diplomatic representative in 1868, and with certain Chinese colleagues concluded a treaty with the United States the same year. Dip. Cor. 1868, I, 461–495, 601–604, Moore, Dig., IV, 550–551.

In 1902, Mr. Herbert W. Bowen, American Minister to Venezuela, was permitted by the United States to act as the representative of Venezuela in entering into negotiations for the adjustment of difficulties arising between that country and numerous other States, including the United States. Agreements with the United States concluded Feb. 7, 1903, and May 7, 1903, were signed at Washington by Mr. Bowen in behalf of Venezuela. Malloy's Treaties, II, 1870; also For. Rel. 1903, 788–805.

TITLE D

THE RIGHTS AND DUTIES OF MINISTERS

1

RIGHT TO PROTECTION

a

§ 426. Of Person and Reputation.

Respect for the State which he represents demands that a minister shall at all times enjoy the right to fulfill his diplomatic function without hindrance or molestation. To that end it is essential that his person be afforded complete protection.[1] Accordingly, the statutory law of the United States subjects to grave penalties any one who in any manner "offers violence to the person of a public minister, in violation of the law of nations."[2] Pro-

[1] Declared McKean, C. J., in Respublica *v.* De Longchamps: "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." 1 Dall. 111, 116, Moore, Dig., IV, 622.

See, also, President Fillmore, second Annual Message, Dec. 2, 1851, Richardson's Messages, V, 118; Ministers Recalled or Not Received, *infra*, § 439. See Charles Noble Gregory, "The Privileges of Ambassadors and Foreign Ministers", *Michigan Law Rev.*, III, 173.

[2] Rev. Stat. § 4062. On Jan. 6, 1915, one E. R. S. was indicted at Tacoma, Washington, for a violation of this statute, for having assaulted and offered violence to the person of Count von Bernstorff, the Imperial German Ambassador to the United States. To this indictment the defendant pleaded guilty, Jan. 15, 1915, and was sentenced without further proceedings. There was no written or published opinion in the case. For the facts concerning it, the author is indebted to Hon. Edward E. Cushman, U. S. District Judge, Western District of Washington, before whom the case arose. See, also, United States *v.* Ortega, 11 Wheat. 467.

See Arts. Ia and Ib of final protocol of agreement between China and the Powers, Sept. 7, 1901, respecting the appointment of Prince Tschun as Ambassador to convey to the Emperor of Germany an expression of regret for the assassination of Baron von Ketteler, the German Minister to China, in 1900, and the erection on the spot of the assassination of a commemorative monument worthy of the rank of the deceased, For. Rel. 1901, Append. 313, Moore, Dig., V, 518. Respecting the expiatory mission of Prince Tschun, see For. Rel. 1901, 187.

See For. Rel. 1912, 268–276, concerning an assault upon Mr. Gibson, American Chargé d'Affaires at Habana, Aug. 27, 1912, and the prosecution and conviction of the offender.

ceedings against the aggressor must be instituted on complaint under oath of the person assaulted, or of a witness to the assault.[1]

A foreign minister is entitled to the same degree of protection for his reputation as for his person, and for like reasons. Hence it behooves the State to which he is accredited to shield him from insult as well as personal violence, and to prosecute with vigor him who attempts to defame him.[2]

According to the existing law, whoever within the jurisdiction of the United States falsely assumes or pretends to be a diplomatic or consular (or other) official of a foreign government, duly accredited as such to the Government of the United States, with intent to defraud such Government or any person, and takes upon himself to act as such, or in such pretended character demands or obtains, or attempts to obtain from any person or from such foreign government or from any officer thereof, any money, paper, document or other thing of value, subjects himself to fine or imprisonment, or both.[3]

b

§ 427. Of Domicile and Property.

All the reasons which establish the independence and inviolability of the *person* of a minister, apply likewise to secure the immunities of his *house*. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the State and all other nations.[4]

An attack upon the house of a minister is equivalent to an attack upon his person.[5] Prior to or simultaneously with the outbreak of war, when the public mind is inflamed against a foreign State which is generally regarded as a probable enemy, it becomes necessary to take special precautions to guard the legation or embassy

[1] Mr. Frelinghuysen, Secy. of State, to Mr. Preston, Haitian Minister, July 10, 1883, MS. Notes to Haiti, I, 301, Moore, Dig., IV, 625.

[2] Opinion of Mr. Bradford, Atty.-Gen., 1 Ops. Attys.-Gen., 52, Moore, Dig., IV, 629; opinion of Mr. Lee, Atty.-Gen., 1 Ops. Attys.-Gen., 71, Moore, Dig., IV, 630; Count Vinci, Italian Chargé, to Mr. Hay, Secy. of State, June 20, 1899, For. Rel. 1899, 413, Moore, Dig., IV, 630.

[3] Act of June 15, 1917, Chap. 30, Title VIII, § 2, 40 Stat. 226.

[4] The language of the paragraph in the text is that of McKean, C. J., in Respublica v. De Longchamps, 1 Dall. 111, 117.

[5] United States v. Hand, 2 Wash. C. C. 435, Moore, Dig., IV, 627, respecting an attack upon the house of the Russian Chargé in Philadelphia in 1810, and the indictment of a participant for assault upon the Chargé. See, also, Mr. Madison, Secy. of State, to Governor McKean, May 11, 1802, 14 MS. Dom. Let. 18, Moore, Dig., IV, 627.

of that State from outrage. If it is subjected to violence, the duty of the territorial sovereign to make apology seems obvious.[1]

2

RIGHT OF OFFICIAL COMMUNICATION

a

§ 428. In General.

For the proper discharge of his duties and hence as a necessary incident of the right of legation, a diplomatic officer is entitled to correspond freely with his own government or with officials thereof in the State to which he is accredited.[2] To that end he may avail himself of the usual modes of communication, such as the telegraph,[3] or the mails or personal messengers.[4] Howsoever transmitted, his communications when so desired may be in cipher.[5] In time of war a belligerent State may, however, not unreasonably restrict the use of cipher by a foreign diplomatic officer to messages passing between his mission and his government.[6]

The Department of State has asserted that the right of correspondence should be available to an American diplomatic officer at his post in a State engaged in war to which the United States is not a party, and that, whether he is in a besieged place,[7] or in one

[1] Sir E. Goschen, British Ambassador in Berlin, to Sir Edward Grey, Secretary of State for Foreign Affairs, Aug. 8, 1914, with respect to the mob violence directed against the British Embassy at Berlin, Aug. 4, 1914, and indicating the assurances of regret expressed by Herr von Jagow, German Secretary for Foreign Affairs, at what had occurred. Misc. No. 8 (1914), Cd. 7445.

[2] Mr. Fish, Secy. of State, to Baron Gerolt, Nov. 21, 1870, For. Rel. 1870, 196, Moore, Dig., IV, 699; Mr. Bayard, Secy. of State, to Mr. Peralta, Salvadorean Minister, April 25, 1885, MS. Notes to Costa Rica, II, 34, Moore, Dig., IV, 701; Mr. Hay, Secy. of State, to Mr. Goodnow, Consul at Shanghai, telegram, Aug. 1, 1900, For. Rel. 1900, 260, Moore, Dig., IV, 703.

[3] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, May 6, 1899, For. Rel. 1899, 579, Moore, Dig., IV, 703.

[4] Declared Mr. Seward, Secy. of State, in a communication to Mr. Burton, Minister to Colombia, No. 1, May 29, 1861: "The right to send despatches of a minister, secured by the law of nations, certainly involves the right to designate the messenger and the inviolability of his person when executing the commission." MS. Inst. Colombia, XVI, 1, Moore, Dig., IV., 695.

[5] Mr. Fish, Secy. of State, to Mr. Bancroft, Minister to Prussia, No. 264, Nov. 11, 1870, For. Rel. 1870, 195, Moore, Dig., IV, 697.

[6] Mr. W. H. Page, American Ambassador to Great Britain, to Secy. of State, telegram, Aug. 27, 1914, American White Book, European War, II, 72; Same to Same, Dec. 29, 1914, *id.*, II, 86; Acting Secy. of State, to Mr. Reinsch, American Minister to China, telegram, Jan. 2, 1915, *id.*, II, 86.

[7] See discussion between the United States and the North German Union

rendered generally inaccessible by blockade.[1] A minister should, however, under such circumstances have unfailing regard for the safety of the State of his residence.[2] He should be scrupulous to ascertain that in the exercise of his rights, he is not also unwittingly opening a forbidden and unlawful channel of communication to outsiders.[3] Persistent abuse of his privileges would justify their curtailment.[4]

Incidental to the right of official communication between a State and its representatives abroad, is the right to demand the inviolability of official correspondence.[5] The United States, when itself a belligerent as well as when a neutral, has steadfastly urged recognition of this principle.[6] In November, 1914, the Department of State initiated a proposal for the establishment of uniform regulations for the transmission of correspondence of American diplomatic and consular officers in belligerent territory. The plan, which proved acceptable to Austria-Hungary as well as to certain other Powers then at war, provided in part that official correspondence under seal of office between the Department and such officers should not be molested.[7]

respecting the correspondence of Mr. Washburne, American Minister at Paris, during the siege of that city in 1870, Moore, Dig., IV, 696–699. See, also, For. Rel. 1900, 259–264, respecting communication with the American Minister at Peking during the siege of the legations in that city in 1900, Moore, Dig., IV, 703–704.

[1] Mr. Fish, Secy. of State, to Mr. Kirk, No. 3, June 17, 1869, MS. Inst. Argentine Republic, XV, 317, Moore, Dig., IV, 696.

[2] Mr. Seward, Secy. of State, to Mr. Burton, Minister to Colombia, No. 1, May 29, 1861, MS. Inst. Colombia, XVI, 1, Moore, Dig., IV, 695.

[3] See, for example, Count Bismarck to Mr. Washburne, American Minister at Paris, Jan. 28, 1871, For. Rel. 1871, 136, Moore, Dig., IV, 699.

[4] This was virtually admitted by Mr. Fish, Secy. of State, in a communication to Mr. Bancroft, Minister to Prussia, No. 264, Nov. 11, 1870, For. Rel. 1870, 195, Moore, Dig., IV, 697–698.

With respect to the impropriety of conduct on the part of the Swedish Legation at Buenos Aires in sending, in 1917, as its own official messages addressed to its own Government, secret despatches of the German Chargé d'Affaires at Buenos Aires for transmission to his Government, and pertaining to the ruthless policy of Germany as a belligerent with respect to submarine warfare, see David Jayne Hill, "The Luxburg Secret Correspondence", *Am. J.*, XII, 135.

[5] Mr. Seward, Secy. of State, to Lord Lyons, British Minister, April 5, 1862, Dip. Cor. 1862, 258, 259, Moore, Dig., IV, 712; Mr. Quincy, Acting Secy. of State, to Mr. Thompson, No. 56, March 25, 1893, For. Rel. 1893, 623; Mr. Gresham, Secy. of State, to Mr. Thompson, Minister to Turkey, No. 54, March 17, 1893, *id.*, 620, Moore, Dig., IV, 712.

[6] Instructions issued by the Secy. of the Navy, Aug. 18, 1862, to American Naval Officers, Moore, Dig., IV, 712. These instructions were attached as Appendix I to a communication of Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, American White Book, European War, III, 25, 38.

[7] Concerning the details of the arrangement, see Consuls, Correspondence with Governmental Agencies of the Consul's State, *infra*, § 468.

b

§ 429. Couriers and Bearers of Despatches.

A government, or its ministers abroad, may employ couriers or bearers of despatches for the transmission of official correspondence.[1] American diplomatic representatives are permitted to do so in case the mails are obstructed, or by reason of other urgent necessity.[2] Individuals so employed are declared to be privileged persons, as far as it is necessary for their particular service, whether in the State to which the diplomatic representative is accredited, or in the territories of a third State with which the government they serve is at peace.[3] They are immune from arrest.[4] Under normal circumstances the right of a diplomatic officer to choose a person to act as a bearer of despatches is doubtless unlimited.[5] In time of war, however, a diplomatic officer representing a belligerent power in a neutral State would subject himself to grave criticism should he employ as a secret bearer of official despatches through the lines of the enemy, a national of that State and one protected by its passport.[6]

3

MISCELLANEOUS PRIVILEGES

a

§ 430. Display of National Flag.

The right of a public minister to display the flag of his country from his official residence would probably not be challenged at

[1] Mr. Gresham, Secy. of State, to Mr. Thompson, telegram, April 1, 1893, For. Rel. 1893, 624, Moore, Dig., IV, 713; Mr. Bryan, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Nov. 25, 1914, American White Book, European War, II, 67.

[2] Instructions to Diplomatic Officers of the United States (1897), § 132. Also *id.*, §§ 130 and 131.

[3] *Id.*, § 57. § 133 declares that: "When a bearer of despatches is employed as above, a special passport may be given to him by the diplomatic representative, setting forth his name and the duty he is to perform. Such a passport is to be furnished without charge and is only good for the journey for which it is issued."

[4] Dana's Wheaton, § 243, Moore, Dig., IV, 713; Mr. Fish, Secy. of State, to Mr. Brent, Oct. 19, 1870, *citing* Calvo, 1868 ed., paragraph 240, page 350, For. Rel. 1870, 519, Moore, Dig., IV, 714; Oppenheim, 2 ed. I, § 405.

[5] Mr. Fish, Secy. of State, to Mr. Freyre, Dec. 17, 1870, MS. Notes to Peru, I, 411, in which it was said, "No appointment in a foreign country of a person as courier under arrest, or liable to arrest, would be approved by this Department, especially if such appointment was in any way intended to screen the appointee from his liabilities under the municipal law." Moore, Dig., IV, 715, 716.

[6] Mr. Lansing, Secy. of State, to Mr. Penfield, American Ambassador to

the present time by any enlightened State.[1] It has been declared by the Department of State that it is in most capitals customary to place an official shield above the principal entrance of the diplomatic representative's residence, or the offices of the mission, when these are separate from his residence, with a short flagstaff set above the shield, on which to display the flag of the United States on occasions of special ceremony. It is stated, however, that a mission "is not under the same necessity of displaying a coat of arms and raising a flag as a consulate." [2]

No local law purports to deter a foreign diplomatic officer from displaying at will the flag of his country in the territory of the United States.[3]

b

§ 431. Liberty of Worship.

That a foreign minister may within the precincts of his legation assert the right of worship for the benefit of himself, his staff and his fellow countrymen, irrespective of the contrasting views of the religious establishment of the State to which he is accredited, appears to be accepted doctrine.[4] It is important, however, that religious services should be conducted in such manner as not to offend the sensibilities of the local adherents of any differing persuasion.[5]

In a country such as the United States, where freedom of worship is safeguarded by the Constitution, the exercise of the right accorded a foreign diplomatic officer by the law of nations meets with no obstacle.[6]

Austria-Hungary, Sept. 8, 1915, relative to the case of Mr. Dumba, Austro-Hungarian Ambassador at Washington, whose recall was requested by the United States, American White Book, European War, III, 321.

[1] Display of Foreign Flags, *supra*, § 212.

[2] Instructions to Diplomatic Officers of the United States (1897), § 64.

It seems important to note that the communication of Mr. Knox, Secy. of State, to the Mexican Ambassador June 21, 1912, For. Rel. 1912, 903, had reference to the display of the American flag by American consular officers in Mexico.

[3] *Compare* Mr. Clay, Secy. of State, to Mr. Obregon, Mexican Minister, Oct. 24, 1827, MS. Notes to Foreign Legation III, 393, Moore, Dig. IV. 554.

[4] In the Printed Personal Instructions to Diplomatic Agents of the United States (1885), § 49, Moore, Dig., IV, 555, it was declared that "if any diplomatic agent should assert the right of worship, within his legation, for himself and those of his fellow-countrymen who profess the same faith as he does, he would be upheld, within the limits of the like privilege conceded in the country of his sojourn to other foreign legations." See, also, Religious Freedom. In General, *supra*, § 215.

[5] Mr. Seward, Secy. of State, to Mr. Crosby, Minister to Guatemala, June 19, 1862, MS. Inst. American States, XVI, 219, Moore, Dig., IV, 554. Also Art. X, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 242.

[6] First Amendment to the Constitution.

c

§ 432. Transit.

The United States asserts that according to the law of nations a diplomatic officer is entitled to a right of transit to his post, by sea,[1] or through the national domain, whether land [2] or water,[3] of a State other than that to which he is accredited. It is not contended that this right embraces one of sojourn in such State,[4] or that the territorial sovereign, especially if it be engaged in war, may not prescribe the route of transit.[5] Nor is it claimed that the officer while within the territory of a third State is entitled to such jurisdictional immunities as he may justly demand while within that of the State to which he is accredited.[6] It is declared that on the grounds of courtesy he is usually exempt from the payment of customs duties.[7]

While evidence is wanting that States generally have as yet agreed to yield their right of jurisdiction over diplomatic officers not accredited to them, it is not unreasonable to claim for such individuals freedom from petty annoyances, whether in the form of criminal prosecutions for minor offenses, or of civil suits of trivial importance.[8]

[1] Mr. Pickering, Secy. of State, to Mr. King, Minister to England, June 17, 1796, MS. Inst. United States Ministers, III, 178, Moore, Dig., IV, 559.

[2] See documents in Moore, Dig., IV, 557–558, concerning the Case of Mr. Soulé, American Minister to Spain, who, in 1854, was detained by France while in that country *en route* to his post. It may be observed that his detention was not due to any desire on the part of France to prevent an envoy of the United States from crossing French territory, but with a view to preventing the sojourn on French soil of one whose continued presence there was deemed objectionable. Declares Mr. Moore: "With regard to the action of the French Government in detaining Mr. Soulé, it should be explained that Mr. Soulé, who was a native of France and a naturalized citizen of the United States, was currently reported to have made speeches adverse to the Government of Louis Napoleon and to have held communication with some of its adversaries."

[3] Mr. Seward, Secy. of State, to Mr. Webb, No. 180, Sept. 23, 1860, MS. Inst. Brazil, XVI, 153, Moore, Dig., IV, 560.

[4] The United States made no such contention in the Soulé case.

[5] Declares Hall: "Even this meagre privilege (of transit) is qualified by a right, on the part of the State through which he travels, to prescribe a route and to require that his stay shall not be unnecessarily prolonged." Higgins' 7 ed., § 99.

[6] Instructions to Diplomatic Officers of the United States (1897), § 61.

[7] *Id.* Mr. Adee, Acting Secy. of State, to Mr. Clayton, Sept. 21, 1903, For. Rel. 1903, 664, where it was stated that the Secretary of Commerce and Labor had expressed opinion "that the action of administrative officers in collecting a head tax on account of the diplomatic and consular officers of foreign countries seeking admission into the United States was in error." In this case such a tax had been imposed upon a diplomatic officer of Japan returning to his country via El Paso and San Francisco, after a residence in Mexico as Chargé d'Affaires of Japan in that State.

[8] Hall, Higgins' 7 ed., § 99; Oppenheim, 2 ed., I, § 398, pp. 469–471. *Compare* Dana's Wheaton, §§ 244–247, Moore, Dig., IV, 556; also Wilson

4

JURISDICTIONAL IMMUNITIES

a

§ 433. Early Practices.

Long before the Christian era the idea prevailed that the person of an envoy sent by one ruler to another should be inviolable. Because Hanun, King of the Ammonites, treated with contempt and ridicule the messengers of David, King of Israel, the latter waged war upon the former and overcame him.[1] The Persians in the time of Xerxes were possessed of the same idea, as were also the Greeks.[2] The Roman law gave recognition to it. "An assault upon an ambassador or herald was a violation of the *jus gentium*."[3] Upon the murderer of such a person the Salic Law imposed a penalty, and likewise the codes of the Alamanni, the Saxons, the Frisians and the Lombards.[4]

Permanent diplomatic missions began to be established by the Italian States during the fifteenth century, and before its close, by France and other powers of western Europe.[5] It may have been the safety accorded the person of an ambassador which made those missions possible; for his work was oftentimes of a character

v. Blanco, 4 New York Supp. 714, Moore, Dig., IV, 557; Holbrook *v.* Henderson, 4 Sandf. 619, Moore, Dig., IV, 557. See, also, Henry Fort-Dumanoir, in *Clunet*, XXXV, 766–771, and in response thereto, L. A. Tosi-Bellucci, *Sulle Immunità Diplomatiche*, Rome, 1908. For a discussion of the views of both writers, see James Barclay, in *Am. J.*, III, 1048–1051.

[1] I Chron., XIX; II Samuel, X. See, also, T. A. Walker, Hist. Law of Nations, I, 34.

[2] Robert Ward, History of the Law of Nations, Dublin, 1795, 298; also Phillimore, II, § 146, *citing*, W. Wachsmuth, *Jus Gentium quale obtinuit apud Græcos*.

[3] T. A. Walker, Hist. Law of Nations, I, 45, *citing* T. Liv., IV, 17, 19, 32; VI, 19; IX, 10; XXI, 25; XXXIX, 25.

[4] David J. Hill, European Diplomacy, I, 39–40, *citing* Pertz, *Monumenta Germaniæ Historica; Lex Alamannorum*, XXX; *Lex Saxonum*, c. 7; *Lex Frisonum*, XVII, and Merkel's edition of *Lex Salica*, p. 96.

"The infidel was taught by his Koran the sacredness of embassies, though he sometimes interpreted the injunction as being applicable only to Mahometan nations [*citing* Miruss, s. 333; Merlin, Ministre Public, V, 3], and the Turk for a long time persisted in considering the European Ambassador as a tolerated spy in time of peace, and a hostage to be imprisoned at the breaking out of war. Lastly, it should be observed, that even during the Middle Ages of violence and lawlessness in Europe, it was the principle of the Roman law, which afterwards took deep root in Christendom, that an injury done to an Ambassador should be treated by the Sovereign of the wrongdoer as a crime against the State." Phillimore, II, §§ 150 and 151.

[5] David J. Hill, European Diplomacy, II, 153–154, 308–310. The same writer declares that: "Although permanent missions became practically universal before the close of the sixteenth century, the expression '*Corps Diplomatique*' did not come into use until about the middle of the eighteenth." *Id.*, II, 310, Note 1.

such as to imperil the life of one not specially protected. Influenced doubtless by the nature and theories of Venetian diplomacy of an earlier century, that of the sixteenth and seventeenth encouraged the fomentation of foreign conspiracy and rebellion through the instrumentality of public ministers. The question, therefore, frequently arose concerning the treatment to be accorded an ambassador who plotted against the life of the monarch to whom he was accredited, and whose very presence was a menace to the safety of the State. The early cases reveal a singular oneness of view.

John Leslie, Bishop of Ross, Ambassador of the deposed Mary, Queen of Scots, was, in 1571, found to have been an active participant in the plot which resulted in the execution of the Duke of Norfolk. Notwithstanding the opinion of eminent civilians, that according to the Roman law the Bishop might be punished, he was, nevertheless, merely banished from the Kingdom.[1] In 1584, Mendoza, the Spanish Ambassador at London, conspired to overthrow Queen Elizabeth. Her council followed the opinions of Albericus Gentilis, and of one Hottoman, who advised that an ambassador though a conspirator could not be lawfully put to death, but should be referred to his sovereign for punishment. Mendoza was accordingly compelled to depart the realm, while charges were preferred against him in Spain.[2] Three years later the assassination of the Queen was the object of a conspiracy in which L'Aubespine, the French Ambassador, was a participant. It is declared that Burleigh reproached him with the design, but never thought of trying him, and "bade him beware how he committed Treason any more."[3]

In the reign of Henry IV of France, De Zuniga, the Spanish Ambassador, plotted with others to carry off to Spain Mlle. D'Entragues and her son by Henry. The King, upon the discovery of the plot, would not permit the ambassador to be punished.[4]

[1] T. A. Walker, Hist., I, 176–179, *citing* Camden, Hist. of Elizabeth, II, 26 and 62. As to the misapplication of the Roman law upon which the civilians relied in declaring that the Bishop was subject to the jurisdiction of England, see Phillimore, II, § 148, *citing* Wicquefort, *L'Ambassadeur et ses Fonctions*, I, Chap. XXVII, also Ward, Hist., II, 312.

Declares Walker: "The English civilians were by no means alone in their view of the rights belonging by strict law to the local sovereign." (Hist., I, 179.) He adverts to the opinion of Henry IV of France, in Bruneau's Case, 1605, Hist. of Henry the Great, p. 318, and to the view of Coke, 4 Inst. 153, and to that of the King's Attorney in 1615, in the case of Roy *v.* Owen, 1 Rolle, 185.

[2] Robert Ward, Hist., II, 314, *citing* Camden, 296.

[3] *Id.*, II, 315, *citing* Camden, *ad an.* 1587.

[4] *Id.*, II. 315–316, *citing* Wicquefort, I. 392.

In 1603, one of the suite of the Duc de Sully, then Marquis of Rosny, Ambassador at London, killed an Englishman in the course of a quarrel. The Duc, assembling a council of Frenchmen, condemned his attaché to death, but surrendered him to the English authorities. King James I pardoned him.[1] In 1618, Alphonso de la Cueva, Marquis de Bedmar, the Spanish Ambassador to Venice, was shown to have entered into a conspiracy to burn the city, murder the nobles and overturn the government. Nevertheless, the Senate merely sent him to Milan, and requested his recall by the King of Spain.[2] In the reign of James I, the Spanish Ambassadors, Inoyosa and Colonna, announced to the King that the Duke of Buckingham sought, with the aid of Parliament, to imprison and dethrone him. It is said that "both the Court and the Parliament deemed this a scandalous libel, but knew not how to proceed." Upon the advice of Sir Robert Cotton, complaint was made to the King of Spain, declares Ward, and the Ambassadors were allowed to depart, but without the usual presents.[3]

§ 434. The Same.

The foregoing instances illustrate the significant fact that before the time of Grotius there had already developed usages which served on the one hand to exempt an ambassador from local jurisdiction, and on the other, to restrain him from the commission of crime.[4] Nations which had developed and accepted both cus-

[1] Robert Ward, 316, *citing* Mém. de Sull. II, 191, 192.

[2] *Id.*, II, 316–317, *citing* St. Real., *Conjur. des Esp. Contr. Ven.*

[3] *Id.*, II, 317–318, *citing* Cotton's Remains, and Wicquefort, I, 393. Ward mentions other later cases, among them that of De Bass, Minister of France to Cromwell, in 1654 (II, 319); that of the Spanish Ambassador in the reign of Charles II (II, 319); that of the English Ambassador at Constantinople in 1646 (II, 319–320); that of Don Pantaleon Sa, brother of the Portuguese Ambassador to England in the time of Cromwell (II, 322–328). Sa was subjected to the local jurisdiction. Declares Ward: "All, therefore, that can fairly be drawn from the precedent, as to the decision of the then existing law of England is, that the suite of an ambassador, if they committed murder, were liable to be tried for it by the courts of the country" (II, 323–324). Mention is also made of the case of Gyllenburg, Swedish Ambassador at London, who, in 1717, was charged with being a participant in a conspiracy against the country and the crown, was arrested, and his cabinet broken into and searched (II, 329–330, *citing* Tindal, Contin. of Rap., and Bynkershoek, *De for. Leg.*, c. 18).

See, also, Case of the Earl of Holdernesse, 1774, Phillimore, II, § 167, taken from Martens, C. C., II, App. 479; also case of Van Hoey, 1746, Phillimore, II, § 168, taken from Martens, C. C., I, 311.

[4] Grotius declared in his *De Jure Belli et Pacis*, published in 1625, that "by the common consent of nations" ambassadors are not bound by the civil law of the people among whom they live, "as being, by a certain fiction in the place of those who send them; and by a similar fiction, they are, as it

toms, acquiesced in the continuance of each. States yielded the right of jurisdiction because the proper exercise of his functions necessitated the complete independence of the public minister, which could not otherwise be assured. They retained, however, the right to prevent his violation of their laws because the requirements of self-defense left no alternative. This circumstance was not without its effect upon the conduct of diplomacy. The existing practice reveals generally a complete abandonment of the early theories. At the present time the functions of a minister are not deemed to be curtailed by his respect for the local law; and his usefulness to his own country is increasingly regarded as dependent upon his possession of a reputation unblemished by any imputation of hostility or unfriendliness towards the State to which he is accredited.[1]

b

§ 435. Exemption from Judicial Process.

A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and cannot be sued, arrested or punished by the law of that country.[2] The statutory law of the United States recognizes such immunity, rendering void the process whereby "the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached"; and it subjects to severe penalties him who sues out or executes such process.[3] Ignorance

were, extra-territorium." The fiction was employed merely to illustrate the situation in which an ambassador appeared to find himself, rather than the reason for the exemption to be accorded him. If such an individual was guilty of a serious crime tending to produce public disorder, Grotius declared that he should be sent to his monarch with a demand for punishment or surrender; and that if the ambassador used force, he might undoubtedly be killed, not in the way of punishment but in the way of natural defense, "*non per modum pœnæ, sed per modum naturalis defensionis.*" Whewell's Edition, Book II, Chap. XVIII, 5 and 7.

[1] That the activities of Austro-Hungarian and German diplomatic officers in the United States in the year 1915 were based on a different theory, betokening a recrudescence of medieval doctrine, is not to be accepted as indicating that enlightened States are disposed to encourage departure from the principle stated in the text.

[2] Instructions to Diplomatic Officers of the United States (1897), § 46, Moore, Dig., IV, 631.

See discussion of the rational basis of immunity, contained in Charles Ozanam, *L'Immunité Civile de Juridiction des Agents Diplomatiques*, Paris, 1912, 35–60.

[3] Rev. Stat. §§ 4063, 4064 and 4065. The last of the foreging sections declares that: "The two preceding sections shall not apply to any case where

of the official character of a person entitled to diplomatic immunities does not excuse his arrest.[1] Nor is knowledge of the law made an ingredient in an offense against his immunities.[2]

Except by the consent of his government, an American diplomatic officer cannot waive his privilege, for it is regarded as belonging to his office rather than to himself. It is not to be supposed, however, that he would intentionally avail himself of his immunity in order to evade just obligations.[3]

A minister may doubtless, without the knowledge and against the will of his government, by appealing to a local court, as in a case of contentious litigation involving his personal interests, subject himself to its jurisdiction.[4] An American envoy is not,

the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office."

Concerning what constitutes a violation of §§ 4063 and 4064, see Mr. Brewster, Atty.-Gen., to Mr. Frelinghuysen, Secy. of State, July 3, 1883, MS. Misc. Let., Moore, Dig., IV, 610; Mr. Frelinghuysen, Secy. of State, to Mr. Preston, Haitian Minister, July 10, 1883, MS. Notes to Haiti, I, 301, Moore, Dig., IV, 640; United States *v.* Benner, 1 Baldwin, 234, Moore, Dig., IV, 641.

Compare the Act of Parliament of 7 Anne, c. 12 (1708), and concerning it Triquet et al. *v.* Bath, 3 Burrow, 1478, Heathfield *v.* Chilton, 4 Burrow, 2015; Parkinson *v.* Potter, L. R. 16 Q. B. Div. 152, and cases there cited; also Scott's Cases (1902 ed.), 189–197.

See Case of one Chance, held on a minor offense at London, in August, 1918, in which the accused claimed immunity as an official of the American Embassy. There was introduced in the course of the prosecution a letter from Mr. Balfour, Foreign Secretary, to the effect that the name of the defendant had not been sent to the Foreign Office by the American Ambassador to indicate that he was a member of his staff, and so did not appear in the list of names of persons entitled to claim immunity from legal proceedings on the ground of diplomatic privilege, and that the name of a person entitled to such immunity on such ground must be on that list. *Jour. Comp. Leg.* (N. S.), XLI, Dec. 1918, 279.

[1] Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, No. 873, Jan. 11, 1877, MS. Inst. France, XIX, 436, Moore, Dig., IV, 634.

See, however, the requirement of Rev. Stat. § 4065 respecting the registration of a minister's servant.

[2] Mr. Fish, Secy. of State, to Mr. de Vaugelas, Chargé, Dec. 28, 1876, MS. Notes to France, IX, 173, Moore, Dig., IV, 635.

[3] The language of the text is substantially that contained in Instructions to Diplomatic Officers of the United States (1897), § 46, Moore, Dig., IV, 631; also of United States *v.* Benner, 1 Baldwin, 234.

See, in this connection, In re Republic of Bolivia Exploration Syndicate, 30 L. T. Rep. (Ch. Div.) 78; also Note thereon in *Harv. Law R.* XXVII, 489; also Re Saurez, 117 L. T. R. 239 and Note thereon in *Yale Law J.* XXVII, 392.

[4] Case of Mr. Jay, American Minister at Vienna, in 1873, Moore, Dig., IV, 635–638, and documents there cited.

according to the Department of State, clothed with diplomatic immunity to enable him to indulge with impunity in personal controversies, or to escape from liabilities to which he might otherwise be subjected.[1]

c

§ 436. Giving of Testimony.

The law of nations is believed to censure the compelling of a diplomatic representative to testify in the country of his sojourn, before any tribunal whatever. The right of exemption is regarded by the Department of State as one not to be divested save with the permission of his government. Thus if an American diplomatic officer is called upon to give testimony under circumstances which do not concern the business of his mission, and where his response would serve to promote justice, he is cautioned to abstain from so doing without the consent of the President, which it is declared in any such case would probably be granted.[2]

When a minister witnesses the commission of a criminal act in the State of his sojourn, as did Señor Comacho, the Venezuelan Minister, who was present at President Garfield's assassination, July 2, 1881, his government may instruct him to waive his rights and to appear as a witness in the case.[3] The United States has similarly permitted an American diplomatic officer to give his testimony on terms consistent with his representative dignity, indicating, however, that unless an interrogatory in open court

[1] Mr. Fish, Secy. of State, to Mr. Jay, Minister to Austria-Hungary, in same case, No. 457, Dec. 29, 1874, MS. Inst. Austria, II, 289, 290, Moore, Dig., IV, 637, in which it was also said: "The assertion of these immunities should be reserved for more important and delicate occasions, and should never be made use of when the facts of the particular case can expose the envoy to the suspicion that private interest or a desire to escape personal or pecuniary liability is the motive which induced it." Also §§ 1 and 2, Art. XVI, of Rules adopted by the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 244.

[2] Instructions to Diplomatic Officers of the United States (1897), § 48, Moore, Dig., IV, 642; Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 547, Nov. 1, 1876, MS. Inst. Italy, II, 1, Moore, Dig., IV, 644; Mr. Gresham, Secy. of State, to Mr. Gray, Minister to Mexico, Jan. 12, 1894, For. Rel. 1894, 426, Moore, Dig., IV, 645. See, also, in this connection, Art. XVII of Rules adopted by the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 244.

[3] Statement of the District Atty. in calling Señor Comacho to the stand as a witness for the prosecution in the trial of Guiteau, Guiteau's Trial, I, 136, Moore, Dig., IV, 644. *Compare* refusal of the Government of the Netherlands in 1856, to permit its diplomatic representative to testify in the criminal courts of the United States, S. Ex. Doc. 21, 34 Cong., 3 Sess., Lawrence's Wheaton (1863), 393, 394, quoted in Moore, Dig., IV, 643–644.

should be deemed indispensable, a personal deposition at the Embassy would be preferable.[1]

The successful outcome of a civil proceeding initiated by a foreign minister may depend upon his readiness to testify. He should submit as a witness to the jurisdiction of the tribunal whose aid he invokes.[2] He should evince equal readiness to do so in case he endeavors to institute criminal proceedings against the perpetrator of a crime, of the commission of which the minister was the sole witness.[3]

d

§ 437. Property.

Immunity from local jurisdiction extends to a diplomatic representative's dwelling-house and goods, and the archives of the mission. These cannot be entered, searched or detained under process of local law or by the local authorities.[4] It is not believed that by merely entering into a contract for the rental of premises to be used for purposes connected with his mission a minister thereby waives the exemption of his belongings placed therein, so as to enable the lessor to attach the same, even though the local law creates by implication a lien in favor of the lessor in the case of a similar contract between private parties. A pledge of such belongings by the minister might serve, however, as Dana has pointed out, to operate as a waiver of the diplomatic privilege.[5]

If a diplomatic representative holds, in a foreign country, real

[1] Telegram, of Mr. Adee, Acting Secy. of State, to Mr. Iddings, Secy. of the American Embassy at Rome, Aug. 1, 1901, For. Rel. 1901, 302; Moore, Dig., IV, 646.

[2] Mr. Van Buren, Secy. of State, to Mr. Bille, Danish Chargé d'Affaires, Oct. 23, 1830, MS. Notes to For. Legs. IV, 312, Moore, Dig., IV, 642.

[3] Mr. Hunter, Acting Secy. of State, to Baron von Gerolt, Aug. 2, 1852, MS. Notes to German States, VI, 310, Moore, Dig., IV, 644; also Mr. Porter, Acting Secy. of State, to Mr. Gana, Chilean Minister, Jan. 3, 1887, MS. Notes to Chilean Legation, VI, 352, Moore, Dig., IV, 645; Mr. Wilson, Acting Secy. of State, to Mr. Morgan, Minister to Cuba, March 15, 1909, For. Rel. 1909, 238.

[4] The language of the text is that of Instructions to Diplomatic Officers of the United States (1897), § 49, Moore, Dig., IV, 646. See, also, Opinion of Mr. Toucey, Atty.-Gen., 5 Ops. Attys.-Gen. 69; Moore, Dig., IV, 646.

According to the Act of March 9, 1888, Chap. 30, 25 Stat. 45, U. S. Comp. Stat. 1918, § 3501, the "Act to restrict the ownership of real estate in the Territories to American citizens and so forth", approved March 3, 1887, was so amended as not to apply or operate in the District of Columbia, "so far as relates to the ownership of legations, or the ownership of residences by representatives of foreign governments, or attachés thereof."

[5] Dana's Note, No. 130, Dana's Wheaton, respecting the Case of Mr. Wheaton, Minister to Prussia; also Dana's Wheaton, §§ 228–241, Moore, Dig., IV, 646–648.

or personal property aside from that which pertains to him as a minister, it is said to be subject to the local laws.[1]

e

§ 438. Persons Other than Heads of Missions.

The suite of a public minister embraces generally three distinct classes of individuals; first, his official staff, such as the secretaries and attachés of the mission; secondly, the members of his family, such as his wife and children; and thirdly, persons in his private service — his unofficial staff — such as his servants, his private secretary and the tutor or governess of his children.[2] Members of each class may also be members of the minister's household. Except possibly in the case of a counselor or *conseiller*, who is said to enjoy a certain representative character,[3] the immunity asserted in behalf of each individual is due to his dependence upon the minister, and to the effect upon the latter of the subjection of the former to the local laws.[4] The abrupt arrest and confinement of any one would clearly serve to interfere with the minister's free exercise of his functions.[5] Hence, it is oftentimes the method of asserting jurisdiction rather than the

[1] Instructions to Diplomatic Officers of the United States (1897), § 47, Moore, Dig., IV, 646.

[2] Oppenheim, 2 ed., I, § 401, pp. 472–473, who regards as a distinct and fourth class, couriers, who "are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations for the safety and secrecy of the despatches." See, also, Jean Roederer, *De l'application des immunités de l'ambassadeur au personnel de l'ambassade*, Paris, 1904.

[3] Mr. Day, Secy. of State, to Mr. Hitchcock, Minister to Russia, May 23, 1898, For. Rel. 1898, 532, *quoting* Calvo in his Dictionary of International Law, to the effect that a *conseiller* "is clothed with a certain representative character; enjoys immunities of his own, independently of the ambassador, or of the chief of legation, but has no right to any ceremonial." Vattel likewise regards the secretary of a mission as "enjoying in his own right the protection of the law of nations, and the immunities annexed to his office, independently of the ambassador." Book IV, Chap. IX, § 122. See, also Oppenheim, 2 ed., I, § 401. The Instructions to Diplomatic Officers of the United States (1897) strongly intimate, however, that the immunities of a secretary are derived from his relation to the chief of his mission. §§ 52 and 53, Moore, Dig., IV, 433 and 648.

[4] "The privilege is not that of the servant but of the ambassador. It is based on the assumption, that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected." Maule, J., in Taylor *v.* Best, 14 C. B. 487, 524, quoted in Abdy's Kent, 2 ed., 121, Moore, Dig., IV, 658.

[5] See, for example, Mr. Evarts, Secy. of State, to Mr. Lowell, Minister to Spain, No. 132, Feb. 25, 1879, MS. Inst. Spain, XVIII, 370, Moore, Dig., IV, 660.

right of the territorial sovereign to do so, that gives rise to controversy.[1]

The personal immunity of a diplomatic representative extends generally to the secretaries of his legation and others belonging to the first of the above named classes.[2] A State may, however, not unreasonably decline to yield immunity to a secretary who is one of its own nationals, save on such terms as it prescribes.[3]

His wife, children, parents and other members of his family, such as his brothers and nieces, and possibly also his household guests, share the minister's exemption while they live with him; and likewise persons similarly connected with a secretary of the mission, share, under similar circumstances, the immunity accorded him upon whom they depend.[4]

The extent to which persons of the third class — those in the private service of a minister — receive the benefit of his immunity is not as yet fully disclosed by existing practice. It is not unreasonable for a State to decline to yield exemptions to a servant who is one of its own nationals.[5] It may also make the enjoyment

[1] Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, March 17, 1888, For. Rel. 1888, II, 1568, Moore, Dig., IV, 661.

[2] Instructions to Diplomatic Officers of the United States (1897), § 53, *citing* Rev. Stats. §§ 4063 and 4064, Moore, Dig., IV, 648. Also Art. XII, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 243.

[3] Rev. Stats. § 4065. See, also, in this connection, Opinion of Mr. Wirt, Atty.-Gen., to Mr. Adams, Secy. of State, March 17, 1818, MS. Misc. Let., respecting the Case of Sarmiento. Moore, Dig., IV, 654.

[4] Art. XII, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 243. Also communication of R. Robin, in *Rev. Gén.*, XIV, 159, respecting the Case of Carlos Waddington, son of the Chargé d'Affaires of Chile at Brussels, who on Feb. 24, 1906, killed in that city the Secretary of the Chilean Legation. The father surrendered the son, who had taken refuge in the Legation, to the Belgian authorities, who withheld action until the Chilean Government also announced its consent to the waiver of any claim to immunity in behalf of the son. The latter was thereupon tried and acquitted. See, also, respecting this case, Oppenheim, 2 ed., I, § 404. *Compare* the early Case of Don Pantaleon Sa, Ward, Hist., II, 322–328.

"The wife of a secretary of a foreign legation in this country is, while with him in his official capacity, subject in respect to her personal estate, to the laws of the country he represents." Moore, Dig., IV, 652, *citing* Mr. Frelinghuysen, Secy. of State, to Mr. Lawrence, March 31, 1883, 146 MS. Dom. Let. 287, based upon Wheat., Int. Law, 300–1, Dana's ed., and 4 Phillimore, Int. Law, 122–123.

[5] In the Instructions to Diplomatic Officers of the United States (1897), it is declared that while the servants of a minister generally share his exemption "this does not always apply when they are citizens or subjects of the country of his sojourn." § 53, *citing* Rev. Stats. § 4065.

See, also, Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey March 17, 1888, For. Rel. 1888, II, 1568, Moore, Dig., IV, 661; Case of Herrmann Tolk, For. Rel. 1907, I, 527–530; Mr. Evarts, Secy. of State, to Mr. Lowell, Minister to Spain, No. 132, Feb. 25, 1879, MS. Inst. Spain, XVIII, 370, Moore, Dig., IV, 660; par. 3, Art. I and Art XV, Rules of the Institute of International Law, Aug. 13, 1895, *Annuaire*, XIV, 240 and 244; Case of the Chauffeur of the Secretary of the American Embassy at London, 1906, *Rev.*

of immunity by a person attached to the unofficial staff of the minister dependent upon compliance with conditions which it prescribes.[1] If, however, it withholds the privilege, it should exercise care to assert the right of jurisdiction in a manner such as to cause the least possible embarrassment to the minister. The State should consult his convenience as to the time and place of the service of process.[2] Its officers should not be permitted to invade his house.[3]

A servant, or other member of the unofficial staff of a mission who is not a national of the State of sojourn, appears to be increasingly regarded as sharing his master's immunity throughout the period of service; yet upon his discharge therefrom, to be subjected to the local law, and punishable, if need be, for criminal acts committed during the course of his employment.[4] This practice indicates that whenever interference with the minister is eliminated, the reason for the exemption ceases, and so justifies the assertion of jurisdiction by the territorial sovereign.

Gén., XVI, 377, *citing Law Times*, 1906, p. 319; also F. Pujia, "*Immunità di Giurisdizione dello Chauffeur al Servizio di un Agente diplomatico*", in *Rivista di Diritto Internazionale*, 1 ser., III, 343.

Compare Claim of the United States in 1905, respecting the immunity of the Dragoman of the American Legation at Constantinople, For. Rel. 1905, 881–882.

Declares Hall: "It is no doubt generally held that they [the servants of a minister] cannot be arrested on a criminal charge and that a civil suit cannot be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognised. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading'; and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by the mission the local authorities claimed to exercise jurisdiction in the case. The English practice is exceptional; but it is not unreasonable." Higgins' 7 ed., § 51. Respecting the Case of Mr. Gallatin's coachman, see Moore, Dig., IV, 656–657, *quoting* Lawrence's Wheaton (ed. 1863), 1006, 1007.

[1] § 4065, Rev. Stat.

[2] Mr. Clay, Secy. of State, to Mr. Ringgold, Marshal, Oct. 30 and Nov. 2, 1825, 21 MS. Dom. Let. 180, 181, Moore, Dig., IV, 656; Mr. Forsyth, Secy. of State, to Mr. Calderon de la Barca, Spanish Minister, Sept. 18, 1838, MS. Notes to Spanish Legation, VI, 34, Moore, Dig., IV, 658; Mr. Cass, Secy. of State, to Mr. Zegarra, Peruvian Minister, June 13, 1860, MS. Inst. Peru, I, 213, Moore, Dig., IV, 660; Mr. Root, Secy. of State, to Mr. Garrett, American Chargé at Berlin, June 10, 1908, For. Rel. 1907, I, 529.

[3] Mr. Brent, Chief Clerk, to Mr. Ringgold, U. S. Marshal, Dec. 10, 1825, 21 MS. Dom. Let. 210, Moore, Dig., IV, 656; Opinion of Mr. Randolph, Atty.-Gen., June 26, 1792, 1 Ops. Attys.-Gen. 26, Moore, Dig., IV, 653; Opinion of Mr. Lincoln, Atty-Gen., 1804, 1 Ops. Attys.-Gen., 141, Moore, Dig., IV, 652. Also Dana's Wheaton, Dana's Note No. 129.

[4] Case of French servant of the Spanish Ambassador at Berlin, who was charged with assault upon a fellow servant, who was a German, and mentioned in a communication of Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, July 5, 1899, For. Rel. 1899, 318, Moore, Dig., IV, 652.

f

§ 439. Ministers Recalled or Not Received.

Neither his diplomatic immunity nor his right to protection are withdrawn from a minister by the bare suspension or termination of his mission. They continue for a reasonable time thereafter, pending his departure from the State to which he is accredited.[1] It is common, in time of peace, to extend to a minister a liberal interval within which to quit the country.[2] If, however, he abuses the privilege by an undue lingering after his official functions are at an end, the State of his sojourn is justified in regarding his immunities as forfeited.[3]

Even though the termination of his mission is occasioned by war between his own State and that to which he is accredited, it is the duty of the latter to employ the means at its disposal to accord the minister and his retinue complete protection from every form of violence, as well as from marks of official discourtesy, and also, to facilitate their departure from its territory by reasonable processes.[4]

When a minister is not received by reason of its failing to appear that he represents any lawful government of the State from which he comes, it has been declared that diplomatic privileges, if any, are accorded him as of courtesy rather than of right.[5] It may be doubted, therefore, whether he is entitled to claim exemption from the local jurisdiction, should occasion for its exercise in respect to him arise.

[1] Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, April 2, 1906, For. Rel. 1906, II, 1456; Dr. Paúl, Venezuelan Minister of Foreign Affairs, to Mr. Sleeper, American Chargé, June 20, 1908, For. Rel. 1908, 823; Mr. Adee, Acting Secy. of State, to Mr. Nabuco, Brazilian Ambassador, July 23, 1908, *id.*, 828. See, also, earlier cases of M. Pichon (1805), Moore, Dig., IV, 662, *citing* Dupont *v.* Pichon, 4 Dall. 321; and that of Mr. Barrozo, Portuguese Chargé at Washington (1829–1830), Moore, Dig., IV, 664–667.

[2] Mr. Adams, Secy of State, to Mr. d'Anduaga, Nov. 2, 1821, MS. Notes to For. Legs., III, 29, Moore, Dig., IV, 664.

[3] Mr. Fish, Secy. of State, to Gen. Gorloff, Dec. 1, 1871, S. Ex. Doc. 5, 42 Cong., 2 Sess., 26–27, Moore, Dig., IV, 667.

[4] Sir E. Goschen, British Ambassador at Berlin, to Sir Edward Grey, British Foreign Secretary, Aug. 8, 1914, respecting the efforts of the German Government to protect the former while *en route* to the Dutch frontier after the outbreak of war, Misc. No. 8 (1914), Cd. 7445. *Compare* report of M. Cambon, French Ambassador at Berlin, to M. Doumergue, French Minister for Foreign Affairs, Aug. 6, 1914, narrating annoyances to which the former was subjected by German authorities in the course of his departure from Germany, upon the outbreak of the war, Misc. No. 15 (1914), p. 142, Cd. 7717.

[5] Mr. Cushing, Atty.-Gen., to Mr. McKeon, Dec. 24, 1855, H. Ex. Doc. 103, 34 Cong., 1 Sess., 13; Same to Same, Dec. 27, 1855, *id.*, 14, Moore, Dig., IV, 668–669.

g

§ 440. Taxation.

The rule observed by the United States with respect to the taxation of property owned by a foreign government, and occupied as its mission, is to accord reciprocity in regard to exemptions from general taxation, but not to exempt specially such property from local assessments, such as water rent and the like, unless it is definitely understood that such taxes are also exempted by the foreign government upon property belonging to the United States, and used for a like purpose by an American minister.[1] The policy to relieve from taxation property so owned and employed, is not applied to premises rented and occupied as dwellings by foreign diplomatic officials subordinate to the head of a mission.[2]

It is not believed that a foreign minister may be justly subjected to the payment of a personal tax by the State to which he is accredited.[3] The levy thereof would directly interfere with the free exercise of his functions. The extent to which members of his retinue, of the several classes heretofore described, share his exemption may be fairly ascertained by reference to the effect of the levy and the mode of collection upon the minister himself. If remote and indirect, as in the case of a person in his private service, and not subjected to local process within the precincts of the legation, no ground for objection would be apparent.[4]

h

§ 441. Customs Duties.

According to existing regulations of the Treasury Department, the privilege of free entry and exemption from examination is

[1] The language of the text is substantially that of Mr. Bayard, Secy. of State, to Mr. Woolsey, April 15, 1886, who declared also: "When a foreign legation occupies rented property in this country, the owner of the premises is not exempted from the payment of all lawful taxes." 159 MS. Dom. Let. 622, Moore, Dig., IV, 670. Also Mr. Fish, Secy. of State, to Mr. Stumm, May 28, 1873, MS. Notes to Prussian Legation, VIII, 484, Moore, Dig., IV, 669; Mr. Seward, Secy. of State, to Mr. Wallach, July 5, 1867, MS. Dom. Let. 432, Moore, Dig., IV, 669.

[2] Mr. Gresham, Secy. of State, to Mr. Bayard, Ambassador to Great Britain, No. 2, May 29, 1893, MS. Inst. Great Britain, XXX, 250, Moore, Dig., IV, 671.

[3] Oppenheim, 2 ed., I, § 394, p. 467.

[4] Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, April 13, 1901, For. Rel. 1901, 172, *citing* despatches of Mr. Coleman, Chargé, No. 182, of Oct. 7, 1890, and Mr. Phelps, Minister to Germany, No. 220, of Jan. 13, 1891, Moore, Dig., IV, 672.

See Macartney *v.* Garbutt, L. R. 24 Q. B. 368, to the effect that a British subject, accredited to Great Britain by a foreign government as a member of its embassy, is, unless received by the British Government upon the ex-

extended to the baggage and effects of the following officers, their families and suites: foreign ambassadors, ministers and chargés d'affaires, and also to those secretaries, and naval, military and other attachés at embassies and legations, accredited to the United States, whose governments grant reciprocal privileges of free entry to American officers of like grade accredited thereto.[1]

It is doubtless a common usage of international intercourse that to the head of a mission shall be conceded the privilege of importation of effects for his personal or official use, or for that of his immediate family, without payment of customs duties thereon.[2] In 1911, it was announced by the Department of State that the United States not only admits the baggage and personal effects of all diplomatic officers from the heads of the missions down to and including attachés upon their first arrival in the country, but also accords to each and every one of such officers the privilege of free importation of goods at any time.[3] Such a

press condition that he should be subject thereto, exempt from the local jurisdiction of his own country, and, therefore, where this condition has not been imposed on him at the time of his reception, his household furniture is privileged from seizure for non-payment of parochial rates.

[1] "High commissioners and consular officers" accredited to the United States are also included in the list. Instructions of Mr. Curtis, Assist. Secy. of the Treasury to Collectors of Customs, Oct. 19, 1911, T. D. 31934, Treasury Decisions, XXI, No. 17, p. 7. *Compare* Mr. Spaulding, Acting Secy. of the Treasury, No. 141, Dec. 22, 1902, Moore, Dig., IV, 675

See *Rev. Gén.*, XV, 448–449, respecting a circular note of the Norwegian Government, Oct. 25, 1907, extending the exemptions from customs duties to diplomatic agents other than heads of missions.

[2] Instructions to Diplomatic Officers of the United States (1897), §§ 58–61, Moore, Dig., IV, 675–676.

[3] Circular Instructions of Mr. Wilson, Acting Secy. of State, to American Diplomatic and Consular Officers, Sept. 12, 1911.

The following provisions are contained in the Treasury Department Regulations of 1915:

> "Art. 376. Baggage. — The privilege of free entry and exemption from examination is extended to the baggage and other effects of the following officials, their families, suites and servants:
>
> "Foreign ambassadors, ministers, chargés d'affaires.
>
> "Secretaries, and naval, military, and other attachés at embassies and legations, high commissioners, and consular officers accredited to this Government or *en route* to and from other countries to which accredited and whose governments grant reciprocal privileges to American officials of like grade accredited thereto.
>
> "Similar representatives of this Government abroad, including consular officers, returning from their missions.
>
> "Other high officials of this and foreign governments.
>
> "Applications should be made to the Department of State for the free entry of the baggage of, and extension of courtesy to, all foreign ambassadors and other foreign officers. Application should also be made through the Department of State in the case of diplomatic and consular officers of the United States returning from their missions. Other high officials of this Government may, however, make application direct to the Treasury Department for the extension of courtesies.
>
> "In the absence of special authorization from the Department prior to the arrival of any of the persons above referred to, collectors of customs may ac-

broad extension of courtesies and privileges may be fairly regarded as based upon the principle of reciprocity.[1]

It is not understood that amendatory regulations of 1920, contemplating the search of baggage for intoxicating liquors, in aid of the enforcement of prohibition laws, was in fact applied in the case of the baggage of foreign diplomatic officers.

Exemptions from customs duties, however justly claimed by American diplomatic officers, are not believed to embrace also municipal *octroi* duties imposed in some foreign countries upon articles of consumption.[2]

i

§ 442. Police Regulations.

It has been observed that the right of the State to which he is accredited, to prevent a minister from committing a hostile act, was well understood in the time of Grotius.[3] This principle still has its applications.[4] A diplomatic officer is expected to observe

cord the privileges of this Article to them upon presentation of their credentials, or by otherwise establishing their identity.

"Collectors will keep a record of the privileges granted, whether the subject of instructions from the Department or not, containing the name of the person to whom granted, his rank or designation, the name of the vessel and date of arrival.

"If by accident or unavoidable delay in shipment, the baggage or other effects of a person of any of the classes mentioned in this article shall arrive after him, the same may be passed free of duty upon his declaration, without examination.

"Art. 377. Imported articles. — Members and attachés of foreign embassies and legations may receive articles imported for their personal or family use free of duty without examination, upon the Department's instructions in each instance, which will be issued only upon the request of the Department of State.

"Packages bearing the official seal of a foreign Government will be admitted to free entry without examination. Costumes, regalia, and other articles for the official use of diplomatic or consular officers of a foreign Government will be admitted free of duty.

"Collectors will take charge of all packages addressed to diplomatic officers of foreign nations which arrive in advance of the receipt of instructions for free entry. Notification of such arrivals should be sent to the Secretary of the Treasury."

[1] This seems to be the view of the Department of State indicated in the language of Instructions of 1897 as well as of 1911.

[2] Mr. Olney, Secy. of State, to Mr. MacVeagh, No. 144, Jan. 20, 1896, MS. Inst Italy, III, 102, Moore, Dig., IV, 676. See For. Rel. 1903, 661–664, respecting the erroneous collection of an alien head tax from the Japanese Chargé d'Affaires to Mexico, when entering the United States *en route* to Japan.

[3] Jurisdictional Immunities, *supra*, §§ 433–434.

[4] Declares Professor Moore: "The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he can not be punished for his failure to respect them. The punitive power of the State can not be directly enforced against him. It will hardly be denied, however, that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which,

local police regulations designed for the good order and safety of the public, such as those regulating traffic on the highway.[1] Immunity from punishment for the violation thereof by no means implies, "that actual coercion might not be employed in protecting the public from injury, as by running down persons in the street."[2] It is hardly to be anticipated, however that a minister accredited to the United States, if conscious of the nature of his mission and of the likelihood of rendering it abortive by contempt for law, would fail to take the customary precautions to respect regulations, or would intentionally give occasion to municipal authorities to hold him in restraint.

5

§ 443. Diplomatic Asylum.

The growth of international law has been contemporaneous with and dependent upon that also of the recognition of the supremacy of the territorial sovereign over a well-defined domain regarded as its own. That law by reason of its relation to this principle has waged persistent warfare against whatever has served to thwart it. One of its most persistent enemies was robust and mature even before the days of Grotius. With the establishment of permanent missions, ambassadors took under their protection large numbers of persons, oftentimes of the worst character, to whom was thereby afforded an asylum.[3] The early practice whereby an ambassador possessed a so-called *franchise des quartiers*, covering a certain area in the city of his abode, offered opportunity for the establishment of a veritable colony of refugees, dangerous to the safety of the State whose justice they defied.[4] Thus an inevitable

if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations, made for the purpose of assuring the public health and safety." Dig., IV, 678.

[1] Mr. Hay, Secy. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom. Let. 104, Moore, Dig., IV, 679; Mr. Rives, Assist. Secy. of State, to Mr. Childs, June 21, 1888, 168 MS. Dom. Let. 651, Moore, Dig., IV, 678; Opinion of Mr. Knox, Atty.-Gen., Jan. 2, 1902, 23 Ops. Attys.-Gen., 608, Moore, Dig., IV, 679; Circular of Department of State, Jan. 17, 1903, concerning a coachman's badge for diplomatic carriages.

[2] Moore, Dig., IV, 678.

[3] Attention is called to the valuable commentary on the "Right of Asylum"; "Early Diplomatic Privileges and their Decadence"; "Survivals of Asylum in Europe"; and "Diplomatic Asylum in International Law", in Moore, Dig., II, 755–770, 775–781; also "Asylum in Legations and Consulates" by the same author, New York, 1892, reprinted from *Pol. Sc. Quar.*, VII, nos. 1, 2 and 3.

[4] "The privileges accorded to ambassadors led to many scandalous abuses in former times, none of them greater than those which arose out of the inviolability of their residences, or what was technically known as the *franchise de l'hôtel*. Whole quarters of populous cities — Rome, Venice, Madrid, and

conflict ensued; the issue was never in doubt so long as society was convinced that the maintenance of justice demanded respect in fact as well as theory for the supremacy of each State within its own domain. The practice, nevertheless, died slowly. It did not completely disappear from Europe until late in the nineteenth century. While it never existed in the United States, traces possibly still linger in parts of Spanish America.[1]

The granting of asylum was merely the abuse of a custom in itself not unreasonable, and of very early origin. The principle that called for the inviolability of the person of an ambassador necessitated also the inviolability of his house. He could not exercise his functions freely and independently unless the latter were exempt from local jurisdiction. Hence there was general acquiescence that both should enjoy immunity. To this extent the existing usage was accepted without resistance, and remains to-day unchallenged. The nature of the exemption was not, however, always clearly understood; while the phrase employed to describe it — extraterritoriality — led to confusion of thought.[2]

The ground occupied by an embassy is not in fact the territory of the foreign State to which the premises belong through possession or ownership.[3] The lawfulness or unlawfulness of acts there committed is determined by the territorial sovereign. If an attaché commits an offense within the precincts of an embassy, his immunity from prosecution is not because he has not violated the local law, but rather for the reason that the individual is exempt from prosecution. If a person not so exempt, or whose immunity is waived, similarly commits a crime therein, the territorial sovereign, if it secures custody of the offender, may subject him to prosecution, even though its criminal code normally does not contemplate the punishment of one who commits an offense outside of the national domain.[4] It is not believed, therefore,

Frankfort, during the assembly for the election of the emperor — were taken possession of by foreign ministers under this guise. By the simple expedient of placing the arms of their sovereigns over the doors of as many houses as they thought proper to hire, and letting them out as asylums for offenders against the laws of the countries in which they dwelt, enormous profits were realised." Lorimer's Institutes, I, 250.

[1] See documents in Moore, Dig., II, 781–841, indicating the practice in various Spanish-American States, and the relation of the United States thereto; also Instructions to Diplomatic Officers of the United States (1897), § 51; Barry Gilbert, "The Practice of Asylum in Legations and Consulates of the United States", *Am. J.*, III, 562; Sir E. Satow, Diplomatic Practice, I, Chap. XX.

[2] Exemptions from jurisdiction, in General, *supra*, § 244–245.

[3] Dana's Wheaton, Dana's Note No. 129.

[4] Case of Nitchencoff, a Russian subject who committed an assault on one de Balsh, in the house of the Russian Ambassador in Paris, Moore, Dig.,

that an ambassador himself possesses the right to exercise jurisdiction, contrary to the will of the State of his sojourn, even within his embassy with respect to acts there committed.[1] Nor is there apparent at the present time any tendency on the part of States to acquiesce in his exercise of it.

Should a public minister endeavor to afford asylum within his official residence to fugitives from local justice, the territorial sovereign might with reason employ coercive measures to check the continuance of the abuse of the diplomatic privilege. The premises might be surrounded by a cordon of police and means of egress and ingress effectually blocked.[2]

It is not believed that at the present time within the domain of any enlightened State exercising control and duly administering justice, a foreign minister should endeavor to resist the demand of local authorities for the surrender, for purposes of prosecution, of any person charged with crime, who is not, by reason of some connection with the mission, to be deemed exempt from the jurisdiction of the State.

Within recent years the Department of State has made it clear that the United States does not recognize a right of asylum.[3] It

II, 778, *citing Solic. Journal*, X, 56, Nov. 18, 1865; also Mr. Jackson, Chargé at Berlin, to Mr. Hay, Secy. of State, July 5, 1899, concerning the prosecution by German authorities of a former servant of French nationality of the Spanish Ambassador at Berlin, on a charge of assault, committed within the embassy, For. Rel. 1899, 318, Moore, Dig., II, 778–779. In this case it was held that the court had jurisdiction.

[1] "Heffter states the law as it exists at the present day, when he says that it is only in Turkey and other non-Christian States that foreign ministers are invested with the right to decide upon disputes among their countrymen or even among the members of their suites. This view is entirely accepted by Lawrence, who, in his invaluable edition of Wheaton, says that the proposition in the latter's text 'seems to have been transferred from one elementary treatise to another without due examination." Prof. Moore, in Dig., II, 777, *citing* Lawrence's Wheaton, ed. 1863, note 133. See, also, Hall, 6 ed., 177, note 1. *Compare* the early Case of the Duc de Sully, Ward, Hist., II, 316.

[2] See case of the arrest and detention by the Chinese Legation at London of a Chinaman named Sim Yat Sen, in 1887, and the steps taken by the British Government to obtain his release, Moore, Dig., IV, 555, based upon a despatch from London in the New York *Evening Post* of Oct. 23, 1896, and also quoting a public letter of Professor Holland respecting the case in the New York *Sun* of Nov. 8, 1896. Also the well-known case of the Duke of Ripperda, a Spanish Minister of Foreign Affairs, who, in 1726, took refuge in the British Embassy at Madrid, and whose seizure was nevertheless there effected by Spanish officers, Martens, *Causes Célèbres*, I, 174–209, Moore, Dig., II, 765–766; also the case of Springer, a native of Russia living in Sweden, who after conviction for crime escaped from prison and took refuge in the British Embassy at Stockholm, and whose surrender was obtained by coercive measures on the part of Sweden, Martens, *Causes Célèbres*, I, 326–358, Moore, Dig., II, 766.

[3] Mr. Root, Secy. of State, in a communication to Mr. Furniss, Minister to Haiti, April 11, 1908, declared: "I have to say that previous instruc-

may be observed that in 1911, the American Chargé d'Affaires at Peking was authorized, in pursuance of his request, to afford at his discretion a temporary refuge where such was necessary to preserve innocent human life.[1] The indisposition of the Department of State to deny temporary shelter to a person whose life may be threatened by mob violence in a country where disorder prevails, does not, however, indicate, as has been definitely announced, that the United States countenances "any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice." [2]

6

THE FUNCTIONS OF A MINISTER

a

§ 444. In General.

The function of a minister is to promote the good relations between his own State and that to which he is accredited.[3] His usefulness ceases, therefore, if for any reason he becomes *persona non grata* to the government of the latter, or in case enmity between the two countries banishes the desire for friendship and terminates diplomatic relations.

tions have made it clear that this Government does not recognize the so-called right of asylum. Recent conditions prevented that policy from being carried out with regard to refugees who were then actually under shelter.

"Now that the American legation and consulates have been cleared of refugees, you will make it distinctly known that no more Haitian refugees will be admitted to shelter by you or your subordinates and that no pretext will be afforded for reawakening the question of asylum so far as the Government of the United States is concerned." For. Rel. 1908, 435. See, also, Raymond Robin, "*Le droit d'asile dans les légations et ses consulats étrangers et les négotiations pour sa suppression en Haïti*", *Rev. Gén.*, XV, 461.

[1] Mr. Knox, Secy. of State, to the American Chargé d'Affaires at Peking, Nov. 10, 1911, For. Rel. 1912, 174. This communication appeared to be in response to a telegram from the Legation declaring that asylum had been asked by the Emperor and Empress Dowager, which the Chargé strongly urged be granted. *Id.*

[2] Instructions to Diplomatic Officers of the United States (1897), § 51. Also Mr. Wilson, Acting Secy. of State, to the Secy. of the Navy, Oct. 23, 1912, For. Rel. 1912, 860.

It may be noted that Mr. Maginnis, American Minister at La Paz, stated in a communication to the Department of State, July 16, 1920, that in the course of the revolution in Bolivia, all the Legations in La Paz, except the French and Chilean, had harbored refugees. Dept. of State, *communiqué* for the Press, July 19, 1920, No. 4. See, also, *communiqué* of July 15, 1920, No. 2, stating that the American Legation reported that President Guerra and certain others had taken refuge in the Legation.

[3] See, generally, Bonfils-Fauchille, 7 ed., §§ 681–683; also Henrique C. R. Lisboa, *Les fonctions diplomatiques en temps de paix*, Santiago de Chile, 1908.

Also F. Van Dyne, Our Foreign Service, 92–93, 103–105; Charlemagne Tower, Essays Political and Historical, 1914, 55–57.

In the fulfillment of his mission an envoy finds that his duties generally possess a threefold aspect. They concern, primarily, what pertains directly to his own country as a whole, such as the negotiation of treaties or the fostering of its political interests. They relate, secondly, to the welfare of private individuals, commonly and chiefly that of his own countrymen, who are within the State of his sojourn. They have to do, thirdly, with the special and technical requirements peculiar to his diplomatic office.

b

§ 445. Representation in Behalf of His State as a Whole.

In the promotion of friendly relations, it is the duty of a minister to make himself familiar with any misapprehension, especially in official places, respecting the attitude of his own State in regard to matters concerning that to which he is accredited. To banish needless causes of friction must be his constant endeavor. To that end he should be alert to ascertain and make known to his government the exact position of the State to which he is accredited with respect to any matters giving rise to controversy with his own country.[1] In so doing he should strive to reflect with accuracy the nature of both official and popular opinion, and to gauge with certainty the temper of each.

In time of war a diplomatic officer of a belligerent power in a neutral State is necessarily burdened with such a task. It becomes his duty not only to advise his government with regard to the nature of possible complaints of its conduct as a belligerent, but also to inform it with candor as to the extent and significance of popular hostility which such conduct may have produced in the country of his sojourn.[2]

To negotiate treaties is oftentimes the duty of a minister. However complete his instructions and however closely he may be in communication with his government, he should possess exact knowledge not only of the nature of and reasons for what he demands, but also of the probable effect of compliance upon the other contracting party. With its existing conventional arrangements

[1] Instructions of Mr. Hay, Secy. of State, to Mr. Beaupré, Minister to Colombia, No. 15, June 2, 1903, For. Rel. 1903, 145.

[2] It may be doubted whether, in the experience of the United States since its Declaration of Independence, any minister representing it as a belligerent at the capital of a neutral State has responded with greater fidelity and success to the complicated obligations incidental to his office, than did the late Charles Francis Adams as American Minister to Great Britain in the days of the Civil War. See, in this connection, The Education of Henry Adams (by himself), Boston, 1918, Chaps. VIII and IX.

dealing with the same matter, he should have familiarity; and, likewise, with whatsoever arguments it may have opposed to similar demands made by other States. Technical skill in the drafting of public agreements, clear understanding of the sense in which particular terms are employed, and a readiness to avoid the use of expressions likely to result in divergent constructions, are vital to the success of a minister who is burdened with the conclusion of a treaty.[1]

In case proposed legislation appears to disregard the terms of an agreement already concluded with his country, it becomes the duty of the minister to ascertain the fact, and, pursuant to instructions, to lodge formal protest with the State to which he is accredited.

It is the constant duty of a minister to watch political and economic or other movements in the State of his official sojourn, and to observe intelligently whatsoever significance they possess in relation to his own. Such conduct is not to be deemed necessarily adverse to the welfare of the country to which he is accredited.[2] The stability of amicable relations between States depends, in large degree, upon the completeness with which their problems and aspirations are mutually understood and respected. Should, however, a minister employ improper means to gain a knowledge of local policies, his conduct, if known, would serve to impair his usefulness, and possibly lead to a demand for his recall, or even to his dismissal.

c

Representation of His Countrymen

(1)

§ 446. Protection.

A minister is, in a broad sense, the representative of his countrymen in the State of his sojourn. In so far as their protection necessitates interposition with the Foreign Office or Department of State, he is their national spokesman.[3] In other respects the

[1] Extradition. The duties of diplomatic officers in relation to the extradition of criminals are considered elsewhere. See Extradition, Requisition, *supra*, § 324; also Authentication of Documentary Evidence of the Demanding Government, *supra*, § 335, p. 599, note 1.

[2] Oppenheim, 2 ed., I, § 380, p. 454; Bonfils-Fauchille, 7 ed., § 682.

[3] Mr. Fish, Secy. of State, to Mr. Mantilla, Spanish Minister, Feb. 16, 1875, MS. Notes to Spain, IX, 345, Moore, Dig., IV, 694.

Passports. Concerning the issuance of passports by American diplomatic officers, see, generally, under Passports, *supra*, § 399.

Judicial Functions. Concerning the judicial functions of American

protection of such individuals is believed to pertain to the consular rather than to the diplomatic service.[1] A foreign minister accredited to the United States could not, for example, with propriety complain of the conduct or invoke the aid of any official, whether Federal or State, save through the medium of the Department of State.[2]

(2)

§ 447. Support of Private Interests.

American diplomatic officers are cautioned generally against furnishing support to the private interests of their countrymen. The former are instructed to espouse no claim founded in contract without specific advices. Previous instructions are also required in order to justify interposition in behalf of an American whose claim is founded in tort, 'unless the person of the claimant be assailed or there be pressing necessity for action in his behalf" before communication with the Department of State is possible.[3]

Such officers, have, however, not infrequently been authorized to assist reputable representatives of American concerns, without endorsing their financial standing, and without espousing the claim of any particular individual or firm to the exclusion of others, to obtain the same opportunity and facilities for submitting proposals, tendering bids, and obtaining contracts as might be enjoyed by business houses of any other foreign country.[4] It has been the practice for diplomatic assistance to originate in the Department of State, where, according to Secre-

diplomatic officers in certain oriental and other countries, see Extraterritorial Jurisdiction, Legislation of the United States, *supra*, § 264.

[1] See, for example, Art. VIII, Consular Convention with Germany, Dec. 11, 1871, Malloy's Treaties, I, 552.

[2] Secretary of State as Organ of Correspondence, *supra*, § 410.

A possible exception to the statement in the text is to be noted in cases where a diplomatic officer, through the medium of counsel, files suggestions as an *amicus curiae* in a court with respect to a matter such as the requisition by his government of a ship which has been libeled. See, for example, The Adriatic, 258 Fed. 902. But see, *supra*, p. 443.

[3] Instructions to Diplomatic Officers of the United States (1897), § 174, Moore, Dig., IV, 566; Mr. Bayard, Secy. of State, to Miss Heald, July 9, 1886, 160 MS. Dom. Let. 666, Moore, Dig., IV, 566.

"The rule that a diplomatic agent is not expected to attend to private professional matters, such as taking testimony, does not apply to the usual official action to facilitate the taking of testimony by letters rogatory." Mr. Olney, Secy. of State, to Mr. Thomas, No. 37, Jan. 10, 1896, MS. Inst. Venezuela, IV, 377, Moore, Dig., IV, 567.

[4] Mr. Olney, Secy. of State, to Mr. Denby, Minister to China, No. 1376, Dec. 19, 1896, For. Rel. 1897, 56, Moore, Dig., IV, 568; Mr. Sherman, Secy. of State, to Same, No. 1404, March 8, 1897, For. Rel. 1897, 59, Moore, Dig., IV, 568; see, also, Mr. Knox, Secy. of State, to Mr. Straus, Ambassador to Turkey, Nov. 1, 1909, For. Rel. 1909, 595.

tary Bayard, the opportunity for estimating the nature of a proposed enterprise and the responsibility of those planning to embark upon it could best be formed.[1] More recently, however, the Department has, at least in one instance, sought to rely upon the discretion of the diplomatic officer, as to the propriety of his undertaking to support the claims of applicants for contracts; and has endeavored to eliminate, when possible, delay necessarily occasioned by forwarding to Washington applications for assistance in the case of persons known to be responsible, or to be acting in behalf of reputable concerns.[2]

(3)

§ 448. Presentations at Court.

If any of his countrymen are to be presented at the court of the State of his sojourn, the minister is the medium of presentation. Unwilling to encourage invidious social distinctions, and reluctant also to burden unduly an American diplomatic officer, the Department of State leaves to his personal discretion the choice of persons to be presented, subjecting, however, the exercise of this social privilege to the custom and wishes of the local court.[3]

d

Good Offices for Nationals of Third States

(1)

§ 449. In Countries where They Lack Diplomatic Representation.

A government is sometimes requested to permit its minister to exercise his good offices for the purpose of protecting nationals of a third State which is without diplomatic representation in the country of his sojourn. The acceptance of this function by

[1] See, for example, Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 274, Dec. 15, 1887, MS. Inst. China, IV, 334, Moore, Dig., IV, 567.

[2] Mr. Knox, Secy. of State, to Mr. Straus, Ambassador to Turkey, Nov. 1, 1909, For. Rel. 1909, 595.

[3] Mr. Bayard, Secy. of State, to Mr. Magee, No. 120, Jan. 12, 1889, MS. Inst. Sweden and Norway, XV, 189, Moore, Dig., IV, 572; Mr. Olney, Secy. of State, to Mr. Johnson, March 6, 1896, 208 MS. Dom. Let. 358, Moore, Dig., IV, 572; Mr. Seward, Secy. of State, to Mr. Dayton, Feb. 3, 1862, S. Ex. Doc. 19, 37 Cong., 2 Sess., Moore, Dig., IV, 570.

Respecting presentations at the court of Italy, see For. Rel. 1898, 410–411.

an American diplomatic officer is dependent upon the approval of the Department of State as well as of that of the State to which he is accredited.[1] He acts in an unofficial capacity, and not as the diplomatic representative of the State whose nationals he endeavors to protect.[2] While the officer is said to be the agent of such State, and responsible to it rather than to the United States in the exercise of his good offices,[3] he does not report to the former or take its orders. "His communication with it is indirectly effected through his own government." [4]

An American minister is expected to examine with care such complaints as are laid before him, and to exercise discretion as to their treatment. It is said that no case requiring formal or informal negotiation with the government to which he is accredited should be taken up unless with knowledge that such interposition is requested by the government of the State of which the complainant is a national, "permitted by the United States, and acquiesced in by the local government." [5]

[1] Instructions to Diplomatic Officers of the United States (1897), § 172, Moore, Dig., IV, 584. See, also, Mr. Adee, Acting Secy. of State, to Mr. Leishman, Minister to Turkey, Aug. 7, 1901, For. Rel. 1901, 523, Moore, Dig., IV, 587.

That a diplomatic officer of the United States cannot without congressional sanction accept a diplomatic commission from another State, even though he is not prohibited from rendering a friendly service to it so long as he does not become an officer of it, see Opinion of Mr. Akerman, Atty.-Gen., Nov. 23, 1871, 13 Ops. Attys.-Gen., 537, Moore, Dig., IV, 585.

[2] Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 23, Dec. 28, 1854, MS. Inst. Peru, XV, 150, Moore, Dig., IV, 595; Mr. Bayard, Secy. of State, to Maj. Kloss, Swiss Chargé, July 1, 1887, For. Rel. 1887, 1076, Moore, Dig., IV, 594; Mr. Gresham, Secy. of State, to Mr. Young, Minister to Guatemala, Aug. 18, 1894, For. Rel. 1894, 331, Moore, Dig., IV, 589; Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Jan. 4, 1900, For. Rel. 1899, 109, Moore, Dig., IV, 592; Mr. Bacon, Acting Secy. of State, to Mr. Jackson, Minister to Greece (No. 146 Greek Series), March 13, 1907, For. Rel. 1907, I, 583; Mr. Knox, Secy. of State, to Mr. Sherrill, Minister to the Argentine Republic, July 23, 1909, For. Rel. 1909, 11.

[3] Mr. Fish, Secy. of State, to Mr. Williamson, Minister to Guatemala, No. 83, June 18, 1874, MS. Inst. Costa Rica, XVII, 179, Moore, Dig., IV, 588; Instructions to the Diplomatic Officers of the United States (1897), § 172.

[4] Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Jan. 4, 1900, For. Rel. 1899, 109, Moore, Dig., IV, 592.

[5] Mr. Bacon, Acting Secy. of State, to Mr. Jackson, Minister to Greece (No. 146 Greek Series), March 13, 1907, For. Rel. 1907, I, 583. Declared Mr. Loomis, Acting Secy. of State, to Mr. Combs, Minister to Guatemala, in the course of a communication of March 15, 1903: "In making representations in behalf of any aggrieved Chinese subjects who may seek the legation's interposition you should, by way of good offices, endeavor to secure for them the same degree of protection from tort as you could demand of right for an American citizen similarly circumstanced. Your discretion does not extend to the presentation of claims. If any such are preferred by Chinese subjects you will report them to the Department, which will bring them to the knowledge of the Chinese Government." For. Rel. 1903, 573. With respect to the presentation by the American Minister at Caracas

(2)

§ 450. Nationals of Belligerent States.

When by reason of war diplomatic relations between two States are terminated, the minister of a third State is commonly called upon to protect the interests of nationals of the one belligerent within the domain of that other to which he is accredited.[1] An American diplomatic officer, when accepting such a function, acts unofficially. His duties call for the exercise of sound judgment, personal courage, and the utmost care to avoid the danger of weakening the neutral relationship of his own country towards either belligerent.[2] He may be burdened with the task of securing permission for and otherwise facilitating the departure of belligerent nationals from the territory belonging to the State of his sojourn.[3] He may render assistance also to their departing minister and his staff in quitting the country.[4]

On such occasions there is also entrusted to the officer protection of the archives and other property of the belligerent State whose nationals are placed within his care.[5] It may request him to display his national flag over the building of its embassy or legation, should the necessity or desirability of the display of such an emblem become apparent.[6] A minister whose good offices

of certain claims of Italian subjects, see Mr. Fish, Secy. of State, to Baron Blanc, Feb. 1, 1876, MS. Notes to Italy, VII, 281, Moore, Dig., IV, 591.

[1] Upon the severing of diplomatic relations, even though war does not ensue, the good offices of the minister of a third State are similarly invoked. See, for example, the course followed by the United States in 1908, upon the termination of its diplomatic relations with Venezuela, For. Rel. 1908, 820–830.

[2] Mr. Gresham, Secy. of State, to Mr. Denby, Jr., Chargé at Peking, Aug. 29, 1894, For. Rel. 1894, 106, Moore, Dig., IV, 601.

Respecting the case of Japanese spies in China during the Chino-Japanese War in 1894, see documents in Moore, Dig., IV, 606–611, especially Mr. Gresham, Secy. of State, to Mr. Denby, Jr., Chargé in China, Oct. 30, 1894, For. Rel. 1894, 119.

[3] Respecting the protection by the American Ambassador in Russia of Japanese interests in that Empire during the Russo-Japanese War, see For. Rel. 1904, 430–436, 714–722; *id.*, 1905, 830.

[4] Sir E. Goschen, British Ambassador at Berlin, to Sir Edward Grey, British Foreign Secretary, Aug. 8, 1914, regarding the assistance rendered the latter by his American colleague Mr. Gerard, upon the outbreak of the war in 1914, Misc. No. 8 (1914), Cd. 7445. See, also, Sir L. Mallet, British Ambassador at Constantinople, to Sir Edward Grey, British Foreign Secretary, Nov. 20, 1914, respecting the assistance rendered the latter by his American colleague, Mr. Morgenthau, Misc., No. 14 (1914), Cd. 7716.

[5] See, for example, M. Cambon, French Ambassador at Washington, to Mr. Sherman, Secy. of State, April 22, 1898, respecting the protection of Spanish interests in the United States, by the French Ambassador and the Austro-Hungarian Minister during the Spanish-American War, For. Rel. 1898, 785, Moore, Dig., IV, 612.

[6] Mr. Adee, Acting Secy. of State, to Mr. Nabuco, Brazilian Ambassador at Washington, July 10, 1908, For. Rel. 1908, 826.

are so invoked by a belligerent government may also be clothed by it with special authority to conclude in its behalf a protocol of peace.[1] So long as a state of war continues, notwithstanding a suspension of hostilities, the belligerent State to which the minister of a neutral is accredited, may, with reason, deem it preferable that diplomatic communications with the enemy continue to be made through him rather than through a consular officer of the enemy acting as an unofficial agent.[2]

While it remained a neutral in the course of The World War, heavy burdens were imposed upon American diplomatic officers accredited to belligerent powers. The endeavor to safeguard and watch over the interests of nationals of belligerents at war with Germany and her allies was scrupulously and vigorously undertaken; and if American officers failed on occasion to effect restraint of ruthless conduct, the United States experienced as a nation satisfaction in the sense that the trust confided to its representatives was, in the estimation of the States which imposed it, faithfully performed.[3]

e

Miscellaneous Restrictions Imposed upon a Minister by His Own State

(1)

§ 451. Residence and Continuance of Mission.

In numerous ways a State may restrict the conduct of its diplomatic officers for the purpose of preserving and increasing their usefulness. Its regulations may be designed both to subserve domestic policies and to facilitate the performance of obligations due to foreign States. Thus, a minister of the United States is obliged to reside at the capital of the country to which he is accredited. The statutory law declares that no diplomatic (or

[1] "On August 12, 1898, there was signed by the Secretary of State on behalf of the United States and by the Ambassador of France at Washington on behalf of Spain a Protocol of Agreement preliminary to the final establishment of peace between the United States and Spain." For. Rel. 1898, 800.

[2] Mr. Moore, Acting Secy. of State, to M. Cambon, French Ambassador, Aug. 19, 1898, For. Rel. 1898, 803, Moore, Dig., IV, 613.

[3] See, in this connection, James W. Gerard, My Four Years in Germany, New York, 1917, especially Chap. X (concerning prisoners of war); Hugh Gibson, A Journal from Our Legation in Belgium, New York, 1917 (especially 344–360, in relation to Miss Edith Cavell); Brand Whitlock, Belgium: A Personal Narrative, New York, 1919, I, 370–379, II, 81–110 (in relation to Miss Cavell).

consular) officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, beyond the term of sixty days in any one year.[1]

While reliance is placed upon his judgment and discretion regarding the course to follow in case he is apprehensive of danger to his person, a minister is not expected to quit the country to which he is accredited "without the most unequivocal necessity." [2] Nor is he permitted to break off diplomatic relations maintained through his mission without the authority of his government, except possibly when subjected to grave personal indignity, and that under circumstances when he can reasonably assume that the United States will approve of his conduct.[3] At the present time the ability of an American minister, under almost all circumstances, to communicate speedily with the Department of State by telegraph, obviates the necessity of his taking such summary action without specific instructions.

(2)

§ 452. Non-Interference in Politics. Speeches. Presents.

It has been said that the "plain duty of the diplomatic agents of the United States is scrupulously to abstain from interfering in the domestic policies of the countries where they reside." [4]

[1] Rev. Stat. § 1742, where it is added that "the time equal to that usually occupied in going to and from the United States in case of the return, on leave, of such diplomatic or consular officer to the United States may be allowed in addition to such sixty days."

See, also, Instructions to the Diplomatic and Consular Officers of the United States (1897), § 266. It is here announced that a minister is not regarded as being absent from his post, if, during periods of the year when, for example, the principal members of the government are absent from the capital, he makes a temporary residence in some other place within the State to which he is accredited, provided he keeps the office of his mission open as usual for the transaction of business by a secretary thereof, and fixes his temporary residence at a place from which he can visit the office without delay and can be reached by telegraph.

Also Mr. Bayard, Secy. of State, to Mr. Seay, Minister to Bolivia, No. 23, Jan. 21, 1887, For. Rel. 1887, 46, Moore, Dig., IV, 563; Mr. Adee, Acting Secy. of State, to Mr. Baker, Minister at Nicaragua, Sept. 7, 1893, For. Rel. 1893, 213, Moore, Dig., IV, 564.

[2] Mr. Randolph, Secy. of State, to Mr. Adams, Minister to the Netherlands, Feb. 27, 1795, MS. Inst. U. S. Ministers, II, 323, Moore, Dig., IV, 565.

[3] Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 8, 1856, MS. Inst. Austria, I, 117, Moore, Dig., IV, 565.

[4] Communication of Mr. Buchanan, Secy. of State, to Mr. Shields, Aug. 7, 1848, MS. Inst. Venezuela, I, 73, Moore, Dig., IV, 573; see, also, Mr. Fish, Secy. of State, to Mr. Curtin, Minister to Russia, Nov. 16, 1871, Senate Ex. Doc. No. 5, 42 Cong., 2 Sess., 12.

"It is forbidden to diplomatic officers to participate in any manner in the political concerns of the country of their residence." Instructions to the Diplomatic Officers of the United States (1897), § 68.

The failure to respect this obligation has led to the recall or censure of American diplomatic officers;[1] and neglect in this regard has led to the dismissal or recall of ministers accredited to the United States.[2] If legislative or other action proposed by the State of his sojourn is deemed to be hostile to the rights of his own country, objections on the part of the minister should be confined to appropriate representations to the Secretary of State or Minister for Foreign Affairs.[3]

A minister may be in fact instructed by his government to participate to a degree in political affairs; and American diplomatic officers have at times been the recipients of instructions in such a sense.[4] In such a situation the impropriety, if any, of the course of action which the minister obediently pursues is to be attributed to his government rather than to himself.[5] The cir-

[1] Case of Mr. Schuyler, Moore, Dig., IV, 573–574, and documents there cited.

Rev. Stat. § 1751 prohibits an American diplomatic or consular officer, without the consent of the Secretary of State previously obtained, from recommending any person, at home or abroad, for any employment of trust or profit under the government of the country in which the officer is located. Also Instructions to the Diplomatic Officers of the United States, § 70, and in this connection the Case of the American Minister to Bolivia in 1894, For. Rel. 1894, 54–56.

[2] Request for Recall, Dismissal. *supra*, § 424.

[3] Secretary of State as Organ of Correspondence, *supra*, § 410.

[4] In a communication to Mr. Beaupré, American Minister to Colombia, June 2, 1903, regarding the ratification by Colombia of a convention in relation to the Panama Canal. Mr. Hay, Secy. of State, declared in part: "You should, when the time seems opportune, in so far as you discreetly and properly may, exert your influence in favor of ratification. It is also expected that you will know what hostile influences, if any, are at work against the ratification of the treaty, and whether or not there is opposition to it from European sources. The situation is seemingly a grave one, but the Department has confidence that you will rise to the full measure of its requirements." For. Rel. 1903, 146. Also Same to Same, telegram, June 9, 1903, *id.*, 146.

[5] "That a government will resent attacks made upon its minister on account of his faithful execution of his instructions, see Mr. Hay, Secy. of State, to Señor Blanco, March 23, 1901, MS. Notes to Venezuelan Legation, II, 53." Moore, Dig., IV, 536.

The abrupt dismissal of Mr. Russell, American Minister at Caracas, by a note of the Venezuelan Minister for Foreign Affairs, Jan. 28, 1877, was resented by Mr. Evarts, Secy. of State, inasmuch as such action was without explanation and not preceded by any request for the recall of the Minister. Mr. Evarts announced to the Venezuelan Minister at Washington that unless a satisfactory explanation were forthcoming, "the dignity of this Government will require that your relations with it shall also terminate, and your passports will be sent to you accordingly." The note of dismissal was withdrawn and cancelled. Later Mr. Russell being advised through official channels that he was *persona non grata* at Caracas, resigned. It was the substance of an official despatch from Mr. Russell to the Secretary of State, later communicated to the House of Representatives in response to a resolution, and duly printed, that gave offense to the Venezuelan Government. The publication of matter necessary for Mr. Russell to communicate to the Department of State, and yet which if known at Caracas was calculated to render the writer thereafter unacceptable, rather than any impropriety of

cumstance, however, that his action is the faithful execution of a specific instruction rather than a personal indiscretion neither authorized nor sought to be condoned, may be carefully concealed; and if it is, the minister bears the brunt of the charge of wrongdoing.

Public utterances by its own ministers have oftentimes been a source of embarrassment to the United States. Hence its present instructions wisely prohibit public addresses by American diplomatic officers save on exceptional festive occasions in the country of official residence. Upon such occasions any reference to political issues pending in the United States or elsewhere is to be carefully avoided by the speaker.[1] Public expressions of opinion upon local political or other questions arising within the State of sojourn are expressly enjoined.[2]

The statutory law of the United States forbids a diplomatic (as well as consular) officer to correspond in regard to the public affairs of any foreign government with any private person, newspaper or other periodical, or otherwise than with the proper officers of the United States.[3]

The same law forbids American diplomatic officers from asking or accepting from any foreign government, for themselves or other persons, any present, emolument, pecuniary favor, office or title of any kind.[4] Consequently the previous authority of Congress

conduct on his part, served to end his usefulness as a diplomatic representative in Venezuela. Documents in Moore, Dig., IV, 535–537, and statement based thereon.

[1] Instructions to Diplomatic Officers of the United States (1897), § 69.

See speeches of Mr. Bayard, Ambassador to Great Britain, in 1895, which resulted in a resolution of censure by the House of Representatives the following year. For. Rel. 1895, I, 581, Moore, Dig., IV, 575.

[2] Instructions to the Diplomatic Officers of the United States (1897), § 68.

[3] Act of June 17, 1874, Chap. 294, 18 Stat. 77, U. S. Comp. Stat. 1918, § 3199.

[4] *Id.*; also Instructions to Diplomatic Officers of the United States (1897), § 70. See the requirements of the Constitution, contained in Art. I, Section 9, paragraph 8, to the effect that "No person holding any office of profit or trust" under the United States, "shall, without the consent of the Congress, accept any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state."

See Act of July 9, 1918, Chap. 143, 40 Stat. 845, 872, permitting all members of the military forces of the United States serving in the then existing war to accept within a specified period, from the government of any of the countries engaged in war with any country with which the United States was or should be concurrently likewise engaged in war, such decorations, when tendered, as were conferred by such government upon the members of its own military forces.

Also Act of March 4, 1919, Chap. 123, 40 Stat. 1325, 1326, permitting specified persons formerly connected with the American embassy at Berlin, to accept pieces of plate presented to them by the British Government in recognition of services rendered by the embassy while in charge of British interests in Germany.

is necessary in order to enable such an officer to accept any presents, orders or other testimonials in acknowledgment of services rendered to a foreign State or its nationals.[1]

(3)

§ 453. Marriages.

The laws of the United States do not confer on diplomatic officers any power to celebrate marriages, to act as official witnesses at the ceremony of marriage, or to grant certificates of marriage.[2] It is not unusual for Americans abroad to ask permission to have a marriage ceremony performed in the embassy or legation and in the presence of their diplomatic representative. While there is no reason generally why such a request should be denied, the Department of State declares that the parties making the application should be informed that in its opinion, the ceremony of marriage, performed within the precincts of the legation, should, with certain limitations, comply with the requirements of the laws of the country within which the legation is situated.[3] Upon application for the use of a legation for such a purpose, it is made the duty of the American diplomatic representative to inquire whether the parties may lawfully marry according to the laws of the country in which the legation is situated; and whether the proper steps

[1] Instructions to the Diplomatic Officers of the United States (1897), § 71; For. Rel. 1907, II, 1016–1018, concerning decorations conferred on American citizens prior to their receiving appointments in the diplomatic service; also For. Rel. 1909, 541.

Engaging in Business: Practice of Law. According to § 7, Chap. 23, Act of Feb. 5, 1915, 38 Stat. 807, U. S. Comp. Stat. 1918, § 3130d: "No ambassador, minister, minister resident, diplomatic agent, or secretary in the Diplomatic Service of any grade or class shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as an agent for any such person to, from, or within the country or countries to which he or the chief of his mission, as the case may be, is accredited, either in his own name or in the name or through the agency of any other person, nor shall he, in such country or countries, practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer so practicing."

[2] The language of the text is that contained in Instructions to American Diplomatic Officers (1897), § 177, Moore, Dig., II, 514. See, also, documents in Moore, Dig., II, 506–514; also Mr. Knox, Secy. of State, to Mr. Ide, Minister to Spain, Feb. 24, 1910, For. Rel. 1910, 855; Consuls, Miscellaneous Duties, *infra*, § 488.

[3] Instructions to American Diplomatic Officers (1897), § 182, Moore, Dig., II, 514.

The Department of State has found it necessary, however, to instruct American diplomatic and consular officers in China to refrain from permitting the use of their offices for the performance of marriage ceremonies unless satisfied that they are *bona fide*, and not employed as a cloak or means to foster a nefarious traffic. See instructions to the American Diplomatic and Consular Representatives in China, June 16, 1905.

have been taken to enable the marriage ceremony to be legally performed according to such laws. If either of such inquiries is answered in the negative, and the case does not fall within one of the exceptions stated in the Instructions (to American Diplomatic Officers, section 179), it is said to be the duty of the diplomatic representative to inform the applicant that the former cannot permit the ceremony to be performed at the legation, as there may be grave doubts respecting its validity.[1]

American diplomatic as well as consular officers are deemed to be incompetent to certify as to the legal requisites of marriage in the United States, because no such power is conferred upon them either by the laws of the United States or by international law. Although such an officer may possess private knowledge respecting the laws of marriage, he is not authorized to certify them upon that knowledge; for it is not a question of individual knowledge, but of official competency.[2]

[1] Instructions to Diplomatic Officers of the United States (1897), § 183, Moore, Dig., II, 514. Also Mr. Uhl, Acting Secy. of State, to Mr. Baker, Minister to Nicaragua, Feb. 24, 1894, For. Rel. 1894, 447, Moore, Dig., II, 513.

For. Rel. 1907, I, 519–526, and *id.*, 1908, 360–365, concerning the marriage of American citizens in Germany and on German territory.

[2] The language in the text is substantially that of Mr. Olney, Secy. of State, to Mr. Runyon, American Ambassador to Germany, Dec. 9, 1895, For. Rel. 1895, I, 538, Moore, Dig., II, 535. See, also, Mr. Bayard, Secy. of State, Circular to Diplomatic and Consular officers, Feb. 8, 1887, to which was appended the following order: "It is not competent, without the special authority of this Department, for diplomatic agents, consuls, or consular agents, to certify officially as to the *status* of persons domiciled in the United States and proposing to be married abroad, or as to the law in the United States, or in any part thereof, relating to the solemnization of marriages." For. Rel. 1887, 1133, Moore, Dig., II, 526, 527.

TITLE E

OFFICIAL NEGOTIATIONS

1

§ 454. The Diplomatic Channel.

In negotiations between States, official correspondence should doubtless be confined on both sides to the diplomatic channel.[1] In 1815, Secretary Monroe declared that the Department of State can receive no communication from subjects of another country on international matters, except through the minister of such country.[2] Conversely, it has been announced that "no officer, civil, military, or naval, can properly carry on an official correspondence with a foreign government, except through the Department of State, or its diplomatic representative at the seat of such government."[3]

While the Department of State has declared that "all usage and precedent make it entirely competent and proper" for a government to present a diplomatic claim against another, either through the ambassador thereof or through the ambassador of the former at the capital of the latter, at least one European State has announced that as a matter of principle and according to prevailing practice, it "receives complaints or suggestions from friendly governments only when they are presented by the diplomatic representatives of such governments accredited to it."[4]

[1] See The Secretary of State as Organ of Correspondence, *supra*, § 410, with special reference to occasions when the President of the United States holds direct communication with the heads of foreign States or with the ambassadors thereof. Also Ambassadorial Privileges, *infra*, § 459; Communications through Non-Governmental Channels, *supra*, § 409.

[2] The language of the text is that contained in Moore, Dig., IV, 693, *citing* Mr. Monroe, Secy. of State, to Admiral Cochrane, April 5, 1815, MS. Notes to Foreign Legations, II, 80.

[3] Communication of Mr. Fish, Secy. of State, to Mr. Wines, Jan. 25, 1872, 92 MS. Dom. Let. 299, Moore, Dig., IV, 691. Also Mr. Olney, Secy. of State, to the Secy. of the Navy, Jan. 2, 1896, respecting certain letters from Admiral Selfridge, U. S. N., to local Turkish officials, For. Rel. 1895, II, 1440, Moore, Dig., IV, 620; Mr. Hill, Act. Secy. of State, to Mr. Finch, Minister to Uruguay, No. 180, Jan. 7, 1901, MS. Inst. Uruguay, II, 71, Moore, Dig., IV, 622.

[4] Mr. Olney, Secy. of State, to Baron von Thielmann, German Ambassador, Oct. 7, 1895, For. Rel. 1895, I, 480, 481; Baron von Thielmann to Mr. Olney, Oct. 14, 1895, *id.*, I, 486, Moore, Dig., IV, 692-693.

It may be observed that the diplomatic agencies of the United States are not open for the presentation of memorials of its citizens to foreign governments, especially when such documents deal with questions of national or international policy not affecting the United States, and even in cases when the rights or interests of American citizens are concerned.[1]

2

§ 455. Language. Tone.

It is the custom of diplomatic intercourse for an agent of a State, whether himself a minister for foreign affairs or a diplomatic officer, to address communications in his own tongue to the foreign government or representative thereof with which he corresponds.[2] Accordingly the United States directs its diplomatic officers to employ the English language.[3] They are instructed, however, that in countries of the East, English diplomatic communications to the local government are generally expected to be accompanied by translations into the language of the country; but such officers are cautioned against omitting the English text,[4] to which alone, in any event, resort should be had in ascertainment of their precise intentions should any question arise.[5]

That the tone of diplomatic correspondence should always be courteous must be obvious. Discourteous expressions betraying truculence or couched in arrogant terms necessarily arouse the sensibilities of governments to which they are addressed, and hence serve to foment disputes which, as Secretary Bayard once declared, "it is the prerogative and aim of diplomacy to avert."[6] Thus

[1] Mr. Gresham, Secy. of State, to Mr. Garrett, April 2, 1895, 201 MS. Dom. Let. 361, *citing* Instruction to Mr. Runyon, American Ambassador at Berlin, Nov. 22, 1893, Moore, Dig., IV, 694. In the latter it was declared that, "It is a very general rule among governments that the individual's privilege to memorialize the crown is to be availed of directly, not through a diplomatic channel, and a tender through the latter course may be and frequently is declined."

See, also, Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Nov. 20, 1875, MS. Inst. Haiti, II, 66, Moore, Dig., IV, 692.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. Robeson, Feb. 28, 1882, MS. Inst. Barbary Powers, XVI, 80, Moore, Dig., IV, 705.

[3] Instructions to the Diplomatic Officers of the United States (1897), § 94.

[4] *Id.*, § 95. In the same section it is also declared that: "In European and American countries urgent need of hastening a negotiation may sometimes require that a translation accompany a note; but recourse to such an expedient should be unusual and occur only when there is reasonable certainty that the translation will be faithful and correct in style."

[5] *Id.*, § 96; also documents in Moore, Dig., IV, 704–705.

[6] Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, July 31, 1885, MS. Inst. Mexico, XXI, 347, Moore, Dig., IV, 708.

the sincerity of the opposing party should not be called in question, nor its integrity impeached,[1] unless it becomes apparent that failure to do so may be construed as attributable to improper motives. Nothing, however, need ever deter a government or its representative from evincing entire candor in diplomatic discussion, or from setting forth and protesting against national grievances with absolute frankness. Nevertheless, in so doing, the careful maintenance of a conciliatory attitude is none the less valuable as a means either of preventing a suspension of negotiations or of obtaining redress desired.

3

§ 456. Publication.

A State may not unreasonably publish correspondence with diplomatic or other agents abroad without deferring to the judgment of any foreign country the affairs of which form the subject of discussion.[2] In so doing care should be taken, however, to guard from publication such expression of personal views of a minister as might, if known, expose him to criticism in the country of his official residence.[3] Reflections upon the commercial operations or character of the inhabitants of a foreign State should not be given circulation.[4]

In one sense the propriety of making public an instruction to a minister intended for communication to a foreign government, and prior to its receipt by the latter, may be questioned, especially when the document embodies a complaint in relation to the conduct of such government. It may be doubted, however, whether any rule of international law forbids publication at such a time.

In 1895, the Department of State announced in a communication to the German Ambassador, that the Government "was fully aware of the practice to submit to foreign governments

[1] Mr. Forsyth, Secy. of State, to Mr. Livingston, Minister to France, March 5, 1835, Brit. and For. State Pap., XXIII, 1319, Moore, Dig., IV, 707.

[2] Mr. Adee, Acting Secy. of State, to Baron von Thielmann, German Ambassador, No. 27, Aug. 14, 1895, MS. Notes to Germany, XI, 483, Moore, Dig., IV, 724; Mr. Seward, Secy. of State, to Mr. Adams, Minister to Great Britain, No. 859, March 23, 1864, MS. Inst. Great Britain, XIX, 214, Moore, Dig., IV, 718.

[3] Mr. Davis, Acting Secy. of State, to Mr. Sargent, May 23, 1883, MS. Inst. Germany, XVII, 269, Moore, Dig., IV, 721.

[4] Mr. Blaine, Secy. of State, to Mr. Snowden, Minister to Greece, No. 26, March 8, 1890, For. Rel. 1889, 483, Moore, Dig., IV, 722.

Declared Mr. Adee, Acting Secy. of State, in a communication to Baron von Thielmann, German Ambassador, No. 27, Aug. 14, 1895: "I am indisposed to question the propriety of excluding, as your note seems to contemplate, from official publications of this character statements or criticisms

official international correspondence, exchanged with it upon matters requiring confidence and reserve." [1] American diplomatic officers are instructed that under no circumstances should any public or official paper be published without the express consent of the Department of State.[2]

which, however legitimate, or made necessary in the performance of the writer's duty, might appear offensive to a foreign government or be calculated to wound the sensibilities of a friendly people." MS. Notes to Germany, XI, 483, Moore, Dig., IV, 724.

[1] *Id.*

[2] Instructions to the Diplomatic Officers of the United States (1897), § 107; also § 106.

TITLE F

CEREMONIAL

1

§ 457. Observance of Formalities.

The intercourse of States has led to the general acceptance of certain conventionalities incidental to the maintenance of diplomatic relations. Upon its admission to membership in the family of nations, a new State is expected to conduct its foreign affairs in conformity with accepted usage. Observance of such formalities as have received widespread and habitual recognition is found to be an aid rather than a detriment to effective diplomacy, without betokening, in the case of a republic, the slightest loosening of attachment to democratic principles upon which it may be founded.[1]

The United States, like other Powers, is not reluctant to send a special embassy to attend the coronation of a king,[2] or the funeral of an emperor.[3] Nor does the Department of State at the present time forbid American diplomatic officers to wear upon suitable occasions an appropriate court costume in accordance with the local usage.[4] On the other hand, the United States wisely declines

[1] Instructions to Diplomatic Officers of the United States (1897), § 13, respecting conformity to ceremonial usage.

[2] For. Rel. 1902, 498, respecting a special embassy to the coronation of King Edward VII, of Great Britain, in 1902; also For. Rel. 1906, II, 1344–1347, respecting a special embassy to attend the celebration of the wedding of the King of Spain to Princess Victoria Eugenia of Battenberg, in 1906.

[3] For. Rel. 1909, 215–219, respecting the appointment of Minister Rockhill as special ambassador to attend the funeral of the Emperor of China in 1909.

[4] Mr. Adee, Acting Secy. of State, to Mr. Tower, Ambassador to Russia, No. 87, Sept. 15, 1899, MS. Inst. Russia, XVIII, 224, Moore, Dig., IV, 772, relied upon by Mr. Bacon, Acting Secy. of State, in an instruction to Mr. O'Brien, Minister to Denmark, March 9, 1906, For. Rel. 1906, I, 527. Mr. Adee declared that the Department of State had always distinguished between a uniform and a court dress conforming to local custom; the former serving to indicate a branch of public service to which the bearer belonged and also the rank or grade held by him therein, the latter denoting no public office or function.

See, also, Rev. Stat. § 1688, prohibiting officers of the several grades in the diplomatic service of the United States from wearing "any uniform or official costume not previously authorized by Congress"; also Rev. Stat. § 1226,

to yield to any formality the observance of which might imply an admission of inferiority on its part.[1] For officers of its government, at home or abroad, it counts upon such manifestation of respect as is commonly accorded those of foreign States in like stations. While not itself disposed to emphasize formality, the United States is careful, when such issues are raised, to attach such significance to them as its own dignity and independence appear, in the particular case, to require.[2]

2

§ 458. Rules of Precedence.

Following the rules of Vienna as modified by the Congress of Aix-la-Chapelle, the following grades of diplomatic representation are recognized by the United States: Ambassador, Minister Plenipotentiary, Minister Resident and Chargé d'Affaires.[3] According to Secretary Hay

> In each of these grades individual precedence is determined by the date of the envoy's presentation of his credentials.[4] . . .

authorizing officers who have served during the rebellion as volunteers in the Army of the United States and have been honorably mustered out of the volunteer service, to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held by brevet or other commissions in the volunteer service. Respecting the statutory requirements, see Instructions to the Diplomatic Officers of the United States (1897), §§ 66 and 67.

Concerning earlier controversies respecting diplomatic dress, see documents in Moore, Dig., IV, 761–771; John W. Foster, The Practice of Diplomacy, 130–158; F. Van Dyne, Our Foreign Service, 274–261.

Concerning certain other aspects of social intercourse, see documents in Moore, Dig., IV, 747–761.

Also Act of June 3, 1916, Chap. 134, § 125, 39 Stat. 216, U. S. Comp. Stat. 1918, § 1949a.

[1] See, for example, Instructions of Mr. Webster, Secy. of State, to Mr. Cushing, Minister to China, May 8, 1843, 6 Webster's Works, 467, 469, Moore, Dig., V, 416; also President Buchanan, Annual Message, Dec. 19, 1859, respecting the failure of Mr. Ward, Minister to China, to obtain an audience with the Emperor by reason of a refusal to submit to the "humiliating ceremonies required by the etiquette of this strange people in approaching their sovereign." Richardson's Messages, V, 559, Moore, Dig., IV, 773.

[2] Declared Mr. Jefferson, Secy. of State, to M. Genet, French Minister, Dec. 9, 1793, "No government can disregard formalities more than ours. But when formalities are attacked, with a view to change principles, and to introduce an entire independence of foreign agents on the nation with whom they reside, it becomes material to defend formalities." 4 Jefferson's Works, Washington's ed., 90, 92, Moore, Dig., IV, 728.

[3] Classification of Ministers, *supra*, § 411.

[4] Communication to Mr. Sampson, Minister to Ecuador, No. 131, Feb. 17, 1900, MS. Inst. Ecuador, II, 22, Moore, Dig., IV, 732. It is there also stated that "the holding by the envoy of an additional consular office is entirely disregarded; only the diplomatic rank he holds as chief of the mission, permanently or for the time being, is taken into account."

A chargé d'affaires *missi*, that is, a person bearing a letter addressed to the Secretary of State accrediting him as chargé, is looked upon as a permanent envoy of the fourth class, and as such takes precedence over a chargé d'affaires ad interim. Any member of the regular diplomatic personnel of a mission may become chargé d'affaires ad interim upon presentation as such to the Secretary of State by the retiring envoy, or *ex officio* upon the death or disability of the regular head of the mission.[1] The fact that a chief of a foreign mission in one country may at the same time be accredited in the same or another diplomatic capacity to the government of another country does not affect his precedence in either.

The United States follows the rule that, in general, new credentials (maintaining the same rank) do not alter the precedence gained by priority of original reception.[2]

As the United States has sent no envoy to the Vatican since the Government of the States of the Church ceased to exist, and has since that time received no envoy from the Pope, occasion for the recognition at Washington of honorary precedence to a papal nuncio has not arisen.[3]

3

§ 459. Ambassadorial Privileges.

As a consequence of his being the personal representative of his sovereign, or, in the case of a republic, of the whole people of his country, an ambassador is accorded special distinction. Regarded as the equal of the head of the State to which he is accredited, there is asserted in his behalf the right to be treated accordingly. Thus it is declared that the foreign ambassadors at Washington

assert the right, when present at official ceremonies conducted by the Government of the United States, to come next to the President, thus outranking the Secretary of State and other members of the cabinet, and all other officials of government —

[1] It is also announced in the same communication that "a consular officer, not holding a diplomatic appointment also, may not become a chargé d'affaires *ad interim;* he can only be made a chargé d'affaires *missi* by special credentials in that capacity. In neither case would the fact of the chargé's holding a coincident consular appointment affect his precedence as chargé." Communication to Mr. Sampson, Minister to Ecuador, No. 131, Feb. 17, 1900, MS. Inst. Ecuador, II, 22, Moore, Dig., IV, 732.

[2] Mr. Bayard, Secy. of State, to Mr. Buck, May 27, 1886, MS. Inst. Peru, XVII, 217, Moore, Dig., IV, 734. Concerning Official Calls, see documents in Moore, Dig., IV, 743–747.

[3] Mr. Uhl, Acting Secy. of State, to Mr. Dunbar, Sept. 10, 1894, 198 MS. Dom. Let. 525, Moore, Dig., IV. 735.

executive, legislative, and judicial. This claim the Department of State in principle concedes except as to the Vice-President. The ambassadors have, as a courtesy, yielded precedence to the Vice-President.[1]

An American ambassador at his post is said to outrank every other American citizen who may be there, except the President, and to receive in fact "honors similar to those which are due to a Chief of State when he is present." [2]

The right of access to the head of the State to which he is accredited, and that without delay, gives to an ambassador the opportunity to exercise his diplomatic functions with a facility not possessed by an officer of lesser rank. Thus in case of national emergency he may be of special usefulness to his own country.[3] It may be doubted whether the United States could at the present time adequately conduct its relations with the more important States to which it accredits ambassadors, through the medium of representatives of a lower grade.

[1] Statement in Moore, Dig., IV, 740, approved by the Hon. A. A. Adee, Second Assistant Secretary of State. The practice remains unchanged.

Respecting the rank of diplomatic representatives, and deploring the use by the United States of the ambassadorial grade, see John W. Foster, The Practice of Diplomacy, 15–33.

[2] Charlemagne Tower, Essays Political and Historical, 63.

[3] The same writer declares that "the Government has in its ambassador a representative whose position is recognized abroad with the highest distinction; whose communications take precedence of all others in international affairs; who speaks with authority; who must be heard without delay, and through whom the interests of the nation may be immediately and effectively safeguarded or the instructions of the President through the Department of State may be instantly carried out." *Id.*, 66.

PART IV

CONSULS[1]

TITLE A

§ 460. Classes and Titles.

According to the existing law of the United States the term "consular officer" is deemed to include persons in its service

[1] Concerning Consuls see documents in Moore, Dig., V, 2–154; Consular Regulations of the United States (1896); Continuations and amendments thereof, referred to in Augustus E. Ingram's Digest of Circular Instructions to Consular Officers (Jan. 1, 1897, to May 25, 1915); "American Consular Service", Dept. of State, February, 1920.

Bibliography in Bonfils-Fauchille, 7 ed., § 733; bibliography in Clunet, *Tables Générales*, I, 445–448, 452–457, 874–878; bibliography in Ellery C. Stowell, *Le Consul*, Paris, 1909, 319–345.

Proceedings of the Institute of International Law, *Annuaire*, XI, 348–394, XII, 275–281, XIII, 179–194, XV. 272–309, embodying Resolutions adopted Sept. 26, 1896, respecting Consular Immunities.

See, also, generally, Marcello Arduino, *Consoli, Consolati e diritto Consolare*, Milan, 1908; Bonfils-Fauchille, 7 ed., §§ 733–791; Calvo, 5 ed., III, §§ 1368–1450, pp. 215–282; Wilbur J. Carr, "The American Consular Service", *Am. J.*, I, 891; A. de Clercq and C. de Vallat, *Guides pratiques des consulats*, 5 ed., Paris, 1898, *Formulaires des chancelleries diplomatiques et consulaires*, 7 ed., Paris, 1909; Encyc. Brit., 11 ed., "Consul", VII, 20; John W. Foster, The Practice of Diplomacy, 1906, 216–242; Hall, Higgins' 7 ed., § 105; Foreign Powers and Jurisdiction of the British Crown, 4 ed., Oxford, 1895; Hershey, Int. Law, 51–52, 299–307, with bibliography; Baron A. Heyking, A Practical Guide for Russian Consular Officers, London, 1904; Chester Lloyd Jones, The Consular Service of the United States, 1906; Camille Jordan, "*Les Consuls dans les pays paisant partie de la communauté internationale*", *Rev. Droit Int.*, 2 ser., VIII, 479 and 717; B. W. von König, *Handbuch des deutschen Konsularwesens*, 7 ed., Berlin, 1909; Ernest Lehr, "*De l'Organisation et des Attributions du Corps Consulaire des États-Unis d'Amérique*", *Rev. Droit Int.*, 2 ser., XIV, 5; Ernest Ludwig, Consular Treaty Rights, Akron, 1913; Malfatti di Monte Tretto, *Handbuch des Österreichisch ungarischen Konsularwesens*, 2 ed., Vienna, 1904; *Manuel diplomatique et consulaire*, published under the direction of the Minister of Foreign Affairs of Belgium, 1901–1905; R. Monnet, *Manuel diplomatique et consulaire*, 3 ed., Paris, 1910; Oppenheim, 2 ed., I, §§ 418–442; Phillimore, II, §§ 243–276, 235–251; Julien Pillaut, *Manuel de droit consulaire*, Paris, 1910; Eugene Schuyler, American Diplomacy, 1895, 41–104; Georges Salles, *L'Institution des Consulats*, Paris, 1898; Stockton, Outlines, §§ 102–109; Ellery C. Stowell, *Le Consul*, Paris, 1909; Consular Cases and Opinions, Washington, 1909; Luigi Testa, *Le voci del servizio diplomatico-consolare italiano e straniero*, 3 ed., Rome, 1912; Frederick Van Dyne, Our Foreign Service, Rochester, 1909; G. G. Wilson, Chap. VI; Woolsey, 6 ed., §§ 99–100; Ph. Zorn, *Die Konsulargesetzgebung des deutschen Reiches*, 2 ed., Berlin, 1901.

designated as "consuls-general, consuls, vice-consuls, interpreters in consular offices, student interpreters, and consular agents, and none others." [1] There are also inspectors-general of consulates designated and commissioned as consuls-general at large.[2]

The terms "consul-general" and "consul" are declared to "denote full, principal, and permanent consular officers as distinguished from subordinates and substitutes." [3]

The term "consular agents" is said to denote consular officers subordinate to such principals, exercising the powers vested in them and performing the duties prescribed for them by regulation of the President at posts or places different from those at which such principals are located, respectively.[4]

"Vice-consuls" are said to denote consular officers subordinate to such principals, exercising and performing the duties within the limits of their consulates at the same or at different points

[1] Rev. Stat. § 1674, amended Feb. 5, 1915, Chap. 23, § 6, 38 Stat. 806, U. S. Comp. Stat. 1918, § 3116.

By the Act of Feb. 5, 1915, the offices of vice-consul-general, deputy-consul-general, and deputy consul were abolished.

By the Act of April 5, 1906, Chap. 1366, § 3, 34 Stat. 100, "The grade of commercial agent" was abolished.

[2] Act of April 5, 1906, Chap. 1366, § 4, 34 Stat. 100, U. S. Comp. Stat. 1918, § 3141. It is the duty of these officers to make such inspections of consular offices as the Secretary of State shall direct, and to report to him. Each consular office is to be inspected at least once in every two years. It is also provided that "whenever the President has reason to believe that the business of a consulate or a consulate-general is not being properly conducted and that it is necessary for the public interest, he may authorize any consul-general at large to suspend the consul or consul-general, and administer the office in his stead for a period not exceeding ninety days."

See, also, Circular to American diplomatic officers respecting the recognition of consuls-general at large, Aug. 24, 1906, For. Rel. 1906, I, 6.

"Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*). Consuls of the first kind, who are so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint Consuls of both kinds according to the importance of the consular districts. But there is a general tendency with most States to appoint professional consuls for important districts." Oppenheim, 2 ed., I, § 420. Also Art. I, declaration of the Institute of International Law, respecting consular immunities, Sept. 26, 1896, *Annuaire*, XV, 304.

[3] Rev. Stats. § 1674, as amended by § 6, Act of Feb. 5, 1915, Chap. 23, 38 Stat. 806.

[4] *Id.* According to Consular Regulations of the United States (1896), § 20, consular agents "are not authorized to correspond with the Department of State, unless through the principal or under exceptional circumstances; they make no returns or reports directly to the Department; and they are not permitted to render accounts or make any drafts for expenditures on the Departments of the Government, unless under express instructions." Moore, Dig., V, 5.

and places from those at which the principals are located, except that when vice-consuls take charge of consulates-general or consulates when the principal officers are temporarily absent or relieved from duty, they are to be deemed to denote consular officers substituted, temporarily, to fill the places of said consuls-general or consuls.[1]

There are two grades of vice-consuls — one designated vice-consuls *de carrière,* vacancies in which are filled by promotions from the grades of consular assistant and student interpreter, or by the appointment of candidates who have satisfactorily passed the examination for consul or vice-consul as prescribed by executive order; the other, vice-consul not of career, vacancies in which grade being filled by candidates selected by the Secretary of State, without examination.[2]

By reason of the requirements of the Constitution, the Department of State has always held that no one can be lawfully appointed to a position in the American consular service who is already holding office under some other government, and that the acceptance of such office from the latter serves to vacate the appointment by the United States.[3] Under special circumstances permission has, however, been given an American consular officer to exercise his good offices temporarily in behalf of the nationals of a foreign State itself unable for the time being to secure adequate consular representation in the country of his sojourn.[4]

[1] Rev. Stat. § 1674, as amended by § 6, Act of Feb. 5, 1915, Chap. 23, 38 Stat. 806. Respecting the circumstances when an American naval officer may exercise consular functions, see Rev. Stat. § 1433; also Stockton, Outlines, p. 222.

[2] American Consular Service, Dept. of State, 1920, 8; also Consular Regulations, 1896, paragraph 40, as amended by executive order of Aug. 26, 1919. Vice-consuls not of career are not eligible to promotion to the grade of vice-consul *de carrière* and consul without undergoing the usual examination.

[3] Mr. Bacon, Acting Secy. of State, to Mr. Brun, Danish Minister, May 7, 1906, For. Rel. 1906, I, 534; Constitution, Art. 1, Section 9, paragraph 8.

[4] Correspondence with the German Embassy at Washington, in 1909, For. Rel. 1909, 265–268, in which the Department of State, in the absence of precedent, hesitated to ask the requisite authority of Congress that an American consular agent in Syria be permitted to act also as a German vice-consul. Pending the appointment by Germany of a new encumbent, the Department permitted the American consular agent to take charge of German interests.

TITLE B

§ 461. Appointment of American Consular Officers.

American consuls-general at large, consuls-general and consuls are appointed by the President by and with the advice and consent of the Senate.[1] Vice-consuls and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer.[2]

Under the statutory law, latitude is given the President in the appointment of substitute and subordinate consular officers, provided such appointments conform with the requirements prescribed by existing executive regulations.[3] He may, for example, appoint a vice-consul to perform the duties of the office in case of the inability of the encumbent, by reason of ill health, to exercise his consular functions.[4] The President may, if, in his judgment, the good of the service so requires, designate consuls (without changing their classification) to act for a period not to exceed one year, as vice-consuls. When so acting such officers are not deemed to have vacated their offices as consuls.[5]

In case of emergency, or in the absence of a consular agent on leave, the principal consular officer may designate, with the approval of the Department of State, a suitable person to perform the duties, under the title of consular agent.[6]

[1] Constitution, Art. II, Section 2, paragraph 2; also Moore, Dig., V, 6; also Consular Regulations of the United States (1896), § 31.

[2] Consular Regulations of the United States (1896), § 39, wherein it is also declared that "the privilege of making such nominations must not be construed to limit the authority of the Secretary of State to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the interests of the service or other public reasons may be deemed to require it. R. S. sec. 1695; 15 Ct. Cl. R. 64." Moore, Dig., V, 7.

[3] Rev. Stat. § 1695.

[4] United States *v.* Eaton, 169 U. S. 331, Moore, Dig., V, 8. The same case affirmed the right of an American diplomatic officer, pursuant to the Consular Regulations of 1888 (§ 87), to appoint a vice-consul-general in case of the inability of a consul-general, by reason of ill-health, to discharge his duties.

[5] § 3, Chap. 1366, Act of April 5, 1906, 34 Stat. 100, U. S. Comp. Stat. 1918, § 3140.

[6] Consular Regulations of the United States (1896), § 21.

The Department of State, while not regarding the statutory law of the United States as prohibiting the appointment of an alien as a consular officer, adverts to the American practice to commission only citizens when such are available.[1] When no citizen is available, an alien may be appointed to a subordinate or substitute position.[2]

[1] Statement in Moore, Dig., V, 11, based upon Mr. Adee, Acting Secy. of State, to Mr. Winchester, Aug. 13, 1895, 204 MS. Dom. Let. 82.

[2] *Id.* See § 5, Act of April 5, 1906, 34 Stat. 101, prohibiting the appointment of any person not an American citizen in any consulate-general or consulate, to any clerical position, the salary of which is one thousand dollars a year or more. Also Mr. Fish, Secy. of State, to Mr. Grover, April 7, 1856, 112 MS. Dom. Let. 586, Moore, Dig., V, 11, respecting the serious embarrassment oftentimes resulting from the appointment of naturalized citizens to consulates within the country of their nativity.

TITLE C

EXEQUATUR

1

§ 462. Nature and Effect. Conditions of Issuance.

The right of a consular officer to exercise his functions is dependent upon the consent of the government in control of the country to which he is accredited. In times of peace the territorial sovereign possessed in fact of supreme control within its own domain is the political entity from which consent must be obtained. In seasons of war, a belligerent power occupying territory of its enemy may demand that authority for the exercise of consular functions therein shall emanate from itself, and hence be sought and granted accordingly.[1] The act of seeking and receiving of such authority by or in behalf of a neutral State, is not believed to be necessarily indicative of recognition of the *de jure* sovereignty of the military occupant.[2]

In the case of a consul-general or consul, the consent of the territorial sovereign is commonly manifested by a document known as an exequatur, which expresses formal recognition of the individual as a consul, bears witness to the fact of his commission to act as such by his own government, and permits him to exercise his functions within the district for which he is appointed.[3]

[1] Belligerent Occupation, Neutral Consuls, *infra*, Sec. 701.

[2] "The request for an exequatur concerns merely the performance of certain duties by a United States officer toward the vessels and citizens of the United States, with the permission of the authority in actual possession, and cannot be assumed to imply the expression of any opinion as to the right of possession or to operate in confirmation of a claim of right. Such was the position of the United States in obtaining exequaturs from Nicaragua for a consul at Corn Island; from the Hovas government for a consul at Madagascar and from Great Britain for a consul at Belize." Moore, Dig., V, 13, *citing* Mr. Rives, Acting Secy. of State, to Mr. Hall, Minister to Central America, No. 638, Nov. 12, 1888, MS. Inst. Cent. Am., XIX, 173.

[3] Stockton, Outlines, 225; Hall, Higgins' 7 ed., § 105.

Declares Stowell, "The true nature of the exequatur is that of a contract between the foreign State and the receiving State, and its object is to permit the consul to avail himself of its service and to utilize it in the interest of both States." *Le Consul*, 209.

A foreign consular officer possessing an unrevoked exequatur issued by the proper authority of the United States will be recognized by the courts as the

In the United States, exequaturs are signed by the President and bear the great seal of the United States; they are issued only to foreign consular officers possessing or exhibiting a regular commission signed by the chief executive of the appointing State and under its great seal.[1] They are not issued to substitute or subordinate officers of a foreign State.[2] To such individuals there is issued a less formal document, signed by the Secretary of State and bearing the seal of the Department of State.[3]

The commission of an American consul-general or consul after his compliance with preliminary requirements relative to taking the prescribed oath of office and the filing and approval of a bond, is transmitted to the appropriate diplomatic representative with instructions to apply for an exequatur. The latter document when obtained by the representative is transmitted to the consul together with the commission through the medium of the consulate-general, if there be one having supervisory powers; otherwise directly to the consul's address.[4] The Department of State may direct a consul to proceed to his post and enter upon the discharge of his duties with the consent of the local authorities, prior to the arrival of his exequatur.[5] If the United States be without diplomatic representation in the foreign country, the commission of a principal consular officer will be delivered or sent directly to him, with instructions to transmit it without delay, on arrival at his post, to the proper department of the government, and to request an exequatur.[6]

It is customary to transmit to the diplomatic representative, for recognition and authority, the certificates of appointment of

accredited representative of his country entitled to all of the privileges pertaining to the consular office, even though the government which sends him has been overthrown, and an apparently successful revolutionary government established in its place. United States *v.* Trumbull, 48 Fed. 94.

[1] Mr. Evarts, Secy. of State, to Mr. Sherman, Secy. of Treas., Dec. 12, 1879, 131 MS. Dom. Let. 13, Moore, Dig., V, 14.

The issuance of an exequatur is dependent upon the submission to the President of the consul's commission emanating either from the head of the appointing State, or from an officer thereof known to possess the power of appointing consular officers. Mr. McLane, Secy. of State, to Mr. Lederer, Austrian consul-general, Feb. 28, 1834, MS. Notes to For. Legs., V, 168, Moore, Dig., V, 15; Mr. Forsyth, Secy. of State, to Baron de Mareschal, Austrian Minister, March 21, 1839, MS. Notes to German States, VI, 51, Moore, Dig., V, 16.

[2] Mr. Evarts, Secy. of State, to Mr. Shishkin, Russian Minister, Nov. 14, 1879, MS. Notes to Russian Legation, VII, 290, Moore, Dig., V, 15.

[3] Mr. Evarts, Secy. of State, to Mr. Sherman, Secy. of Treas., Dec. 12, 1879, 131, MS. Dom. Let. 13, Moore, Dig., V, 14; Mr. Forsyth, Secy. of State, to His Highness Prince Metternich, Dec. 26, 1834, MS. Notes to German States, VI, 3, Moore, Dig., V, 16.

[4] Instructions to American Consular Officers (1896), § 48.

[5] *Id.*, § 49.

[6] *Id.*, § 50.

all subordinate American officers (except those of consular clerks, interpreters and marshals); and in such cases the subordinate officer is instructed not to enter upon his official duties before receiving recognition from either the government or local authority of the country.[1]

With respect to colonies or dependencies, it is said to be customary to instruct the consul-general, or principal consular officer therein, to apply to the proper colonial authority for permission for the newly appointed consular officer to act temporarily in his official capacity, pending the result of the request for an exequatur.[2]

2

§ 463. Refusal or Revocation.

While a State may at will refuse an exequatur to a foreign consul,[3] this right is rarely exercised by the United States,[4] except for cause, such as, for example, the previous misconduct of the appointee, or action on his part deemed adverse to the State.[5]

The Department of State declared in 1897, that as a general rule of international intercourse, a government may justly revoke an exequatur without assigning any reason for so doing; that if cause is assigned for revocation, discussion of the sufficiency thereof is invited, and opportunity offered for the presentation of defensive evidence coupled with a request for reconsideration of the action taken; that if, however, no reasons are offered, the State revoking the exequatur cannot be compelled to give any.[6] In 1908, however, the Department of State expressed surprise and regret at the "abrupt action" of Honduras in canceling the exequaturs of the American consul and vice-consul at Ceiba, "with-

[1] Instructions to American Consular Officers (1896), § 51. "The certificates of appointment of subordinate officers in countries in which the United States have no legation are sent to the principal officer, with instructions to request, from the proper authority, the recognition or exequatur accorded to such officers." *Id.*, § 52.

[2] *Id.*, § 53. "Upon the application of the consular officer, or of the consul-general where there is one, the diplomatic representative may make to the minister of foreign affairs a request for temporary permission to act in the case of any consular officer under his jurisdiction." *Id.*, § 54.

[3] Mr. Marcy, Secy. of State, to Mr. Wheeler, Minister to Nicaragua, May 11, 1855, MS. Inst. Am. States, XV, 236, Moore, Dig., V, 28.

[4] Mr. Blaine, Secy. of State, to Mr. Morgan, May 31, 1881, MS. Inst. Mexico, XX, 267, Moore, Dig., V, 28.

[5] Mr. Adee, Second Assist. Secy. of State, to Mr. Sickles, Dec. 26, 1899, MS. Inst. Spain, XXII, 658, Moore, Dig., V, 29.

[6] Mr. Sherman, Secy. of State, to Mr. Pringle, American Chargé, Aug. 18, 1897, For. Rel. 1897, 338, Moore, Dig., V, 27; Mr. Seward, Secy. of State, to Baron de Wetterstedt, April 23, 1866, MS. Notes to Sweden, VI, 174, Moore, Dig. V, 23.

out customary diplomatic notification" to the United States, "and without opportunity for interchange of views and temperate investigation of the facts." It was urged that the cancellation of the exequaturs be withdrawn, and that any complaint which the Government of Honduras might feel constrained to make concerning the course of the officers in question "should take the appropriate diplomatic channel of investigation and amicable settlement."[1] The Honduranean Government yielded.[2]

The revocation of his exequatur may be anticipated as the natural consequence of certain conduct on the part of a consul, such as the commission of illegal acts,[3] or manifest hostility towards the State of his sojourn especially when it is engaged in war,[4] or the endeavor to use his consular position to defeat the ends of justice by refusing to appear as a witness in a suit pending against himself.[5]

[1] Mr. Bacon, Acting Secy. of State, to the Honduranean Minister, July 31, 1908, For. Rel. 1908, 458, where it was also said: "It is very unfortunate, and in some regards most embarrassing, that a question of this character should be precipitated at a moment when we are earnestly acting, coincidently with Mexico, in the interest of peace in Central America. . . . If the American consul and vice-consul at Ceiba be shown to have done any act contrary to international precept, to the instructions of their Government, or to the friendly and impartial purposes of the United States, a frank ascertainment of the facts, and an equally frank comparison of the views of the two Governments could hardly fail to result in a cordial agreement touching the course to be pursued for a friendly closure of the incident. Your Government, Mr. Minister, like mine, can expect nothing less than fair play in such a case, and it certainly can ask no more." Also Art. 5, declaration of the Institute of International Law, Sept. 26, 1896, *Annuaire*, XV, 304.

[2] For. Rel. 1908, 469; *id.*, 456–470, respecting the matter generally.

[3] Coppell *v.* Hall, 7 Wall. 542, Moore, Dig., V, 19. See, also, Mr. Jefferson, Secy. of State, to Mr. Duplaine, Oct. 3, 1793, Am. State Pap., For. Rel., I, 178, Moore, Dig., V, 19. Also Moore, Dig., IV, 533–534, and documents there cited, concerning the revocation of the exequaturs of three British Consuls in 1856, on account of their violation of the neutrality laws of the United States during the Crimean War.

[4] Case of Mr. Bunch, Moore, Dig., V, 20–21, and documents there cited; Case of Mr. Rogers, Moore, Dig., V, 22–23, and documents there cited; also Mr. Fish, Secy. of State, to Mr. Stevens, June 23, 1873, MS. Inst. Paraguay, I, 163, Moore, Dig., V, 25.

[5] Janssen's Case, in Report of Mr. Seward, Secy. of State, to the President, March 28, 1867, accompanying message of President Johnson to the Senate, March 28, 1867, S. Ex. Doc. No. 1, special session of the Senate, 6, 36, 38, Moore, Dig., V, 23; also Mr. Marcy, Secy. of State, to Commander Figanière, Portuguese Chargé d'Affaires, Feb. 19, 1855, MS. Notes to Portugal, VI, 143, Moore, Dig., V, 20.

Concerning the gross misconduct of certain German consular officers in American territory while the United States was a neutral with respect to the World War, see House Report No. 1, 65 Cong., I Sess., Cong. Record, Vol. LV, Part 1, 319, 321.

TITLE D

PRIVILEGES AND IMMUNITIES

1

§ 464. Under International Law and Treaty.

Consuls are not diplomatic officers, and cannot of right claim the privileges and immunities accorded the latter. Consuls are, nevertheless, officers both of the State which appoints and that which receives them.[1] They possess, moreover, a certain representative character as affecting the commercial interests of the appointing country.[2] Such officers are for many purposes the spokesmen of their fellow countrymen residing in the same district; and upon the death of the latter are oftentimes made by treaty the legal representatives of the non-resident heirs.[3] The right of intercourse with local authorities, executive or judicial, is frequently expressly acknowledged,[4] and upon occasion, in the absence of diplomatic representation, the right of access to the national government of the State.[5]

The bare authorization of a consular officer to perform certain duties commonly entrusted to diplomatic officers does not serve to attach to him a diplomatic character, or to clothe him with diplomatic immunity. A foreign consul not acknowledged by the Department of State to possess the character of a public

[1] Consular Regulations of the United States (1896), § 72. See, also, Moore, Dig., V, 32–33, and documents there cited; The Anne, 3 Wheat. 435, 445–446. Concerning Consular Jurisdiction in Oriental and Certain Other Countries, see Extraterritorial Jurisdiction, *supra*, §§ 259–264.

[2] Consular Regulations of the United States (1896), § 71.

[3] See, for example, Art. X, consular convention with the German Empire, Dec. 11, 1871, Malloy's Treaties, I, 553; Art. XV, consular convention with Belgium, March 9, 1880, *id.*, I. 99.

[4] See, for example, Art. IX, consular convention with Sweden, June 1, 1910, Charles' Treaties, 114.

[5] *Id.*; also Art. VIII, consular convention with the German Empire, Dec. 11, 1871, Malloy's Treaties, I, 552.

It is oftentimes provided in extradition treaties that requisitions for the surrender of fugitives from justice shall be made by consular officers of the contracting parties in the absence from the country or its seat of government of diplomatic representatives. See, for example, Art. III, convention with France, Jan. 6, 1909, Charles' Treaties, 35. Also Consular Regulations of the United States (1896), § 71.

minister will not be regarded as such by the courts of the United States.[1]

2

§ 465. Respect for the Consular Function.

The yielding of consular privileges and immunities is for the purpose of facilitating the performance of the consular function.[2] Such performance is retarded unless respect for that function be maintained, and contempt for it both prevented and penalized.[3] Respect is enhanced by provisions in numerous conventions of the United States conferring upon a consul special privileges, such as, for example, that of giving his testimony in a civil case, at his consulate rather than in open court.[4] The consular function is

[1] In re Baiz, 135 U. S. 403, 424, 431–432, Moore, Dig., IV, 650; also Mr. Foster, Secy. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, I, 414, Moore, Dig., IV, 445.

The statutory law of the United States forbids an American consular officer to exercise diplomatic functions, or to hold any diplomatic correspondence or relation on the part of the United States in, with or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; or in any case, unless expressly authorized by the President to do so. Rev. Stat. § 1738.

It may be noted that Mr. D. C. Poole, Jr., a consul, was accorded the "rank of counselor" and assigned to the American Embassy in Russia in 1918. Diplomatic and Consular Service of the United States, corrected to July 26, 1919.

Concerning the situation where a consular office is formally superadded to the diplomatic office filled by a single individual, see Diplomatic Missions, Classification of Ministers, *supra*, § 411.

[2] Stowell, *Le Consul*, 139, calling attention to Art. XVI of the Jay Treaty with Great Britain, of Nov. 19, 1794, Malloy's Treaties, I, 600.

[3] "Consuls are to be considered as distinguished foreigners, dignified by a commission from their sovereign, and specially recommended by him to the respect of the nation with whom they reside. They are subject to the laws of the land indeed precisely as other foreigners are, a convention where there is one making a part of the laws of the land; but if, at any time, their conduct should render it necessary to assert the authority of the laws over them, the rigor of those laws should be tempered by our respect for their sovereign, as far as the case will admit. This moderate and respectful treatment towards foreign consuls it is my duty to recommend, and press on our citizens, because I ask it for their good, towards our own consuls, from the people with whom they reside." Communication of Mr. Jefferson, Secy. for Foreign Affairs, to Mr. Newton, Sept. 8, 1791, 4 MS. Am. Let. 283, Moore, Dig., V, 33.

"Ministers and Consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they discharge their respective duties and are guilty of no violation of the law of nations. . . . As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." President Fillmore, Annual Message, Dec. 2, 1851, Richardson's Messages, V, 118.

[4] See, for example, Art. IV of consular convention with Sweden, June 1, 1910, Charles' Treaties, 113; Art. IV of consular convention with Belgium, March 9, 1880, Malloy's Treaties, I, 95. Also *infra*, § 476.

upheld in the United States by the Federal law punishing one who falsely assumes or pretends to be a consular officer of a foreign government duly accredited as such to the Government of the United States, with intent to defraud such government or any person, and takes upon himself to act as such officer, or in such pretended character demands or obtains, or attempts to obtain from any person or from such foreign government, or from any officer thereof, any money, paper, document, or other thing of value.[1] It is doubtless also possible to enjoin one who interferes with or obstructs the performance by a consul of his official duties.[2]

In their intercourse with local or minor officials oftentimes ignorant of the law of nations and of the terms of existing conventions, consular officers are not infrequently subjected to humiliation, and occasionally to insult.[3] When a foreign consular officer within the United States is the victim of such treatment, there appears to be no law which subjects the offender to criminal prosecution in the Federal courts.[4] Frank expression of regret is, nevertheless, to be anticipated upon reasonable protest duly lodged with the superior authorities, State or Federal. If, because of the absence of an appropriate statute or for any other reason, the State authorities are unable or indisposed to inflict any penalty upon the offender, the country to which the consul belongs may justly seek redress through the diplomatic channel.

[1] Act of June 15, 1917, Chap. 30, title VIII, § 2, 40 Stat. 217, 226. Also Von Thororovitch *v.* Franz Josef Beneficial Association, 154 Fed. 911. See also For. Rel. 1906, II, 931–934, respecting the counterfeiting of the American consular seal at Palermo.

[2] If the consul be an alien, it is believed that he may rely upon paragraph 17, § 24, Chap. 2, of the Federal Judicial Code of Mar. 3, 1911, conferring original jurisdiction upon the United States District Courts, "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." Interference with the performance of the consular functions of one empowered to exercise the same by the State to which he is appointed as well as by his own country, violates the law of nations, and in most instances, also, the provisions of treaties which the consular officer may justly invoke.

See, also, Act No. 51 of April 15, 1913, Pennsylvania Sess. Laws of 1913, making it under certain circumstances unlawful for any person, firm or corporation to use the word "Consul" or "Consulate", or the coat of arms of a foreign country for exhibition, display, or advertising purposes, and providing a penalty therefor.

[3] For. Rel. 1905, 517–524, respecting treatment accorded Mr. Winslow the American Consul-General, by a judge of the first instance at Guatemala, in 1905.

[4] Case of the German consul at Cincinnati, Moore, Dig., V, 41, and documents there cited; also Opinion of Mr. Garland, Atty.-Gen., May 5, 1887, respecting the operation of § 4062, Rev. Stats., 19 Ops. Attys.-Gen., 16; also Opinion of Mr. Bradford, Atty.-Gen., 1 Ops. Attys.-Gen. 41.

3

§ 466. Protection of the Person of a Consul.

To enable him to perform his official duties effectively and without molestation, the person of a consul as well as his reputation are entitled to complete protection. The State to which he is appointed should make the utmost endeavor to accord it. Neglect in this regard always evokes protest and justifies demands for reparation.[1]

4

§ 467. Protection of the Consular Archives and Dwelling.

A consul may claim inviolability for the archives and official property of his office, and their exemption from seizure or examination.[2] Such inviolability is secured by numerous treaties of the United States.[3] A consul is also protected from the billeting of soldiers in the consular residence.[4] It is oftentimes agreed that

[1] Instances are numerous. See cases in Moore, Dig., V, 42–48, especially cases in Venezuela in 1900, For. Rel. 1900, 943–953, and case of Riot at Mollendo, Peru, 1893, For. Rel. 1893, 509–525.

Declared Mr. Webster, Secy. of State, to Mr. Calderon da la Barca, Spanish Minister, Nov. 13, 1851, in connection with the riot in New Orleans in 1851: "While the Government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another in cases of this kind, it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens." 6 Webster's Works, 509, 511, Moore, Dig., VI, 812–813.

Respecting indignities suffered by American consular officers at the hands of German frontier authorities in the course of the World War before the United States became a belligerent, see. House Report No. 1, 65 Cong., I Sess., Cong. Record, Vol. LV, 319, 321.

See, also, Mr Hunter, Acting Secy. of State, to Mr. Molina, Aug. 6, 1852, MS. Notes to Central America, I, 33, Moore, Dig., V, 48; Case of Mr. Jenkins, American Consular Agent at Puebla, Mexico, in 1919, under Claims, *supra*, § 285; E. C. Stowell, The Magee Incident, Washington, 1920, illustrating from Parliamentary Papers, 1875, Vol. 82, how Great Britain in 1874, secured redress for the ill-treatment of its consular representative at San José, Guatemala.

[2] Consular Regulations of the United States (1896), § 73; also Mr. Hunter, Acting Secy. of State, to Mr. Molina, Aug. 6, 1852, MS. Notes to Central America, I, 33, Moore, Dig., V, 48; case of outrage on the American Consulate at Malaga, April, 1898, For. Rel. 1898, 1078–1085, Moore, Dig., V, 52–53; Arts. 9 and 10, declaration of the Institute of International Law, Sept. 26, 1896, XV, *Annuaire*, 306.

[3] Art. VI of the consular convention with Sweden of June 1, 1910, Charles' Treaties, 114; Mr. Sherman, Secy. of State, to Mr. Neill, No. 250, June 26, 1897, respecting a violation by local authorities at Piura, of Art. XXXI of the treaty with Peru, of Aug. 31, 1887, MS. Inst. Peru, XVIII, 37, Moore, Dig., V, 52.

[4] Consular Regulations of the United States (1896), § 73; also *id.*, § 84, with respect to certain treaty provisions.

the consular office and dwelling shall at all times be inviolable, and that the local authorities shall not, under any pretext, invade them.[1] Business establishments belonging to a consul and separate from the consular premises are not inviolable.[2] In the absence of treaty, the territorial sovereign is not believed to be shorn of the right to make domiciliary searches or serve writs of judicial process within the consular offices and dwelling, provided, however, that such steps are taken with suitable consideration for the official position of the consular officer.[3]

Treaties yielding inviolability of the consular office and dwelling commonly provide also that they shall, under no circumstances, be used as places of asylum.[4] Hence it behooves a consul not to endeavor to shield from the local jurisdiction any employee sought to be subjected to process, but rather, upon due notice, to facilitate access to him, by placing the employee, if need be, outside of the consular premises.[5]

In 1912, the Department of State declared, in an instruction for the guidance of the American consul at Vera Cruz, that the United States does not claim what is technically known as the right of asylum in the strictest sense. It was said, however, that there is "an evident distinction between cases of this kind and cases in which temporary refuge is given in order to preserve innocent human life." In those of the latter kind the Department found it expedient to give a certain latitude to the judgment of the officer who might be called upon to determine within his discretion the course recommended by broad considerations of humanity in

[1] Consular Regulations of the United States (1896), § 80; also Art. VI, convention with Sweden, June 1, 1910, Charles' Treaties, 114. The same Article contains also the common provision that "when a consular officer is engaged in other business, the papers relating to the consulate shall be kept separate." See Myers' Case, arising under Art. XXXV of the treaty with Salvador of Dec. 6, 1870, Moore, Dig., V, 51–52, and documents there cited; also Tourgée's Case, arising under Art. III of consular convention with France of Feb. 23, 1853, For. Rel. 1900, 429–456, Moore, Dig., V, 53–54.

According to Art. V of the consular convention with Germany of Dec. 11, 1871, provision as to inviolability was limited to "the offices and dwellings of Consuls *missi* who are not citizens of the country of their residence." Malloy's Treaties, I, 552.

[2] Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, April 25, 1899, For. Rel. 1899, 377, Moore, Dig., V, 55.

[3] Case of Invasion by Haitian authorities in 1899, of the residence of the American Deputy Consul-General, For. Rel. 1899, 405–407, Moore, Dig., V, 55–57.

[4] See, for example, Art. VI of consular convention with Servia, Oct. 14, 1881, Malloy's Treaties, II, 1619; also, in this connection, Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, For. Rel. 1899, 302, Moore, Dig., V, 82.

[5] *Compare* Stowell, *Le Consul*, 154.

each individual case. It was accordingly announced as the general rule of the Department to place all emphasis upon the responsibility of the officer concerned, and within the foregoing limitations to permit him, at his discretion, to afford temporary refuge where such might be necessary to preserve innocent human life.[1]

5

CORRESPONDENCE

a

§ 468. With Governmental Agencies of the Consul's State.

A consular officer is believed to possess the right of free communication with his own government, and with its diplomatic or consular representatives in the State of his appointment.[2] To that end he may avail himself of the post or telegraph. When so desired his communications may be in cipher.[3]

A State engaged in war may, however, not unreasonably restrict the use of a cipher by neutrals to messages passing between diplomatic missions and their respective governments.[4] Pursuant to such regulations a cipher telegram from the American Minister at Peking addressed to the American Consul-General at Hong Kong was obstructed by the British censor at that place late in 1914. It does not appear that the United States deemed this action worthy of protest.[5]

Official mail bags or pouches of a consular officer are generally

[1] Mr. Knox, Secy. of State, to the American Chargé d'Affaires in Mexico, Oct. 29, 1912, For. Rel. 1912, 925; Mr. Adee, Acting Secy. of State, to the American Vice-Consul at Foochow, Nov. 7, 1911, For. Rel. 1912, 174.

[2] Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, invoking Art. XXXV of the convention with Salvador of Dec. 6, 1870, For. Rel. 1892, 34, Moore, Dig., V, 98. A consular officer doubtless possesses also the right of communication with the naval forces of his country in the waters of the State to which he is appointed.

See also Art. 15, declaration of the Institute of International Law, Sept. 26, 1896, *Annuaire*, XV, 307.

Coöperation with the Diplomatic Service. According to a circular instruction of May 22, 1907, an American diplomatic officer is deemed to possess general supervision over the consular service of the United States in the State of his residence. Consular officers therein are to report to him all political information, and all contentions which are, or may by their nature become, the subject of diplomatic action.

[3] Mr. Olney, Secy. of State, to Mr. Taylor, Minister to Spain, telegram, Feb. 17, 1897, For. Rel. 1897, 501, Moore, Dig., V, 100.

[4] Mr. W. H. Page, American Ambassador to Great Britain, to Secy. of State, telegram, Aug. 27, 1914, American White Book, European War, II, 72.

[5] Same to Same, telegram, Dec. 29, 1914, *id.*, II, 86; Acting Secy. of State, to Mr. Reinsch, American Minister to China, telegram, Jan. 2, 1915, *id.*, II, 86.

deemed inviolable;[1] likewise official communications addressed to such an officer from agencies of his own government or other sources. Such inviolability is not, however, conceded for the personal communications to or from a consul, in relation, for example, to his own commercial transactions in the country of his residence and outside of the scope of his official duties.[2]

In time of war it becomes highly desirable to establish uniform regulations for transmission of the correspondence of neutral consular as well as diplomatic officers in belligerent territory. To such an end the United States on November 25, 1914, directed that inquiry be made of the Austro-Hungarian Government (and *mutatis mutandis*, of that of other belligerent Powers), whether it would agree to the following regulations for American diplomatic and consular officers in Austria-Hungary:

> First, all correspondence between American diplomatic and consular officers within Austrian territory to be inviolable if under seal of office; second, no correspondence of private individuals to be forwarded by diplomatic and consular officers under official cover or seal; third, official correspondence between American diplomatic officers residing in different countries is not to be opened or molested if under seal of office; fourth, official correspondence under seal of office between Department of State and American diplomatic and consular officers is not to be opened or molested; fifth, pouches under seal passing between American diplomatic missions by mail or courier not to be opened or molested; sixth, correspondence other than that described in foregoing sent by ordinary mail to be subject to usual censorship.[3]

The Austro-Hungarian Government promptly acquiesced, and in May, 1915, the Department of State announced that the

[1] Case of mail of Mr. Bunce, British Consul at Charleston in 1861, Moore, Dig., V, 96, and documents there cited, in connection with which Mr. Seward, Secy. of State, regarded as indefensible the enclosure of private letters by the Consul in his official bag.

[2] Mr. Uhl, Acting Secy. of State, to Mr. Terres, No. 113, Dip. Series, Oct. 23, 1895, MS. Inst. Haiti, III, 463, Moore, Dig., V, 99; also Mr. Root, Secy. of State, to Mr. Leishman, Minister to Turkey Feb. 24, 1906, For. Rel. 1906, II, 1416, in which it was said: "The department is inclined to take your view, that circumspection should be exercised in claiming immunity for postal matter not obviously official. The department sedulously guards against needless extension of the privilege of immunity to include matter for private purposes."

[3] Mr. Bryan, Secy. of State, to Mr. Penfield, American Ambassador to Austria-Hungary, telegram, Nov. 25, 1914, American White Book, European War, II, 67.

arrangement was "apparently working out satisfactorily." [1] It is understood that the plan was acceptable also to the other belligerent governments.[2]

b

§ 469. Interposition with Local Authorities.

The right of a consular officer to interpose with the local authorities for the protection of his countrymen from unlawful acts in violation of a treaty or of principles of justice has been declared by the Department of State to be "so generally admitted as to form an accepted doctrine of international law." [3] This right has received recognition in consular conventions of the United States.[4] Although the matter giving rise to interposition may ultimately become the theme of diplomatic negotiation, that possibility does not deprive a consul of the right, nor absolve him from the duty

[1] Same to Same, May 20, 1915, *id.*, II, 67.

[2] *Id.*, enclosing telegram of Secy. of State, to Mr. Sharp, American Ambassador to France, April 23, 1915, referring to Department's circular of Dec. 18, 1914, and embracing the following rules established by the Department in respect to diplomatic and consular correspondence:

"1. Communications from private individuals or institutions abroad to private individuals or institutions in United States should not be sent in Department pouches.

"2. Personal letters from United States Diplomatic or Consular officers or employees of American missions or consulates abroad addressed to private individuals in United States may be sent in pouches but should be censored by heads of missions with a view to prevent transmission of statements which would otherwise be censored by Governments, and should be left unsealed with postage fully prepaid.

"3. Official correspondence of diplomatic and consular officers to individuals outside of Department should be marked 'Official business', and should be left unsealed.

"4. Communications from nations at war to agents in the United States should not be transmitted through pouches.

"5. The Department reserves right to censor all mail received in the pouches."

See, also, Mr. F. W. Seward, Acting Secy. of State, to Lord Lyons, British Minister, Feb. 6, 1862, Dip. Cor. 1862, 253, Moore, Dig., V, 97; Same to Same, Oct. 18, 1861, Dip. Cor. 1861, 174, Moore, Dig., V, 97. See, also, Special Instructions to American Diplomatic and Consular Officers, No. 486, Oct. 28, 1916; Instructions to American Diplomatic Officers, April 19, 1917.

[3] Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Sept. 26, 1895, For. Rel. 1895, II, 1209, Moore, Dig., V, 102; also Von Thororovich *v.* Franz Josef Beneficial Ass'n, 154 Fed. 911, 913.

Declared Mr. Wilbur J. Carr, of the Department of State in 1907: "It is the duty of a consul to endeavor upon all occasions to maintain and promote all the rightful interests of his countrymen; to protect them in all the privileges provided for by treaty or conceded by usage; and to aid them before the local authorities of the foreign country in all cases in which they may be injured or oppressed." *Am. J.*, I, 891, 906.

See, also, circular instructions to American consular officers, July 12, 1909, respecting the assistance to be rendered American travelers.

[4] See, for example, Art. VIII, consular convention with Germany, Dec. 11, 1871, Malloy's Treaties, I, 552; Art. IX, consular convention with Serbia, Oct. 14, 1881, *id.*, II, 1620; Art. XXI, treaty with Spain, July 3, 1902, *id.*, II, 1707; Art. IX, consular convention with Sweden, June 1, 1910, Charles' Treaties, 114.

of initiating such inquiries and remonstrances as the interests entrusted to his keeping may from time to time require.[1] The right of interposition is believed to justify, for example, courteous inquiry of a court as to the nature of an offense charged against a fellow countryman, or as to the status of a pending case, even in countries where the preliminary proceedings in criminal cases are secret.[2] The right is, however, capable of abuse, which is apparent when a consul demands, for example, information unrelated to the violation of a treaty or of international law, or to the protection of his countrymen.[3]

When upon proper occasion a consul interposes with local authorities, his complaints are entitled to respectful consideration; and if they are not satisfactorily redressed, direct application to the Government of the country is, according to numerous treaties, thereupon justified.[4]

Foreign consuls in the United States have at times availed themselves of the right of interposition by appeals to the judiciary committees of State legislatures. Such action has been for the purpose of suggesting the enactment of laws facilitating the exercise of consular rights conferred by existing conventions, or of explaining the nature of proposals in contravention of treaty provisions, or of exposing the evils (also sought to be prevented by certain agreements of the United States) of particular discriminations against aliens and their dependents, both resident and non-resident. Such participation in local political affairs indicates,[5]

[1] Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish minister, Oct. 11, 1895, For. Rel. 1895, II, 1213, Moore, Dig., V, 103.

According to Circular Instructions to American Consular Officers in Mexico, Central America and South America, Aug. 25, 1898, it was declared: "It is one of the most important duties of consular agents as well as of consuls to use their good offices in behalf of American citizens and for the protection of their interests, and it is confidently believed that our citizens would be treated with injustice less frequently in foreign countries if it were known and felt in each community that the nearest consular representative of the United States took an interest in every American citizen in his district, no matter how humble, and would be sure, if occasion arose, to demand justice."

[2] Mr. Sherman, Secy. of State, to Mr. Sepulveda, May 5, 1897, For. Rel. 1897, 396, Moore, Dig., V, 106.

According to Circular Instructions of Dec. 12, 1909, American consular officers were directed to endeavor, upon request, to obtain information respecting the enforcement of the claims of American Citizens.

[3] Mr. Hay, Secy. of State, to Mr. Tower, Ambassador to Germany, No. 42, April 1, 1903, For. Rel. 1903, 447, Moore, Dig., V, 107.

[4] See, for example, Art. IX, consular convention with Sweden, June 1, 1910, Charles' Treaties, 114.

[5] In the course of the enactment of so-called workmen's compensation acts, consular interposition has been frequent in certain States of the United States, in order to emphasize the equities of non-resident alien dependents, and also to secure recognition of consular officers as legal representatives of such individuals.

however, no impropriety of conduct which the State of residence finds just cause to resent. It may be observed that legislative committees have on numerous occasions given heed to such consular suggestions which have at times been incorporated in laws subsequently enacted.[1]

6

CERTAIN ACCESSORY PRIVILEGES

a

§ 470. Display of National Arms and Flag.

It has been announced by the Department of State that a consul may place the arms of his government over his door.[2] The American consular officer is, however, instructed to place the arms of the United States over the entrance of the consulate "unless prohibited by the laws of the country."[3] The right to place the national arms and the name of the consulate on the outer door of the consular offices is frequently given by treaty.[4]

In 1912 the Department of State declared that the display by a consul of the flag of his country was "a thing which may be properly claimed as a right under international law", and that in the exercise of it, the flag might be displayed at all times and not merely on certain holidays.[5]

[1] See, for example, § 113 (5) of the Employer's Liability Act of Nebraska of 1913; also § 23 of the Workmen's Compensation Law of Minnesota (Chap. 467, General L., 1913), as amended in 1915.

A foreign consular officer on one occasion, however, exposed himself to criticism, when, after having been appointed administrator of the estate of an American citizen who had died domiciled within his consular district and on the petition of resident American heirs, he subsequently sought to make use of his alienage in order to confer jurisdiction upon a Federal court in a suit brought by him as administrator. Cerri *v.* Akron-People's Telephone Co., 219 Fed. 285, 294.

[2] Consular Regulations of the United States (1896), § 73; also Art. 14, Regulations respecting consular immunities adopted by the Institute of International Law, Sept. 26, 1896, *Annuaire*, XV, 307.

[3] Consular Regulations of the United States (1896), § 70. "As to the display of national arms, §§ 70 and 73 do not seem to be entirely consistent." Moore, Dig., V, 57.

[4] See, for example, Art. V, consular convention with Sweden, June 1, 1910, Charles' Treaties, 114. The right to place the national arms and the name of the consulate on the consular "dwellings" was also conferred by Art. IV, consular convention with Germany, Dec. 11, 1871, Malloy's Treaties, I, 551.

[5] Mr. Knox, Secy. of State, to the Mexican Ambassador at Washington, June 21, 1912, For. Rel. 1912, 903. *Compare* the language of Consular Regulations of the United States (1896), § 73. *Id.*, § 70, Moore, Dig., V, 58, and documents there cited.

See provisions of Art. V of consular convention with Sweden, June 1, 1910, Charles' Treaties, 114; Display of Foreign Flags, *supra*, § 212; case of outrage to the escutcheon and flag of the German Consulate at Lausanne in January, 1916, *Rev. Gén.*, XXIII, 340-345.

b

§ 471. Ceremonial and Rank.

It is doubtless true that "consuls have no claim, under international law, to any formal ceremonial, and no right of precedence except among themselves, and in their relation to the military and naval officers of their own country." [1] Nevertheless, in certain States such as the United States, where a foreign consul is oftentimes the chief representative of his government within a wide territorial area, and is burdened with vast responsibilities in relation to a numerous population of his countrymen residing within his district, he becomes increasingly regarded as a high official entitled to special marks of courtesy.

As a matter of domestic policy the United States has found it wise to indicate a correspondence of rank between American consular and American naval or military officers; [2] and also to prescribe certain rules of conduct respecting official intercourse of officers of the former with those of the latter services.[3] That an American consul-general is given rank with, but next after, a brigadier-general of the Army, and a rank intermediate between a rear-admiral and a captain in the Navy, is significant estimate of the dignity attached to the highest consular office.[4]

c

§ 472. Exemption from Taxation.

It has been declared by the Department of State as recently as 1909, that in the absence of treaty, a foreign State is not under any legal obligation to exempt an American consular officer from the payment of a tax upon his private income, even though derived from property situated in the United States.[5] Hence, any exemption of such an officer from a tax upon his private income derived from property located outside of the territory of the taxing

[1] Consular Regulations of the United States (1896), § 76, where it is also declared that "this precedence, as to officers of the same grade in the consular body of the place, depends upon the date of the respective exequaturs. 1 Halleck, ch. 11, sec. 7."

[2] *Compare* Mr. Hay, Secy. of State, to Gov. Allen (Porto Rico), May 23, 1900, 245 MS. Dom. Let. 230, Moore, Dig., V, 59.

[3] Consular Regulations of the United States (1896), §§ 109–113, 440–442; also Circular Instruction, Jan. 22, 1908, amending § 441.

[4] Circular Instruction, Jan. 22, 1908, amending § 441, Consular Regulations of the United States (1896). According to the amendatory instruction, on occasions of ceremony, other than purely diplomatic functions, a consul-general is given a rank with, but next before, a first secretary of an embassy.

[5] Memorandum of the law officer of the Department of State on the payment of income taxes by American consular officers in Great Britain, March 1,

State must be sought upon "grounds of international comity and reciprocal favor." [1] A State is not, however, believed to possess the right to tax the official income of a foreign consul, unless he is one of its own nationals.[2]

The right to tax the private immovable property of a foreign consul, as well as his private movable property or incorporeal property, which may be fairly said to belong, for purposes of taxation, within the taxing State, is not open to doubt.

By treaty broad exemptions are habitually conceded. Consular conventions of the United States purport to exempt a consul who is a national of the appointing State, from all personal or property taxes, except such as are due on account of the possession of real property in, or for interest on capital invested in the country where the consul exercises his functions.[3] Such exemptions are, however, commonly declared to be inapplicable to consular officers engaged in any profession, business or trade. Engagement therein is said to subject them to the same taxes that would be paid by any other foreigner under like circumstances.[4] It may be doubted whether the act of engaging in an occupation alien to the consular service should in itself serve to subject the officer to the payment of a tax upon his official income, if any.[5]

1909, enclosed in instruction of Mr. Knox, Secy. of State, to Mr. Reid, Ambassador to Great Britain, April 21, 1909, For. Rel. 1909, 284.

Compare Art. 13, declaration of the Institute of International Law, respecting Consular Immunities, Sept. 26, 1896, *Annuaire*, XV, 306.

Exemption from Military or Naval Service. In order to prevent interference with the performance of their official duties, consuls, at least when nationals of the State by which they are appointed, should be exempt from any military or naval service. Numerous treaties of the United States so provide. See, for example, Art. III, consular convention with Sweden, June 1, 1910, Charles' Treaties, 113.

[1] Mr. Knox, Secy. of State, to Mr. Reid, Ambassador to Great Britain, April 21, 1909, For. Rel. 1909, 284. Indicating inability on the part of the British Government to exempt from taxation the private income of foreign consular officers derived from property abroad, see Mr. Reid, Ambassador to Great Britain, to Mr. Knox, Secy. of State, June 18, 1909, *id.*, 286.

[2] Mr. Frelinghuysen, Secy. of State, to Mr. de Struve, Russian Minister, April 21, 1884, MS. Notes to Russia, VII, 449, Moore, Dig., V, 87; also Mr. Seward, Secy. of State, to Mr. Chase, Sept. 23, 1863, 62 MS. Dom. Let. 9, Moore, Dig., V, 87.

[3] See, for example, Art. III, consular convention with Sweden, June 1, 1910, Charles' Treaties, 113. In that Article there is also embraced within the exception "income from pensions of public or private nature enjoyed from" the country wherein the consul exercises his functions.

[4] *Id.*

[5] Thus Art. III of the consular convention with Germany of Dec. 11, 1871, contained the wise provision that "under no circumstances shall their official income be subject to any tax." Malloy's Treaties, I, 551. See, also, For. Rel. 1901, 172–173, Moore, Dig., V, 88–89, respecting the liability of employees of American consulates in Germany to the German compulsory insurance act.

d

§ 473. Customs Duties.

It is not believed that foreign consular officers possess the right of free entry for goods sent to them for their personal use, or for their personal effects even upon first arrival in the country to which they are appointed.[1]

The Government of the United States does, however, extend the privileges of free entry and exemption from examination to the baggage and effects of foreign consular officers (including their families and suites), whose governments grant reciprocal privileges of free entry to American officers of like grade accredited thereto.[2] All official supplies of whatever nature sent by foreign governments to their consular officers in the United States are also admitted free of duty.[3] The Department of State is, nevertheless, of the opinion that the extension of these courtesies and privileges should be based upon the principle of reciprocity.[4]

7

AMENABILITY TO LOCAL PROCESS

a

§ 474. Civil Process.

A foreign consular officer is not, according to the law of nations, exempt from the local jurisdiction. The territorial sovereign is not obliged to yield to him so great a privilege. He is amenable to

[1] Mr. Bayard, Secy. of State, to Mr. Cox, Nov. 6, 1885, MS. Inst. Turkey, IV, 305, Moore, Dig., V, 90; also Mr. Moore, Assist. Secy. of State, to Mr. Cafiero, May 11, 1898, MS. Notes to For. Consuls, IV, 413, Moore, Dig., V, 91.

The more recent consular conventions of the United States do not purport to exempt consular officers from customs duties. That Art. II of the consular convention with Austria-Hungary, July 11, 1870, exempting consular officers under certain circumstances "from all direct and personal taxation, whether federal, state or municipal", did not embrace customs duties, see Mr. Bayard, Secy. of State, to Mr. Lee, Chargé, No. 16, Nov. 6, 1885, MS. Inst. Austria-Hungary, III, 371, Moore, Dig., V, 90. *Compare* Article XVII, treaty with Tunis, August, 1797, Malloy's Treaties, II, 1798, superseded by treaty with France, of March 15, 1904, *id.*, I, 544.

[2] Instructions of Mr. Curtis, Assist. Secy. of the Treasury, to Collectors of Customs, Oct. 19, 1911, T. D. 31934, Treasury Decisions, XXI, No. 17, p. 7; Art. 376 of Customs Regulations of 1915, as amended Oct. 4, 1920.

See, also, Diplomatic Intercourse of States, Customs Duties, *supra*, § 441.

[3] Circular Instruction of Mr. Wilson, Acting Secy. of State, to American Diplomatic Officers, Sept. 12, 1911.

[4] *Id.*

civil process.[1] Such amenability implies an obligation to submit to an adjudication when he is duly served.[2]

Difficulties arise, however, with respect to the service of process. To subject a consular officer to the jurisdiction of a particular tribunal by personal service upon him within his consular offices or dwelling, appears to be incompatible with the common treaty provision declaring such places to be inviolable.[3] A consul should not attempt to escape service by taking refuge in his consulate. Should he do so, however, the agreement to regard it as inviolable should not be disregarded. The territorial sovereign by threatening to withdraw his exequatur, or by complaint to his government, is never without the means of causing such an officer to place himself within the reach of the local courts.[4]

b

§ 475. Criminal Process.

Because amenable to the local jurisdiction, a consular officer finds himself subject to arrest when charged with offenses which, according to the local law, are rendered criminal, and for the commission of which the offender is made punishable.[5] Consular

[1] Opinion of Mr. Lee, Atty.-Gen., Nov. 21, 1797, 1 Ops. Attys.-Gen. 77, Stowell's Cases, 465, Moore, Dig., V, 72; Opinion of Mr. Wirt, Atty.-Gen., Dec. 1, 1820, 1 Ops. Attys.-Gen. 406, Stowell's Cases, 467, Moore, Dig., V, 73; Caldwell *v.* Barclay, 1 Dall. 305, Stowell's Cases, 86, Moore, Dig., V, 62.

See, also, Mr. Adee, Second Assist. Secy. of State, to Messrs. Hensel, Bruckmann & Lorbacher, Oct. 29, 1897, MS. Dom. Let. 81, Moore, Dig., V, 64; Mr. F. W. Seward, Assist. Secy. of State, to the Fifth Auditor of the Treasury, March 23, 1861, 53 MS. Dom. Let. 507, Moore, Dig., V, 62; Case of American Vice-Consul at Dresden in 1910, For. Rel. 1910, 522–523.

See Arts. IV–VIII of declaration of the Institute of International Law respecting consular immunities, Sept. 26, 1896, *Annuaire*, XV, 305.

[2] See, for example, Jones *v.* Le Tombe, 3 Dall. 384, Stowell's Cases, 199, Moore, Dig., V, 62. Also case of attempted service of a writ in a libel suit upon the Consul General of Italy at Denver in 1909; also opinion of Solicitor of the Department of State, concerning the matter, Jan. 27, 1910, enclosed in communication of Mr. Knox, Secy. of State, to Mr. Leishman, American Ambassador to Italy, Jan. 31, 1910, For. Rel. 1910, 674. Also same to the Italian Ambassador, Jan. 13, 1910, *id.*, 673.

[3] Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, For. Rel. 1899, 302, Moore, Dig., V, 82.

[4] Note the argument of Mr. Marcy, Secy. of State, to Mr. Figanière, Portuguese Chargé d'Affaires, March 27, 1855, MS. Notes to Portugal, VI, 145, Moore, Dig., V, 80–81.

[5] United States *v.* Ravara and Reporter's Note thereon, 2 Dall. 297, 299, Stowell's Cases, 415, 417, Moore, Dig., V, 55; Opinion of Mr. Cushing, Atty.-Gen., 7 Ops. Attys.-Gen. 367, 384, Stowell's Cases, 548, 552, Moore, Dig., V, 70.

See, also, Mr. Monroe, Secy of State, to Mr. Harris, Chargé d'Affaires at St. Petersburg, Dec. 23, 1815, with respect to Kosloff's Case, MS. Inst. U. S. Ministers, VIII, 17, Moore, Dig., V, 66; Same to Same, July 31, 1816, MS. Inst. U. S. Ministers, VIII, 89, Moore, Dig., V, 67; Mr. Olney, Secy. of State,

conventions of the United States commonly limit any immunity from arrest to cases where the act charged against the officer does not possess a criminal character.[1] The arrest and confinement of a consul when subjected to the local jurisdiction on merely a civil complaint is thereby sought to be avoided.[2]

c

§ 476. The Giving of Testimony.

Exemption from the obligation to appear as a witness except for the defense of persons charged with crime, is secured by numerous consular conventions of the United States.[3] The Depart-

to Moustapha Bey, Turkish Minister, Feb. 19, 1897, For. Rel. 1897, 583, Moore, Dig., V, 72.

Compare Art. VII, of the declaration of the Institute of International Law respecting consular immunities, Sept. 26, 1896, *Annuaire*, XV, 305.

[1] See, for example, Art. III convention with Sweden, June 1, 1910, Charles' Treaties, 113.

[2] Croxall's Case, Moore, Dig., V, 68–70, *citing* Mr. Forsyth, Secy. of State, to Mr. Cass, Minister to France, No. 6, Dec. 6, 1836, and No. 19, April 13, 1838, MS. Inst. France, XIV, 220, 239.

Jurisdiction of Courts in the United States. According to § 256 of the Federal Judicial Code, Act of March 3, 1911, Chap. 231, "the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . . Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls." 36 Stat. 1160. Respecting the legislation of the United States prior to the enactment of this law, see Moore, Dig., V, 72–78.

According to par. 18 of § 24, Chap. II, of the Judicial Code, the United States District Courts are given original jurisdiction "of all suits against consuls and vice-consuls." 36 Stat. 1093.

[3] Consular Regulations of the United States (1896), § 82, Moore, Dig., V, 78; also Art. IV of consular convention with Sweden, June 1, 1910, Charles' Treaties, 113.

See Art. VIII of Declaration of the Institute of International Law in respect to consular immunities, Sept. 26, 1896, *Annuaire*, XV, 305, J. B. Scott, Resolutions, 125.

Criminal Cases. According to Art. II of the consular convention with France, Feb. 25, 1853, it is provided that consular officers of the contracting States "shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them in the administration of justice, they shall be invited, in writing, to appear in court, and if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings." Malloy's Treaties, I, 529. Respecting the exemption of a French consul under this convention from the duty to testify as a witness for the defense in a criminal case, notwithstanding the Sixth Amendment to the Constitution of the United States, securing to persons accused of crime the right of compulsory process for obtaining witnesses in their favor, see In re Dillon, 7 Sawyer, 561, Moore, Dig., V, 78–81, and documents there cited; United States *v.* Trumbull, 48 Fed. 94. An agreement that even under the special circumstances specified in the convention with France, a foreign consul is exempt from the obligation to appear as a witness, might be at variance with the Sixth Amendment, if the latter were given a literal interpretation. If, however, as was held by Hoffman, J., in Dillon's Case, the Amendment was designed merely to place the accused

ment of State is of opinion that a convention providing for the inviolability of the consular archives is rendered nugatory if a consular officer may be compelled to disclose their contents by his testimony in a local forum.[1] According to Secretary Hay, such an officer cannot justly be required to divulge information coming to him in his official capacity, "for that is the exclusive property of his government;"[2] but that as to matters within his personal knowledge or observation in his mere capacity as an individual, he is not privileged from testifying as a witness.[3]

8

PRIVILEGES IN RELATION TO DECEASED COUNTRYMEN

a

§ 477. In General.

Upon the death of a countryman within the consular district, a consular officer is accorded by international law, and even more broadly by treaty, extensive privileges. These concern notification of the consul by local authorities of the fact of

in the same position in making his defense, as the Government occupied in endeavoring to establish his guilt, the bare removal of the consular officer beyond reach of the court's process, by virtue of a treaty, would do no violence to the Amendment.

In order to avoid controversies, such as that arising from Dillon's Case, Art. IV of the consular convention with Sweden, June 1, 1910, provides that "in all criminal cases, contemplated by the Sixth Article of the amendments to the Constitution of the United States, whereby the right is secured to persons charged with crimes to obtain witnesses in their favor, the appearance in court of said consular officers, shall be demanded, with all possible regard to the consular dignity and to the duties of his office, and it shall be the duty of such officer to comply with said demand. A similar treatment shall also be extended to the consuls of the United States in Sweden, in the like cases." Charles' Treaties, 113.

[1] Mr. Hay, Secy. of State, to Mr. White, Ambassador to Germany, March 6, 1899, respecting Guenther's Case, For. Rel. 1899, 302, Moore, Dig., V, 82.

Also Case of the American consular officer at Solingen, in 1905, For. Rel. 1905, 458–460.

[2] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, April 17, 1899, For. Rel. 1899, 566, Moore, Dig., V, 84–85; also Mr. Rockhill, Third Assistant Secy. of State, to Mr. Mason, U. S. consul, July 31, 1894, For. Rel. 1899, 304, Moore, Dig., V, 83; Mr. Blaine, Secy. of State, to Mr. Phelps, No. 178, Dec. 17, 1890, and No. 196, Jan. 29, 1891, MS. Inst. Germany, XVIII, 389, 403, Moore, Dig., V, 83.

[3] Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, April 17, 1899, For. Rel. 1899, 566–568, Moore, Dig., V, 84. In the same Instruction it is declared that a consul is not to refuse to testify because the facts to which he is required to testify might be of a political character, or simply because his testimony might have a tendency to implicate American citizens or others in the commission of unlawful acts. See, also, in this connection, Mr. Merry, Minister to Nicaragua, to Mr. Hay, Secy. of State, May 9, 1899, For. Rel. 1899, 583, Moore, Dig., V, 85.

death; the taking charge of or placing the consular seal upon the assets of the decedent pending the appointment of an administrator; the administration of the estate of the decedent; and the distribution to foreign heirs in the State to which the consul belongs, either of property of the estate, or of pecuniary benefits due them by reason of their connection with or dependence upon the decedent.

The foregoing privileges are of great importance to foreign consuls in the United States, and particularly to those within whose consular districts reside large numbers of their fellow-countrymen, engaged in industrial occupations in the course of which death is frequently encountered. Such persons oftentimes leave surviving heirs or dependents residing in the country to which they owe allegiance. The proper protection of the interests of the non-resident heirs or dependents renders it expedient, and at times imperative, that a consular representative should automatically, and by virtue of the law, act in their behalf.[1]

b

§ 478. Notification of the Deaths of Fellow-Countrymen.

Numerous conventions of the United States have provided that in case of the death of a citizen of either contracting party within territory belonging to the other, who has no known or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consular representative of the State of the deceased, that information may be at once transmitted to the parties interested.[2] In the absence of local laws imposing a duty upon specified officials to make the requisite notification, foreign consuls in the United States oftentimes fail to learn of the deaths of their intestate fellow-countrymen residing within the same consular district. Upon complaint made through the diplomatic channel, the Department of State has on more than

[1] The helplessness of non-resident dependents has oftentimes been utilized by local agencies which, when fortified by powers of attorney, have served their principals without zeal or scruple, and with vigorous opposition to the endeavors of the consular representative of the decedent to obtain justice in behalf of those who suffered pecuniary loss through his demise.

[2] See, for example, Art. XVI, consular convention with Austria-Hungary, July 11, 1870, Malloy's Treaties, I, 44; Art. X, consular convention with Germany, Dec. 11, 1871, *id.*, I, 553; Art. XVI, consular convention with Italy, May 8, 1878, *id.* I, 982; Art. XV, consular convention with Belgium, March 9, 1880, *id.*, I, 99; Art. XXVI, treaty with Spain, July 3, 1902, *id.*, II, 1709; Art. XIV, consular convention with Sweden, June 1, 1910, Charles' Treaties, 117.

one occasion formally communicated with the governors of the several States (excepting those of States whose statutory law made appropriate provision), requesting that the terms of the particular treaty invoked be brought to the attention of the "competent local authorities", in order that the stipulation with respect to consular notification be complied with.[1] The failure of certain States generally to deal with the matter by appropriate legislation has served to leave the international obligation unfulfilled,[2] and to suggest the importance if not the necessity of a Federal law making uniform and adequate provision responsive to the formal undertaking of the United States.

According to instructions issued in 1914, the Department of State declared it to be the duty of an American consul to take such steps as might be practicable to insure his being informed of the deaths of Americans that might occur within his district, whether or not, under the regulations, he was called upon to take charge of the effects or administer the estate.[3]

c

§ 479. Temporary Possession of the Assets of an Estate.

Official opinion in the United States has lacked uniformity with respect to the right of a consul, in the absence of treaty, to take even temporary possession of the assets of the estate of a deceased and intestate countryman. It was announced by Secretary Clay in 1827, that such an officer might, according to the prevailing practice, put his official seal upon the effects of the deceased until the local law operated upon them by the grant of administration, or if no administration were granted, for the purpose of transmission to the kindred of the deceased.[4] Much the same idea had

[1] See, for example, Mr. Adee, Acting Secy. of State, June 27, 1907, to the Governors of the States, For. Rel. 1907, I, 53.

[2] See, however, § 12151, Vol. 5, Michigan Annotated Statutes, imposing upon judges of probate, in connection with the application for letters of administration, the duty to notify the appropriate consular officer; also § 7231, Minnesota Gen. Stat. 1913. According to § 20A, Act of April 21, 1915, amending Chap. 467, Minnesota General Laws of 1913, provision is made in the Workmen's Compensation Act, that in case a decedent be a native of a foreign country leaving no known dependents within the United States, "it shall be the duty of the department of labor to give written notice of said death to the consul or other representative of said foreign country forthwith."

[3] Circular Instructions to American Consular Officers, July 25, 1914.

According to Circular Instructions of June 3, 1914, American consular officers are directed to make report of American citizens injured, killed or saved in calamities or disasters.

[4] Communication to Mr. Vaughan, British Minister, Nov. 12, 1827, MS. Notes to For. Legs., III, 400, Moore, Dig., V, 117.

been expressed by Secretary Pickering in 1799.[1] Secretary Marcy, in 1855, went so far as to declare that American consuls were "authorized and required to act as administrators on the estates of all citizens of the United States dying intestate in foreign countries and leaving no legal representative or partner in trade."[2]

The Supreme Court of the United States in 1912 announced it to be "the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration."[3]

The statutory law of the United States prescribing the duties of American consular officers appears to make the right of a consul to take even temporary possession of the assets of an estate, inventory the same, and perform other specified acts, dependent upon the consent of the territorial sovereign.[4] The Consular

[1] Communication to Mr. Smith, May 13, 1799, 11 MS. Dom. Let. 324, Moore, Dig., V, 117.

[2] Communication to Mr. Aspinwall, Aug. 21, 1855, 44 MS. Dom. Let. 270, Moore, Dig., V, 118. The Secretary's statement should, however, as was suggested by the Supreme Court of the United States, in Rocca *v.* Thompson, 223 U. S. 317, 327, be read in the light of the existing statutory law of the United States (§ 1709, Rev. Stat.), which did not contemplate the assertion of a right of consular administration which the local law did not permit.

[3] Rocca *v.* Thompson, 223 U. S. 317, 331. Similarly it was declared by the Court of Appeals of New York in 1914, that "the function of consuls is to preserve derelict estates. When their countrymen die in foreign lands it is their duty to step in and guard the stranded property from waste. This right belongs to them, irrespective of express statute or treaty, by virtue of their office." Matter of D'Adamo, 212 N. Y. 214, 223.

[4] § 1709, Rev. Stat. provides that:

"It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

Mr. Cushing, Atty.-Gen., in the course of an opinion, Sept. 12, 1856, declared that "Sundry legislative acts of the United States, proceed on the assumption that American consuls, in foreign countries, will collect and remit the assets of deceased Americans. Their authority to do this will depend, of course, on the law of the foreign country. If permitted by that law, and so far as permitted, the consul may do it, but not otherwise, nor further, unless al-

Regulations of the United States of 1896 announced that by the law of nations as well as by statute a consular officer was the "provisional conservator of the property within his district belonging to his countrymen deceased therein."[1] In 1903, Secretary Hay, having in mind the views of Attorney-General Cushing expressed in 1855 and 1856, respecting the statutory law, said that the power and duty to guard, collect and transmit the assets of an estate were not exclusive; and that if those powers were not conferred by treaties or by the local law or usage, it became the consul's "alternative duty to aid others upon whom those functions devolve under local law."[2] This view prevails at the present time. American consular officers are instructed to exercise greatest care not to exceed powers granted by treaty or "by local statute."[3]

It may be observed that certain conventions of the United States declare, in various form, that, so far as the laws of the contracting parties will permit, a consular officer may take temporary possession of the assets of the estate of a deceased intestate countryman, pending (as is specified in one instance) the appointment of an administrator.[4]

d

§ 480. Administration of Estates.

It is not believed that in the absence of agreement a consular officer is possessed of an exclusive right to administer the estate

lowed by treaty. And so it is with respect to foreign consuls in the States of the Union." 8 Ops. Attys.-Gen. 98, 100, Stowell's Cases, 568, 570. See, also, Opinion of Mr. Cushing, Atty.-Gen., June 2, 1855, 7 Ops. Attys.-Gen. 242, 274, Stowell's Cases, 511, 538.

[1] § 409, wherein it was also declared that "He (a consular officer) has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's state — 7 Ops. Attys.-Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

[2] Communication to Mr. White, Chargé at London, No. 1109, Jan. 15, 1903, For. Rel. 1903, 487, Moore, Dig., V, 123.

[3] Mr. Adee, Acting Secy. of State, to Mr. Sands, Minister to Guatemala, No. 6, Oct. 12, 1909, For. Rel. 1909, 346, 347.

[4] Art. XIV, consular convention with Sweden, June 1, 1910, Charles, Treaties, 117; Art. X, treaty of friendship with Paraguay, Feb. 4, 1859, Malloy's Treaties, II, 1367. See, also, the provisions of par. 10, Art. III, consular convention with Colombia, May 4, 1850, Malloy's Treaties, I, 316; Art. VIII, treaty of friendship with Costa Rica (followed in later treaties with Honduras and Nicaragua), July 10, 1851, *id.*, I, 344; Art. XXVII, treaty of friendship with Spain, July 3, 1902, *id.*, II, 1709. *Compare* the provisions of Art. VI, treaty of friendship with Persia, Dec. 13, 1856, *id.*, II, 1373.

of a deceased intestate countryman. In the United States the right to administer property left by a foreigner within the territory of any State of the Union is "primarily committed to State law." [1] Various treaties of the United States, the interpretation of which has become the subject of frequent adjudication in American courts, have purported to confer upon consular officers certain privileges of administration.

According to Art. IX of the treaty with the Argentine Republic of July 27, 1853, a consular officer was given "the right to intervene in the possession, administration and judicial liquidation of the estate [of a deceased intestate countryman] conformably with the laws of the country, for the benefit of the creditors and legal heirs." [2] In 1912, the Supreme Court of the United States declared that the treaty did not take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and did not commit the same to consular officers of that country, to the exclusion of persons entitled to administer by the local laws of the State in which the foreign decedent died and left property.[3] It was not intimated that the President with the approval of the Senate lacked the constitutional power to conclude, in behalf of the United States, a treaty conferring upon a foreign consul an exclusive right to administer.[4] The sole question was whether such a right had in fact been conferred by the terms of the particular convention; and that was decidedly negatively.

According to Article X of the treaty of friendship with Paraguay of February 4, 1859, a consular officer, in the event of the death of an intestate countryman, "shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, until an executor or administrator be named by the said

[1] Rocca *v.* Thompson, 223 U. S. 317, 329. See, also, Pagano *v.* Cerri, 93 Ohio S. 345, 112 N. E. 1037.

[2] Malloy's Treaties, I, 23.

[3] Rocca *v.* Thompson, 223 U. S. 317, *affirming* In the Matter of the Estate of Ghio, 157 Cal. 552. *Compare* In re Wyman, 191 Mass. 276, Stowell's Cases, 460; In re Lobrasciano's Estate, 77 N. Y. Supp. 1040, Stowell's Cases, 235; Carpigiani *v.* Hall, 172 Ala. 287. See, also, "Rights of Consular Officers to Letters of Administration under Treaties with Foreign Nations", by Frederic R. Coudert, *Col. Law Rev.*, XIII, 181; Ernest Ludwig, Consular Treaty Rights, 108–115; For. Rel. 1908, 6–9, respecting consular jurisdiction under Art. IX of the treaty of July 27, 1853, over estates of American citizens dying in the Argentine Republic.

[4] "We cannot feel that the Court had any real doubt as to the constitutionality of a treaty granting to Consuls the right to administer upon the estates of their deceased nationals for the benefit of foreign heirs." Frederic R. Coudert, in *Col. Law Rev.*, XIII, 181, 185.

Consul-General, Consul or Vice-Consul, or his representative."[1] In 1914, the Court of Appeals of New York expressed the opinion that the words "so far as the laws of each country will permit" must be deemed to qualify the right of a consular officer to name an executor or administrator, as well as his right of temporary custody.[2]

By Article XXXIX of the treaty of friendship with Peru, of July 26, 1851, it was agreed that pending the conclusion of a consular convention, in the absence of legal heirs or representatives, "the Consuls or Vice Consuls of either party shall be *ex officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district."[3] The same language was employed in Article XXXVI of the treaty with Peru of September 6, 1870,[4] and in Article XXXIII of the treaty with the same State of August 31, 1887.[5] All of these treaties have long since been terminated.[6] It may be observed, however, that a mixed commission under the claims convention with Peru, of January 12, 1863,[7] made an award against the United States by reason of the detention of the goods of a deceased Peruvian citizen from the Peruvian consul in New York in violation of the treaty of July 26, 1851.[8]

According to Article VI of the treaty of friendship with Persia, of December 13, 1856, it was provided that in case of the death of

[1] Malloy's Treaties, II, 1367.

[2] Matter of D'Adamo, 212 N. Y. 214, 230–231, where the court practically overruled the conflicting opinion of the Surrogate of New York County in In re Baglieri's Estate, 137 N. Y. Supp. 175. The Court of Appeals adverted to the fact that the Paraguayan treaty was before the Supreme Court of the United States when it decided Rocca *v.* Thompson, and "though not mentioned in the opinion, must have been held unavailing to establish an exclusive right in favor of the Italian consul."

[3] Malloy's Treaties, II, 1400.

[4] *Id.*, II, 1425.

[5] *Id.*, II, 1441. Mr. Justice Day, in Rocca *v.* Thompson, 223 U. S. 317, 332, adverted to Art. XXXIII of the treaty with Peru of Aug. 31, 1887, as an instance where it had been the purpose of the United States to commit the administration of estates of citizens of one country, dying in another, exclusively to a consular officer.

[6] Malloy's Treaties, II, 1388, note *a*, 1414, note *a*, and 1431, note *a*.

[7] *Id.*, II, 1408.

[8] Moore, Arbitrations, 4390–4392. See, in this connection, the interesting provisions of Art. IX of agreement (*accord*) concluded by Bolivia, Ecuador, Peru and Venezuela, July 18, 1911, in relation to the exercise of consular rights in the territories of the contracting parties. Brit. and For. State Pap., CVII, Part 1, p. 603.

See certain Articles of the Brazilian decree No. 855, of Nov. 8, 1851, Brit. and For. State Pap., XCII, 424; also exchange of notes between the Governments of Brazil and Germany, 1897–1898, with respect to the application of the provisions of the decree, *id.*, 422–424.

a citizen or subject of either of the contracting parties within the territories of the other, the "effects" should be delivered up to the family or business partners of the decedent, and in the absence thereof, "to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country." [1] In the Consular Regulations of the United States of 1896, it was stated that American consuls in Persia "may administer upon the property of their deceased countrymen." [2]

In a treaty with Salvador of December 6, 1870, which was abrogated on notice given by that country May 30, 1893, broadest privileges were conferred upon consular officers enabling them to perform the functions common to an administrator.[3] Neither the Persian nor Salvadorean treaty appeared to make the enjoyment of the right conferred upon a consul dependent upon the sanction of the local law.

According to Article XIV of the consular convention with Sweden of June 1, 1910, the consular officer or his representative "shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate." [4] The Supreme Court of Minnesota in 1912,[5] and the Court of Appeals of New York in 1914,[6] were of opinion that the clause — "so far as the laws of each country will permit" — served to qualify the entire sentence in which they were contained, and

[1] Malloy's Treaties, II, 1373.
[2] § 91, Moore, Dig., V, 117.
[3] Par. 10, Art. XXXIII, Malloy's Treaties, II, 1563.
[4] Charles' Treaties, 117. See In re Holmberg's Estate, 193 Fed. 260, where it was held that this Article brought a consular officer of Sweden within the tenor of Rev. Stat. § 4544, providing that when a seaman died intestate, and his assets did not exceed $300, they should be paid into a specified court, and by it delivered to any persons proving themselves entitled to take out letters of administration, even though no letters were taken out. This convention was to remain in force ten years from the date of the exchange of ratifications which took place March 18, 1911, and thereafter from year to year, unless within a specified time, either party should give notice of its intention not to renew it.
[5] Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122.
[6] Matter of D'Adamo, 212 N. Y. 214. Such was also the view of the Supreme Court of California in 1915, in In re Servas' Estate, 146 Pac. 651.

According to a Circular to American Consular Officers of March 31, 1902, pursuant to an Executive Order of the same date, acceptance by a consular officer of appointment from a foreign State in any fiduciary capacity, as administrator, guardian, etc., for the settlement or conservation of estates of deceased persons or of their heirs or other persons under legal disabilities is forbidden, unless previously authorized by the Secretary of State.

to render, therefore, a foreign consul merely a person eligible to act as administrator when no one having a prior right under the local law was competent or able to act.

It may be observed that the courts of last resort in Minnesota, New York and Ohio have appeared to share the reluctance of the Supreme Court of California to impute to the Federal Government the intention "by means of its treaty-making power, to materially abridge the autonomy of the several States and to interfere with and direct the State tribunals in proceedings affecting private property within their jurisdiction." [1] Inasmuch as it has been conceded by these tribunals that it lies within the so-called treaty-making power of the Federal Government to confer an exclusive right to administer the estate of a deceased intestate countryman upon a foreign consular officer, and in view of the fact that such a right has on three distinct occasions been accorded Peruvian consuls, it may be doubted whether the true significance of the terms employed is to be derived from the effect produced upon the institutions of a particular State of the United States by the grant of the right asserted.[2] In view, however, of the mode and nature of the reference to the local laws, the decisions respecting the Swedish and Paraguayan conventions may be regarded as the natural and reasonable consequence of the phraseology of the texts. Although the consular right thereby conferred must, in the light of judicial opinion, be regarded as subordinate to that conferred by local statutes upon specially designated individuals, it is suggested that a consular officer who is entitled to invoke the benefits of these conventions may justly claim the right of appointment whenever the appointing judge is given discretionary power, or whenever no opposing applicant relies upon a superior statutory right.[3]

[1] Matter of the Estate of Ghio, 157 Cal. 552, 557; Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122, 140; Matter of D'Adamo, 212 N. Y. 214, 227–228; Pagano *v.* Cerri, 93 Ohio S. 345, 112 N. E. 1037. See, also, In re Servas' Estate, 146 Pac. 651.

[2] The problem here, as in every case involving the interpretation of a treaty, is to ascertain the sense in which particular terms were employed by the contracting parties. Light thereon may come from many sources, such as from declarations of the negotiators, or from local constitutions. It is, however, an indirect ray that passes through the constitutionally subordinated agencies of a single nation, or through *ex parte* and unrelated views of national policy emanating from its foreign office. See, also, The Interpretation of Treaties, So-called Rules of Construction, *infra*, § 535.

Respecting divergent views of policy expressed by the Department of State, see Moore, Dig., V, 118–124, and documents there cited; also Mr. Root, Secy. of State, to Mr. Brun, Danish Minister, No. 678, May 2, 1907, For. Rel. 1907, I, 304.

[3] Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122; In re Bagnola's

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§ 481. Representation of Non-Resident Heirs or Dependents.

As early as 1821, the Supreme Court of the United States announced that a foreign consul was a competent party to assert or defend the rights of property of his countrymen in any courts of the nation having jurisdiction of causes affected by the application of international law.[1] It is believed that no special authorization, by treaty or otherwise, is essential in order to warrant the intervention by such an officer in cases affecting his non-resident countrymen whensoever he has reason to believe that their interests require the consular protection.[2]

The United States has concluded certain conventions which, in varying form, recognize a consular officer as the legal representative of his non-resident countrymen, and which serve to enable him to act in their behalf as completely as if he held their mandate.[3] According to Article VIII of the consular convention with Germany of December 11, 1871, he was, for certain purposes, presumed to be their legal representative.[4] By virtue of Article XV of the con-

Estate, 154 N. W. 461, where the Supreme Court of Iowa declared in 1915: "It is thoroughly well settled that under our treaty obligations the Consul [of Italy] has the initial right to administer upon the property of the subjects of his country"; In re Infelise's Estate, 149 Pac. 365 (Montana).

See, also, *dissenting* opinion of Donahoe, J., in Pagano *v.* Cerri, 112 N. E. 1037, 1041, in relation to the requirements of the Ohio statutory law.

[1] The Bello Corrunes, 6 Wheat. 152, Stowell's Cases, 68. It was also there said, pp. 168, 169, that "Whether the powers of the vice-consul shall in any instance extend to the right to receive, in his national character, the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed." See, also, The Anne, 3 Wheat. 435, 445–446.

[2] Thus a consul, without special authorization, might, it is believed, as the legal representative of his non-resident countrymen, start suit, in their behalf, should occasion so require.

In Nicola Marsicana *v.* Felice Ambrose et al., Gen. No. 313,768, Superior Court of Cook County, Illinois, Judge Sullivan held, on June 1, 1915, on petition of the Royal Italian Vice-Consul, that under existing treaty provisions with Italy, that officer had the right to enter his appearance as legal representative of Felice Ambrose, an Italian subject residing in Italy (who had been made a party defendant to a bill in chancery and had been defaulted), and in his own name as consular representative take whatever steps might be deemed necessary to protect the latter's interests.

[3] "In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented." Miller, J., in Succession of Rabasse, 17 So. 867, 47 La. Ann. 1454.

[4] Malloy's Treaties, I, 552.

sular convention with Belgium of March 9, 1880, he was accorded the right to appear personally or by delegate on behalf of the absent or minor heirs or creditors, until they were duly represented,[1] while Article VI of the treaty of friendship with Persia of December 13, 1856, expressly declared that the effects of the deceased ("in case he has no relations or partners") should "be delivered up" to the consul or agent of the nation of which the deceased was a subject or citizen.[2] Provisions of certain treaties of commerce, such as were contained in Article XXII of that with Italy of February 26, 1871, permitted citizens of each contracting party to succeed to personal property by will or otherwise within the territory of the other, and to take possession thereof, "either by themselves, or others acting for them."[3] Thus an Italian consular officer, by virtue of the most-favored-nation clause contained in Article XVII of the consular convention with Italy of May 8, 1878,[4] is made the legal representative of his non-resident countrymen, who, through his agency, are permitted to take possession of their personal property within the United States. Consequently he is entitled to claim their distributive shares derived either from estates in process of probate in American courts or from other sources, and by his receipt therefor, he is capable of completely discharging all claims of his principals. The exercise of this right has received repeated recognition from local governmental agencies having occasion to make distribution of funds to non-resident alien heirs.[5] It has also been shown marked respect in the workmen's compensation laws of certain American States, such as those of Nebraska and Minnesota, according to which the consular representative is declared to possess in behalf of his non-resident dependent countrymen an exclusive right to settle all claims for compensation, and to receive for distribution all compensation arising thereunder.[6]

[1] Malloy's Treaties, I, 99.
[2] *Id.*, II, 1373.
[3] *Id.*, I, 976.
[4] *Id.*, I, 982.
[5] See, for example, In re Tartaglio, 33 N. Y. Supp. 1121, 1123, Stowell's Cases, 360, 361; In re Rosario Carioto, Probate Court of Cook County, Illinois, *Chicago Legal News*, October 1, 1910, Vol. 42, page 57; In re Paola La Torre, Probate Court of Wayne County, Michigan, May 31, 1911, Ludwig's Consular Treaty Rights, 62; In re Giuseppe Cernyar's Estate, Orphans' Court of Westmoreland County, Pa., No. 58, May Term, 1911, Ludwig's Consular Treaty Rights, 63; In re Estate of Charles Casper, District Court of St. Louis County, Minn., July 17, 1906, Ludwig's Consular Treaty Rights, 72; Vujic *v.* Youngstown Sheet and Tool Co., 220 Fed. 390. See, also, judgment of the Italian Court of Cassation, Feb. 4, 1907, contained in communication of Mr. Griscom, American Ambassador to Italy, to Mr. Root, Secy. of State, April 29, 1907, For. Rel. 1907, II, 750.
[6] According to § 113 (5) of the Employer's Liability Act of Nebraska of

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§ 482. The Most-Favored-Nation Clause.

The consular conventions to which the United States is a party commonly provide that the consular officers of the contracting parties shall enjoy reciprocally, all of the privileges, exemptions and immunities that are enjoyed by officers of the same rank and quality of the most-favored nation.[1] It is noted elsewhere that, according to the weight of American judicial opinion, in which that of the Department of State appears now to coincide, consular officers of the State whose convention makes such provision, are entitled generally to the benefits of rights accorded by treaty to similar officers of a third State.[2]

9

SHIPPING AND SEAMEN

a

§ 483. Jurisdiction in Controversies Respecting Seamen.

That a seaman when in foreign ports and places should be subjected for certain purposes to the control of the consular representative of the State to which the ship belongs is a matter of common necessity to maritime nations. In response

1913, "The consul-general, consul, vice-consul-general. or vice-consul of the nation of which the employe, whose injury results in death, is a citizen, or the representative of such consul-general, consul, vice-consul-general or vice-consul residing within the State of Nebraska, shall be regarded as the sole legal representative of any alien dependents of the employe, residing outside of the United States, and representing the nationality of the employe. Such consular officer, or his representative, residing in the State of Nebraska, shall have, in behalf of such non-resident dependents, the exclusive right to adjust and settle all claims for compensation provided by this Article and to receive for distribution to such non-resident alien dependents all compensation arising thereunder." Chap. 35, Art. VIII, § 3663, Rev. Stat. of Nebraska, 1913.

According to § 23 of the Workmen's Compensation Law of Minnesota, Chap. 467, General L., 1913, as amended in 1915: "In case [of] a deceased employe, for whose injury or death compensation is payable, leaves surviving him an alien dependent or dependents residing outside of the United States, the said judge shall direct payment of all compensation due to the deceased or to his dependents to be made to the duly accredited consular officer of the country of which the beneficiaries are citizens, if such consular officer reside within the State of Minnesota, or if not, to his designated representative residing within the State, and such consular officer or his representative shall be the sole representative of such deceased employe and of such dependents to settle all claims for compensation and to receive for distribution to the persons entitled thereto, all compensation arising hereunder."

[1] See, for example, Art. II, convention with Sweden, June 1, 1910, Charles' Treaties, 112.

[2] Interpretation of Treaties, Most-favored-nation Clause, Consular and Other Privileges, *infra*, § 537.

thereto modern consular conventions have made elaborate provision. Those of the United States have been designed to cope with three distinct problems: first, with the jurisdiction over seamen; secondly, the reclamation of deserting seamen; and thirdly, the adjustment of damages suffered at sea and arising in matters of wreck and salvage.[1]

It has been observed that according to certain conventions of the United States, consular officers are given jurisdiction over the internal order of merchant vessels of their nation, and the exclusive right to take cognizance of any differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. Interference on the part of local authorities is, moreover, forbidden, except when disorder has arisen of a nature such as to disturb tranquillity and public order on shore, or when a person of the country, not belonging to the crew is concerned therein.[2] Otherwise the function of such authorities is confined to lending aid, when requested by the consular officers, in arresting and imprisoning, for any cause, any person whose name is inscribed on the crew list.[3]

By certain treaties the persons arrested at the request of consular officers by the local authorities are to be held in custody "during the whole time of their stay in the port" at the disposal of the latter.[4] The statutory laws of the United States enacted

[1] Consular Regulations of the United States (1896), §§ 88, 89 and 90, Moore, Dig., V, 128.

The statutory law of the United States making provision for the exercise by American consular officers of acknowledged rights in respect to American shipping and American seamen have given rise to problems of a domestic rather than an international character.

[2] Rights of Jurisdiction, Foreign Merchant Vessels, Matters of Internal Order and Discipline, *supra*, § 222.

[3] The statement in the text is taken from Art. XI, consular convention with Belgium, March 9, 1880, Malloy's Treaties, I, 97, which is followed in Art. XI, consular convention with Roumania, June 17, 1881, *id.*, II, 1515, and in Art. XI, consular convention with Sweden, June 1, 1910, Charles' Treaties, 115. Concerning the Swedish convention see The Ester, 190 Fed. 216.

See, also, the slightly differing provisions of Art. XI, consular convention with Austria-Hungary, July 11, 1870, Malloy's Treaties, I, 42; Art. XIII, consular convention with Germany, *id.*, I, 554; Art. XI, consular convention with the Netherlands, May 23, 1878, *id.*, II, 1258; Art. I, supplemental consular convention with Italy, Feb. 24, 1881, *id.*, I, 983; Art. XXIII, treaty of friendship with Spain, July 3, 1902, *id.*, II, 1708. Respecting the convention with the Netherlands, see The Albergen, 223 Fed. 443.

See analysis of earlier treaties of the United States by Chief Justice Waite, in Wildenhus's Case, 120 U. S. 1, 13–17.

See case of intervention by the American Consul-General at Rio de Janeiro in 1908, notwithstanding the absence of any appropriate treaty, For. Rel. 1909, 41–42.

[4] This provision is found, for example, in Art. VIII, consular convention

for the purpose of executing its treaties,[1] permit an arrested seaman to be held in custody for a period not to exceed two months, and that (according to the opinion of the Supreme Court of the United States), irrespective of the departure of the ship prior to the expiration of such time.[2]

In the absence of treaty the exercise of jurisdiction by an American court of admiralty in a contest between a foreign seaman and the master of a foreign ship and relating to a maritime contract is deemed to be within the discretion of the tribunal. The Supreme Court of the United States has, however, declared that admiralty courts will not interfere between the parties in such cases "unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction." [3]

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§ 484. Reclamation of Deserting Seamen.

It has been laid down as a general proposition that the surrender of deserting seamen cannot, in the absence of treaty, be granted by the authorities of the United States.[4] The statutory law which

with France, Feb. 23, 1853, Malloy's Treaties, I, 531; Art. I, supplemental convention with Italy, Feb. 24, 1881, *id.*, I, 983; and in Art. XXIII, treaty of friendship with Spain, July 3, 1902, *id.*, II, 1708.

[1] Rev. Stat. §§ 4079, 4080 and 4081.

But see the repeal in part of § 4081, by the Act of March 4, 1915, Chap. 153, § 17, 38 Stat. 1184, U. S. Comp. Stat. 1918, § 8382b, in so far as the earlier statute related to the arrest and imprisonment of officers and seamen charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof.

[2] Dallemagne *v.* Moisan, 197 U. S. 169, Moore, Dig., V, 129. In the same case it was held that while the statute required application for the arrest of a seaman to be made "to any court of record of the United States, or any Judge thereof, or to any commissioner appointed under the laws of the United States", and the issuance of the warrant of arrest to a United States Marshal, and hence rendered irregular an application to and an arrest by a local chief of police, the bringing of a seaman so arrested before a United States court on *habeas corpus* rendered it the duty of such tribunal to examine the case and commit the seaman to prison, if he came within the terms of the treaty, and served to render unimportant the irregularity of the arrest.

[3] The Belgenland, 114 U. S. 355, 364. See, also, The Lady Furness, 84 Fed. 679; The Troop, 128 Fed. 856, where an American court of admiralty entertained jurisdiction after the appropriate British consul disclaimed authority to adjudicate the question as respecting the duty of the master of a British ship to furnish a German seaman with proper care, treatment and supplies after his accidental injury in the service of the ship. Respecting the Act of December 21, 1898, 30 Stat. 763, relating to the protection of American seamen, and the application thereof to the shipment of seamen on foreign vessels in American ports, see Patterson *v.* Bark Eudora, 190 U. S. 169.

[4] See opinion of the court in Tucker *v.* Alexandroff, 183 U. S. 424, 431, *citing* Moore, Extradition, § 408; also *dissenting* opinions of Justices Gray,

formerly made provision for the recovery of deserters from foreign vessels, was limited in its scope to cases where applications for arrest emanated from consular officers of foreign States with which appropriate conventions had been concluded.[1] The conduct of an American consul in causing, in 1899, the arrest and imprisonment in the Argentine Republic of a deserter from an American vessel of war, was not approved by the Department of State, because of the absence of a treaty with that country providing for the arrest in the United States of deserters from Argentine vessels, and of the resulting inability of the Government to give assurance of reciprocity.[2]

Numerous conventions of the United States have, in the past, provided for the reclamation of deserting seamen through the consular service. According to the arrangement with Sweden of 1910, the consular officer was permitted to cause the arrest of officers, sailors and "all other persons making part of the crews in any matter whatever, of ships of war or merchant vessels of their nation, who may be guilty, or be accused, of having deserted said ships and vessels, for the purpose of sending them on board or back to their country."[3]

In 1915, the United States, through the enactment of the Seamen's Act, departed from its previous policy established by consular conventions in harmony with the statutory law. That Act announced that in the judgment of Congress, Articles in treaties and conventions of the United States, in so far as they provided for the arrest and imprisonment of officers and seamen deserting

Harlan, White, and Chief Justice Fuller, *id.*, 467; Opinions of Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 148 and 6 Ops. Attys.-Gen., 209; also Moore Dig., IV, 417 and documents there cited; Mr. Hunter, Acting Secy. of State, to Mr. Osborn, Minister to the Argentine Republic, No. 190, Nov. 6, 1883, MS. Inst. Argentine Republic, XVI, 292, Moore, Dig., IV, 420.

[1] See statement in Moore, Dig., IV, 418; also Mr. Adee, Acting Secy. of State, to Duke de Arcos, Oct. 9, 1901, informing the latter of the absence of any law or regulation of the United States, providing for the punishment of deserters from the vessel of a foreign country with which the United States had no treaty, For. Rel. 1901, 484.

See Rev. Stat. § 5280. Respecting the operation of the statute in relation to the treaties, see Opinion of Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen. 148; Opinions of Mr. Black, Atty.-Gen., 9 Ops. Attys.-Gen. 96 and 246; Tucker *v.* Alexandroff, 183 U. S. 424, Moore, Dig., IV, 422–424; United States *v.* Minges, 16 Fed. 657; United States *v.* Kelly, 108 Fed. 538. See, also, enactment of the Philippine Commission, Jan. 16, 1906, providing for the arrest, examination and return of seamen deserting from foreign vessels, For. Rel. 1906, II, 941–942.

[2] Mr. Hay, Secy. of State, to Mr. Buchanan, Minister to Argentine Republic, No. 476, April 4, 1899, MS. Inst. Argentine Republic, XVII, 453, Moore, Dig., IV, 422.

[3] Article XII, consular convention with Sweden, June 1, 1910, Charles' Treaties, 116. This Article was terminated by agreement in 1920.

or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the coöperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, and any other treaty provision in conflict with the provisions of the Act, ought to be terminated. To that end the President was requested and directed, within ninety days after the passage of the Act, to give notice to the several governments, respectively, that so much "as hereinbefore described" of all of such treaties and conventions between the United States and foreign governments would terminate on the expiration of such periods after notices had been given as might be required in such agreements.[1]

Notice of abrogation of articles of treaties in conflict with the Act was accepted by certain foreign States with the understanding that the other provisions of the conventions should remain in force.[2]

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§ 485. Matters of Wreck and Salvage.

It is found desirable that a foreign consul should be permitted to direct proceedings relative to the salvage of vessels under the flag of his country and which are wrecked upon the coasts of the State to which he is accredited. The United States has concluded numerous conventions making provisions appropriate to that end.

[1] Act of March 4, 1915, Chap. 153, § 16, 38 Stat. 1184, U. S. Comp. Stat. 1918, § 8382a.

According to § 17 of this Act: "Upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent State of the Kongo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and thereupon section fifty-two hundred and eighty and so much of section four thousand and eighty-one of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof, and for the coöperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, shall be, and is hereby, repealed."

According to § 18: "This Act shall take effect as to all vessels of the United States, eight months after its passage, and as to foreign vessels twelve months after its passage, except that such parts hereof as are in conflict with articles of any treaty or convention with any foreign nation shall take effect as regards the vessels of such foreign nation on the expiration of the period fixed in the notice of abrogation of the said articles as provided in section sixteen of this Act."

[2] Mr. Phillips, Acting Secy. of State, to the Senate, March 27, 1919, with enclosures, Senate Doc. No. 2, 66 Cong., 1 Sess.

According to a recent agreement, all proceedings relative to the salvage of vessels of either contracting party wrecked upon the coasts of the other are to be directed by the respective consular officers of designated rank.[1] In locations where no consular agency exists, and pending the arrival of the appropriate consular officer who shall have been immediately informed of the occurrence, the local authorities are charged with the duty of taking all necessary measures for the protection of persons and the preservation of wrecked property. Such authorities are not to interfere otherwise than for the maintenance of order, the protection of interests of salvors (if these do not belong to the crews that have been wrecked), and for the purpose of carrying into effect the arrangements for the entry and exportation of the merchandise salved, which, unless intended for consumption in the country where the wreck occurred, is not to be subjected to custom-house charges.[2]

10

NOTARIAL FUNCTIONS

a

§ 486. Administration of Oaths.

It is of highest importance that a consular officer should be permitted to perform certain notarial acts within his consular district.[3] Numerous conventions to which the United States is a party confer that privilege. According to an agreement of 1910, consular officers may, "as far as may be compatible with the laws of their own country, take at their offices, their private residences, at the residence of the parties concerned, or on board ship, the depositions of the captains and crews of the vessels of their own country and of passengers thereon, as well as the depositions of any citizen or subject of their own country." [4]

[1] Art. XIII, consular convention with Sweden, June 1, 1910, Charles' Treaties, 116.

[2] *Id.*, where it is also provided that "The intervention of the local authorities in these different cases shall occasion no expense of any kind, except such as may be caused by the operations of salvage and the preservation of the goods saved, together with such as would be incurred under similar circumstances by vessels of the nation."

That the Federal courts of the United States have jurisdiction in cases of claims for salvage even where all parties are aliens, see Mason *v.* Blaireau, 2 Cranch, 240, 264, Moore, Dig., II, 78.

[3] Oppenheim, 2 ed., I, § 433.

[4] Art. X, consular convention with Sweden, June 1, 1910, Charles' Treaties, 115. See, also, Art. XXII, treaty of friendship with Spain, July 3, 1902, Malloy's Treaties, II, 1707.

Every American consular officer is required by the statutory law of the United States, when application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States.[1]

b

§ 487. Authentication of Documents.

Certain conventions of the United States permit consular officers of the contracting parties to "draw up, attest, certify and authenticate" all unilateral acts, deeds and testamentary dispositions of their countrymen, as well as all contracts to which one or more of their countrymen are parties; all deeds or written instruments which have for their object the conveyance or encumbrance of real or personal property within the territory of the country appointing the consul; also all unilateral acts, deeds, testamentary dispositions, as well as contracts relating to property situated or business to be transacted within such country, even in case such acts, deeds, testamentary dispositions, or contracts are executed solely by citizens of the State within which the officers exercise their functions.[2] Agreement is also made that all such instruments

[1] Act of April 5, 1906, Chap. 1366, § 7, 34 Stat. 101, U. S. Comp. Stat. 1918, § 3185; also § 1750 Rev. Stat. See F. Van Dyne, Our Foreign Service, 154–155

Compare the situation prior to the enactment of the Act of 1906, indicated in communication of Mr. Adee, Second Assistant Secy. of State, to Mr. Johnson, April 20, 1887, 121 MS. Inst. Consuls, 102, Moore, Dig., V, 110.

According to Circular Instructions of May 29, 1903, American consular officers are forbidden to perform notarial services outside of the limits of their consular districts. See, also, correspondence with Great Britain in 1910, respecting the taking of testimony by consular officers. For. Rel. 1910, 592.

[2] Art. XXII of treaty with Spain, of July 3, 1902, Malloy's Treaties, II, 1707; also Art. X, consular convention with Sweden, June 1, 1910, Charles' Treaties, 115.

According to Circular Instructions of Dec. 17, 1906, the drawing of wills, powers of attorney and performance of other legal services were declared not to come properly within the scope of the functions of consular officers, who were instructed to decline to perform legal services, except in cases where a different course was rendered absolutely necessary by reason of the absence of any available lawyer, or where delay would work hardship upon an American citizen. In such cases it was stated that interested persons should be informed that the services were performed at their risk and that the Government of the United States assumed no responsibility therefor. Apart from the usual fees for copying and translation, consular officers were forbidden to make any charge for such services.

WILLS. In response to an inquiry from the Italian Chargé at Washington, June 18, 1910, concerning the functions assigned to American consuls, Mr. Wilson, Acting Secretary of State, on July 2, 1910, declared that "it is

and documents thus executed, and all copies when duly authenticated by the consular officers, are to be received as evidence in the specified territories of the contracting parties as original documents or authenticated copies, as the case may be, and shall have the same force and effect as if drawn up and executed before a notary or public officer duly authorized in the State by which the consuls are appointed, provided they have been drawn and executed in conformity with the laws and regulations of the country wherein they are intended to take effect.[1]

The treaties of the United States are silent respecting any right or duty on the part of a consular officer to authenticate the signatures of officials of the State to which he is accredited. Secretary Marcy, in 1853, was of opinion that the duty of authentication was not discretionary, but one impliedly assumed by a consular officer upon receipt of his exequatur or commission. Hence the refusal of a Spanish consul to authenticate the signature of the Secretary of State was deemed to be arbitrary and unreasonable.[2] Discrimination by foreign consular officers in the United States against American citizens of certain races, by the refusal to authenticate for their use the signatures of public officials, has been the subject of frequent if unsuccessful remonstrance.[3]

It may be observed that consuls do not appear to be entrusted with the power of authenticating the laws of foreign States. According to the view expressed by Chief Justice Marshall as early as 1804, consular officers cannot issue official copies of foreign laws; and no reason appears "for assigning to their certificate respecting a foreign law any higher or different degree of credit

no part of a consul's duty to take any action either in drawing wills or accepting them for deposit, although in some instances they are permitted by treaty to draw up testamentary dispositions. Their general instructions require them to decline to perform these as well as all other legal services except in cases where no lawyer is available and where delay would work hardship upon any American citizen." For. Rel. 1910, 676.

[1] Art. XXII of treaty with Spain, of July 3, 1902, Malloy's Treaties, II, 1707; Art. X of consular convention with Sweden, of June 1, 1910, Charles' Treaties, 115.

[2] See communication to Mr. Magallon, Spanish Minister, Jan. 19, 1854, MS. Notes to Spanish Legation, VII, 10, Moore, Dig., V, 115.

[3] Moore, Dig., V, 116, and documents there cited, respecting the refusal of Russian consular officers to exercise certain notarial functions for the use of certain classes of American citizens.

See, Mr. Adee, Acting Secy. of State, to Mr. Moeser, July 13, 1894, 197 MS. Dom. Let. 671, Moore, Dig., V, 116, respecting the refusal of an Austro-Hungarian consul to certify to the official character of a notary public. In the course of this communication it was declared that "it has been held that an American consul cannot be required to certify to the official character or acts of a foreign notary public. 12 Ops. Attys.-Gen. 1." See, also, Catlett v. Pacific Insurance Company, 1 Paine, 594, Stowell's Cases, 98.

than would be assigned to their certificates of any other fact." [1]

11

§ 488. Miscellaneous Duties.

There are numerous duties, the performance of which by its consular officers is required by the appointing State, and which are rarely opposed by that other within whose domain they are undertaken. Concerning many the treaties are silent and diplomatic controversy infrequent. As questions relating to performance are chiefly confined to issues between consular officers and their own governments, they possess but slight international significance.

The United States, for example, finds its consular corps a valuable ally in protecting its own institutions, such as its customs revenue, its public health and its merchant marine. Thus, there is imposed upon American consular officers the duty to certify as to the correctness of invoices of merchandise to be imported into its territory.[2] Such officers, as well as medical officers detailed

[1] Church *v.* Hubbart, 2 Cranch, 187, 237. In this case, in order to prove that the ship *Aurora* and her cargo had been sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration were produced by the defendant in the circuit court. The edicts of the Crown were certified by the American consul at Lisbon to be copies of the original law of the realm. The certificate was granted under the official consular seal. The consul was not sworn. His certificate was to the effect that the edicts offered as evidence were true copies of the original. The court declared that to give this certificate the force of testimony, it would be necessary to show that this was one of those consular functions to which the laws of the United States attached full faith and credit. *Compare* the power conferred upon consular officers with reference to the authentication of foreign extradition papers by the Act of Congress of Aug. 3, 1882. See, also, in this connection, Mr. Knox, Secy. of State, to the Mexican Ambassador, April 13, 1910, For. Rel. 1910, 731.

[2] Consular Regulations of the United States (1896), §§ 657 and 658, *citing* 26 Stat. 131; also Rev. Stat. §§ 1715 and 2862. See F. Van Dyne, Our Foreign Service, 138–140.

Uniform. Respecting the application of the statutory law forbidding diplomatic officers to wear any uniform or official costume not previously authorized by Congress to American consular officers, see Consular Regulations of the United States (1896), § 452, *citing* Rev. Stat. §§ 1226 and 1688, Moore, Dig., V, 60.

Presents. The constitutional restriction with respect to the acceptance of presents by persons holding office under the United States is obviously applicable to American consular officers. Moore, Dig., V, 60, and documents there cited.

Engaging in Business. Practice of Law. See Act of April 5, 1906, Chap. 1366, § 6, 34 Stat. 101, U. S. Comp. Stat. 1918, § 3151, amending Rev. Stat. § 1699, forbidding a consul-general, consul, or consular agent receiving a salary of more than one thousand dollars a year, from engaging in business "within the port, place, or limits of his jurisdiction", or from practicing law or being interested in the fees or compensation of any lawyer. The same

for that service by the President, are utilized also for the purpose of issuing bills of health to vessels clearing from foreign ports for ports in the United States,[1] and of informing the Government through consular reports of the sanitary condition of foreign ports.[2] For the protection of American shipping and seamen, the statutory law of the United States imposes elaborate duties upon American consular officers in relation to the shipment and discharge of seamen, the recovery of wages and damages, provisions for crews, and the relief of the destitute.[3]

To safeguard its citizenship, American consular as well as diplomatic officers in foreign countries are required by statute to furnish the Government of the United States from time to time with the names of those naturalized citizens within their respective jurisdictions who, within five years after the issuance of certificates of citizenship, have taken permanent residence in the country of their nativity or any other foreign country;[4] as well as the names of those American citizens who have become naturalized in conformity with the law of a foreign State or who have made oath of allegiance thereto.[5]

section of the same Act, amending Rev. Stat. § 1700, U. S. Comp. Stat. 1918, § 3152, subjects all consular officers whose respective salaries exceed one thousand dollars a year to the prohibition against transacting business or the practice of law, or the being interested in the fees or compensation of any lawyer. The President is, moreover, authorized to extend the prohibition to any consul-general, consul, or consular agent whose salary does not exceed one thousand dollars a year or who may be compensated by fees, and to any vice-consular officer or consular agent.

[1] Act of Feb. 15, 1893, Chap. 114, § 2, 27 Stat. 450, amended by Act of Aug. 18, 1894, Chap. 300, 28 Stat. 372, U. S. Comp. Stat. 1918, § 9157.

[2] Act of Feb. 15, 1893, Chap. 114, § 4, 27 Stat. 451, U. S. Comp. Stat. 1918, § 9159.

[3] Rev. Stat. § 4517, U. S. Comp. Stat. 1918, § 8307, concerning the shipping of seamen in foreign ports; Act of March 4, 1915, Chap. 153, § 1, 38 Stat. 1164, U. S. Comp. Stat. 1918, § 8306, concerning the replacement of seamen; Act of June 26, 1884, Chap. 121, § 2, 23 Stat. 54 (amending Rev. Stat. § 4580), U. S. Comp. Stat. 1918, § 8371, concerning the discharge of seamen and extra wages; also in this connection, Act of March 4, 1915, Chap. 153, § 19, 38 Stat. 1185, U. S. Comp. Stat. 1918, § 8372; Act of Dec. 21, 1898, Chap. 28, § 17, 30 Stat. 759, U.S. Comp. Stat. 1918, § 8373, and § 18 of same Act, U. S. Comp. Stat. 1918, § 8374; Rev. Stat. § 4577, U. S. Comp. Stat. 1918, § 8368, and Rev. Stat. § 4578 as amended by Act of June 26, 1884, Chap. 121, § 9, 23 Stat. 55, and by Act of June 19, 1886, Chap. 421, § 18, 24 Stat. 83, U. S. Comp. Stat. 1918, § 8369, concerning the return and transportation of destitute seamen.

See, also, generally, Moore, Dig., V, 128–148, and documents there cited; F. Van Dyne, Our Foreign Policy, 143–145; §§ 175–360, Consular Regulations of the United States (1896), and continuations thereof.

[4] § 15, Act of June 29, 1906, 34 Stat. 601; also Circular Instructions to American Diplomatic and Consular Officers respecting Reports of Fraudulent Naturalization, April 19, 1907, For. Rel. 1907, I, 8.

[5] Circular Instructions to American Diplomatic and Consular Officers respecting Expatriation, April 19, 1907, For. Rel. 1907, I, 3.

To assist in checking the emigration to the United States of persons whose admission thereto is forbidden, American consular officers are required to report all information possible which will prevent the violation of the immigration laws, as well as violations by masters of vessels bound for the United States, of its laws regulating the transportation of emigrants.[1]

What is deemed to be an important function of American consular officers is the gathering and compiling of useful and material information and statistics calculated to promote the development of the foreign and domestic commerce of the United States, and relating particularly to mining, manufacturing, the shipping and fishery industries, labor interests and transportation facilities.[2]

[1] § 366, Consular Regulations of the United States (1896), also § 361 respecting the verification of manifests of vessels before American consular officers. According to § 365, "If a consular officer has reason to think that any person, society, or corporation (municipal or otherwise) in the country in which he resides contemplates shipping paupers or criminals as emigrants to the United States, he will at once forcibly protest to the local authorities, and will also immediately notify the diplomatic representative of the United States (or the consul-general, as the case may be) and the Department of State. Such an act is regarded by the United States as a violation of the comity which ought to characterize the intercourse of nations. Should any vessel of the United States, within his jurisdiction, attempt to transport such persons to the United States, he will endeavor to prevent the master from doing so. Should a foreign vessel attempt to do so, he will by earliest mail notify the collector of customs at the port in the United States for which such vessel is bound."

[2] Chap. 552, § 5, Act of February 14, 1903, 32 Stat. 827. See, also, Rev. Stat. § 1712, amended by Act of June 18, 1888, Chap. 393, 25 Stat. 186, U. S. Comp. Stat. 1918, § 3167; Rev. Stat. § 1713, as amended by same Act, U. S. Comp. Stat. 1918, § 3169, and Consular Regulations of the United States (1896), §§ 602, 603 and 697, respecting the procuring and transmitting of information concerning agricultural and horticultural industries, and respecting also current prices of articles exported to the United States, or imported through the place or port where the particular consul is situated; also relating to the character of agricultural implements in use.

See, in this connection, Samuel MacClintock, The Consular Service and Foreign Trade, Chicago, 1909.

Marriages. American consular officers are forbidden to celebrate marriages. Consular Regulations of the United States (1896), §§ 417–422. "It is provided by statute that 'marriages in presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes and shall have the same effect as if solemnized within the United States', R. S., § 4082. The statute does not exclude modes of solemnization other than that in presence of a consular officer. Marriages abroad, when not in the presence of a consular officer, if otherwise valid, are not invalidated by the above statute. The statute does not authorize the consular officer to perform the ceremony, but simply prescribes the legal effect which will be given to a marriage performed in his presence. In view of the exclusive authority of the States in such matters, this statute would probably not be operative outside of the District of Columbia and the Territories." Instructions to American Diplomatic Officers, 1897, § 178, set forth also in Consular Regulations of the United States, 1896, § 420, Moore, Dig., II, 524. See, also, documents in Moore, Dig., II, 515–525. No law of the United States requires its consular officers to permit the use of their consulates for

Principal consular officers of the United States are instructed to keep at their offices a register of all American citizens residing in their respective districts, and therefore, to make it known that a register is kept, and to invite all resident Americans to cause their names to be entered therein. Such officers are authorized to issue certificates of registration for use with the authorities of the place where the person registered is residing, and good for use for one year only. Such certificates upon expiration are capable of renewal. Consular officers are obliged to make returns to the American embassy or legation in the country in which the consulate is situated, as well as to the Department of State, of all registrations made and of all certificates of registration issued. It should be observed that American citizens resident abroad are required to register each year.[1]

Upon the outbreak of The World War the Department of State directed all consular officers in Europe to advise American citizens within their districts to register, and to give duplicate certificates of registration to all persons registered who did not bear passports. In case of emergency, certificates of registration were to be issued directly from consular agencies.[2] Attention was later called to the fact that consular registration certificates should be issued

the performance of marriage ceremonies. Such officers in China are instructed to refrain from permitting the use of their offices for the performance of marriage ceremonies, unless satisfied that the ceremony is *bona fide*, and not employed as a cloak or means to foster nefarious traffic. See Instructions to American Diplomatic and Consular Officers in China, June 16, 1905.

The power to make a certificate as to the legal requisites in the United States for a valid marriage abroad is not conferred on consular officers by the laws of the United States or by international law. American consular officers are, therefore, declared to be incompetent to certify officially as to the status and ability to marry of persons domiciled in the United States and proposing to be married abroad, or as to any American laws touching capacity for marriage or the solemnization thereof. Consular Regulations of the United States (1896), § 422, Moore, Dig., II, 536. See, also, For. Rel. 1907, I, 519–526, *id.*, 1908, 360–365; Diplomatic Intercourse, Marriages, *supra*, § 453.

EXTRADITION. Concerning the functions of foreign consular officers in extradition cases, pursuant to the treaties and laws of the United States, see under Extradition, Requisition, *supra*, § 324; Provisional Detention, *supra*, § 325; Complaint, *supra*, §§ 332–334.

[1] Circular instructions to American Diplomatic and Consular officers respecting Registration of American citizens, April 19, 1907, pursuant to an executive order of April 8, 1907, amending paragraph 172 of the Consular Regulations, For. Rel. 1907, I, 6. It was there also stated that "Persons who hold passports which have not expired shall not be furnished with certificates of registration, and it is strictly forbidden to furnish them to be used for traveling in the place of passports." See, also, generally, later instructions to American consular officers in Augustus E. Ingram's Digest of Circular Instructions to Consular Officers.

[2] Telegram of Mr. Bryan, Secy. of State, to the American Embassies and Legations in Europe, Aug. 1, 1914, American White Book, European War, II, 155.

only to native and naturalized American citizens and to citizens of the insular possessions.[1] On May 20, 1915, the Department issued notice that "American citizens who expect to make a prolonged stay in any foreign country should apply for consular registration to the American consulate in that country at or nearest the place in which they are sojourning." [2] The special duties imposed upon American consular officers with respect to passports after the United States itself became a belligerent in The World War have been observed elsewhere.[3]

[1] Telegram of Mr. Lansing, Acting Secy. of State, to Same, Sept. 12, 1914, *id.*, II, 155, in the course of which it was said that "Special consular registration certificates may be issued to wives of persons in the United States who have resided here more than three years and have made declarations of their intention to become American citizens. Such certificates should not describe the holders as American citizens, but should set forth their exact status."

[2] American White Book, The European War, II, 164.

[3] American Passports, Regulations of the United States as a Belligerent, *supra*, § 406.

END OF VOLUME ONE