KENT'S COMMENTARIES

REDUCED TO

QUESTIONS AND ANSWERS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

1. *When the United States assumed the character of an independent nation, to what system of public law did they submit themselves?*—1

They became subject to that system of rules which reason, morality, and custom, had established among the civilized nations of Europe, as their public law. They claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, "according to the general usages of Europe."*

2. *What are we to understand by the law of nations?*—1.

That code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other.

3. *Upon what, according to Montesquieu, is the law of nations founded?*—1.

It is founded on the principle, that different nations ought

* See Journals of Congress, Vol. vii. 185. The English judges have frequently declared that the law of nations was part of the Common Law of England; and it is well settled that the Common Law, so far as it may be consistent with the Constitutions of this country, and remains unaltered by statute, is an essential part of American jurisprudence.

to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interests.

4. *How have writers differed concerning the foundation of the law of nations?*—2.

It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature,* applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws.

5. *What is the most useful and practical part of the law of nations?*—2.

Instituted or positive law, founded on usage, consent, or agreement.

6. *Is it proper to separate this instituted or positive law of nations from natural jurisprudence?*—2.

It would be improper to separate that law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity, from the same principles of right reason, the same views of the constitution and nature of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced.

7. *Is there then a natural, as well as a positive law of nations?*—2

There is.

8. *How far are states, in their relations with other states, bound by this natural law of nations?*—2.

By it, every state, in its relations with other states, is bound to conduct itself with justice, good faith and benevolence.

9. *How is this application of the law of nature called?*—2.

By Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; by others, the internal law of nations, because it is obligatory upon them in point of conscience.

* The law of nature, by the obligation of which individuals and states are bound, is identical with the will of God, and that will is ascertained, either by consulting Divine revelation, where that is declaratory, or by the application of human reason, where revelation is silent.

10. *Should we separate the science of public law and that of ethics?*—3.

We ought not to separate the science of public law from that of ethics, nor encourage the dangerous suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns.

11. *How are states, or bodies politic, to be considered?*—3.

As moral persons having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of which carries with him, into the service of the community, the same binding law of morality and religion which ought to control his conduct in private life.

12. *Of what does the law of nations consist?*—3.

It is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce; and of a code of conventional or positive law.

13. *In the absence of conventional or positive law, how are the intercourse and conduct of nations to be governed?*—3.

By principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligations.

14. *Have the Christian nations a law of nations peculiar to themselves?*—3, 4.

The Christian nations of Europe, and their descendants on this side of the Atlantic, have established a law of nations peculiar to themselves. It is the offspring of modern times.

15. *Had the ancients an international law?*—4.

The most refined states, among the ancients, seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons

and property as lawful prize. Their laws of war and peace were barbarous and deplorable. In the most enlightened ages of the Grecian republics, piracy was regarded as an honorable employment. There were states that avowed its practice.

16. *What was the received opinion among the Grecians, as to the reciprocal rights and duties of their own cities and states?*—4.

That they were bound to no duties, nor by any moral law, without compact; and that prisoners taken in war had no rights, and might lawfully be put to death, or sold into perpetual slavery with their wives and children.

17. *Were the early Romans under the influence of international law?*—5.

They exhibited much stronger proofs than the Greeks of the influence of regular law, and there was a marked difference between those nations in their intercourse with foreign powers. It was a principle of the Roman government, that none but a sworn soldier could lawfully fight the enemy; and in many instances the Romans showed that they excelled the Grecians, by the observance of better principles in their relations with other nations. The institution of the college of heralds, and the fecial law, were proofs of a people considerably advanced in the cultivation of the law of nations as a science.

18. *When was the law of nations recognized by the Romans?*—7.

In the latter age of the Roman empire, when their municipal law became highly cultivated, and adorned by philosophy and science, the law of nations was recognized by them as part of the natural reason of mankind.

19. *What was the Roman jurisprudence, in its most cultivated state, on the subject of national duty?*—8.

It was a very imperfect transcript of the precepts of natural justice. It retained strong traces of ancient rudeness, from the want of the Christian system of morals, and the civilizing restraints of commerce.

20. *Upon the fall of the Roman empire, what was the state of international law?*—8.

The irruption of the northern tribes of Scythia and Germany, overturned all that was gained by the Roman law, annihilated every restraint, and all sense of national obligation; and civil society relapsed into the violence and confusion of the barbarous ages. Piracy, rapine and ferocious warfare deformed the annals of Europe. The manners of nations were barbarous, and their maxims of war cruel. Notwithstanding some efforts to introduce order and justice, and though municipal law had undergone great improvement, the law of nations remained in a rude and uncultivated state down to the period of the sixteenth century.

21. *Did the Emperor Charlemagne improve the public law of Europe?*—9.

He made distinguished efforts to improve the condition of Europe, by the introduction of order, and the propagation of Christianity; and we have examples, during the darkness of the middle ages, of some recognition of public law by means of alliances, and the submission of disputes to the arbitrament of a neutral power.

22. *What institutions, about the period of the eleventh century, contributed, in a very essential degree, to improve the law of nations?*—9.

Five are enumerated: 1. The feudal system. 2. The concurrence of Europe in one form of religious worship and government. 3. The establishment of chivalry. 4. The negotiations and treaties forming the conventional law of Europe. 5. The settlement of a scale of political rank and precedency. Of all causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community.

23. *What was the influence of Christianity in improving public law?*—10.

It was very efficient toward the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The church had its councils or convocations of the clergy, which formed the nations professing Christianity into a connection resembling a federal alliance; and those councils sometimes set-

tled the titles and claims of princes, and regulated the temporal affairs of the Christian powers. The confederacy of the Christian nations was bound together by a sense of common duty and interest, in respect to the rest of mankind.

24. *What influence had chivalry upon the laws of war?*—11.

It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonorable. It dictated humane treatment to the vanquished, courtesy to enemies, and the virtues of fidelity, honor, and magnanimity in every species of warfare.

25. *What influence had the civil law in improving the law of nations?*—11.

The introduction and study of the civil law, contributed largely to more correct and liberal views of the rights and duties of nations. This grand monument of the embodied wisdom of the ancients, when once known and examined, must have reflected a broad stream of light upon the feudal institutions, and the public councils of the European nations. We accordingly find that the rules of the civil law were applied to the government of national rights, and they have contributed very materially to the erection of the modern international laws of Europe. From the thirteenth to the sixteenth century, all controversies between nations were adjudged by the rules of the civil law.

26. *What influence had treaties, conventions, and commercial associations, in forming the modern code of public law?*—12.

They gave a new character to the law of nations, and rendered it more and more of a positive or instituted code.

27. *How did commercial ordinances and conventions contribute to that end?*—12.

They improved and refined public law and the intercourse of nations, by protecting the persons and property of merchants in cases of shipwreck, and against piracy, and against seizure and arrest upon the breaking out of war.

28. *When commenced the practice of plundering shipwrecks?*—13.

It has been traced to the Rhodians, and from them it passed to the Romans.

29. *What of the efforts to restrain it?*—13.

They were very feeble and gradual, and mixed with much positive injustice. The goods cast ashore first belonged to the fortunate occupant, and then they were considered as belonging to the state.

30. *What effect had this change from private to public appropriation of shipwrecked property?*—13.

It rendered a returning sense of right and duty more natural and easy.

31. *What Roman emperors first renounced their claim to shipwrecked property, in favor of the owners?*—13.

Hadrian and Antoninus.

32. *Were Roman laws in favor of the sufferers by shipwreck, subsequently disregarded?*—13.

They were disregarded by succeeding emperors; and, when the empire was overturned, these laws of humanity were swept away in the tempest.

33. *What effect had the continual depredations at sea of the Saxons and Normans?*—13.

They induced the inhabitants of the western coasts of Europe to treat all navigators, who were thrown by the perils of the sea upon their shores, as pirates, and to punish them as such, without inquiry or discrimination.

34. *What contributed gradually to suppress this criminal practice?*—13.

The revival of commerce, and with it a sense of the value of order; commercial ordinances; particular conventions and treaties between sovereigns, by rendering the regulations upon the subject of shipwrecks a branch of the public law of nations.

35. *What put the finishing stroke to the practice?*—14.

The ordinances of Louis XIV., by declaring that shipwrecked persons and property were placed under the special protection and safeguard of the crown; and by which the punishment of death, without hope of pardon, was pronounced against the guilty.

36. *To what is to be imputed the progress of humanity in the treatment of prisoners?*—14.

To the influence of Christianity, and of conventional law, establishing a general exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose.

37. *What resulted from the admission of resident ambassadors?*—15.

It was an important improvement in the security and facility of national intercourse; and led to the settlement of a great question, which was very frequently discussed in the fifteenth and sixteenth centuries, concerning the inviolability of ambassadors. It became at last a definitive principle of public law, that ambassadors were exempted from all local jurisdiction, civil and criminal.

38. *How stood the law of nations at the age of Grotius?*—15.

It had been rescued, to a very considerable extent, from the cruel usages and practices of the Barbarians. It had been restored to some degree of science and civility by the influence of Christianity, the study of the Roman law, and the spirit of commerce. It had grown in value and efficacy, from the intimate connection and constant intercourse of the modern nations of Europe, who were derived from a common origin, and were governed by similar institutions, manners, laws and religion. But that law was still in a state of extreme disorder, and its principles were little known and less observed.

39. *How is Grotius considered?*—15.

As the father of the law of nations, and justly.

40. *What was his object?*—16.

To correct false theories and pernicious maxims, by showing a community of sentiment among the wise and learned of all ages and nations, in favor of the natural law of morality. He likewise undertook to show that justice was of perpetual obligation, and essential to the well being of every society, and that the great commonwealth of nations stood in need of law, and the observance of faith, and the practice of justice. His object was to digest, in one systematic code, the principles of public right,

and to supply authorities for almost every case in the conduct of nations.

41. *What did he accomplish?*—16.

He reduced the law of nations to a system, and produced a work which has been resorted to as the standard of authority in every succeeding age.

42. *Who holds the first rank among the disciples of Grotius?*—17.

Puffendorf. His work went more at large into the principles of natural law, and combined the science of ethics with what may be more strictly called the law of nations. It is rather a treatise on moral philosophy than on international law; and is of very little practical value in teaching us what the law of nations is at this day.

43. *What of the works of Wolfius, Burlemaqui, and Rutherforth?*—17.

They are rather treatises on moral philosophy than on international law.

44. *What of the work of Martens?*—17.

His summary of the law of nations is a treatise of great practical utility, but it is only a very partial view of the system, being confined to the customary and conventional law of the modern nations of Europe.

45. *What of Bynkershoeck's treatise on the laws of war?*—17.

It has been received as of great authority on that particular branch of the science of the law of nations, and the subject is by him ably and copiously discussed.

46. *What of Vattel?*—18.

The most popular, and the most elegant writer on the law of nations is Vattel, whose method has been greatly admired. He has been cited, for the last half century, more freely than any one of the public jurists.

47. *Has the code of war improved since the age of Grotius?*—18.

It has been vastly enlarged and improved, and its rights better defined, and its severities greatly mitigated. The rights

of maritime capture, the principles of the law of prize, and the duties and privileges of neutrals, have grown into very important titles in the system of national law.

48. *What evidence of the rules of public law do we possess?*—18.

We now appeal to the decisions of those tribunals, to whom, in every country, the administration of that branch of jurisprudence is specially intrusted; and, also, to the official documents and ordinances of particular states, which have professed to reduce into a systematic code, for the direction of their own tribunals, and for the information of foreign powers, the law of nations, on those points which relate particularly to the rights of commerce and the duties of neutrality. In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims.

49. *How are the United States guided in their foreign negotiations, and domestic discussions of questions of international law?*—19.

We pay the most implicit respect to the practice of Europe, and the opinions of her most distinguished civilians.

50. *What are referred to, as containing the most authentic evidence of the immemorial, and customary maritime law of Europe?*—19.

The most celebrated collections and codes of maritime law, such as the *Consolato del Mare*, the laws of Oleron, the laws of the Hanseatic League, and, above all, the maritime ordinances of Louis XIV.

51. *To whom is a knowledge of international law necessary?*—20.

A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practicing in our commercial ports, but to every gentleman who is animated by liberal views, and a generous ambition to assume stations of high public trust.

LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

1. *Are nations equal to, and independent of each other, in a state of peace?*—21.

They are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law.

2. *What is a necessary consequence of this equality among nations?*—21.

It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. No state is entitled to take cognizance, or notice of the domestic administration of another state, or of what passes within, as between the government and its own subjects.

3. *When may circumstances justify an interference with the internal concerns of other states?*—23.

Every nation has an undoubted right to provide for its own safety, and to take precaution against distant as well as impending danger. The danger, however, must be great, distinct, and imminent, and not rest on vague and uncertain suspicion. The British government officially declared to the allied powers, in 1821, that no government was more prepared than their own "to uphold the right of any state or states to interfere, where their own security, or essential interests were seriously endangered by the internal transactions of another state;—that the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby;—that it could not receive a general and indiscriminate application to all revolu-