

LECTURE III.

OF THE DECLARATION AND OTHER EARLY MEASURES OF A STATE OF WAR.

1. *For what is war undertaken?*—47.

For the sake of peace, which is its only lawful end and purpose.

2. *What is just cause of war?*—48.

An injury, either done or threatened, to the perfect rights of the nation, or any of its members, and susceptible of no other redress. The injury may consist, not only in the direct violation of personal or political rights, but in wrongfully withholding what is due, or in the refusal of a reasonable reparation for injuries committed, or of adequate explanation or security in respect to manifest and impending danger.

3. *When only is war to be resorted to?*—48.

It is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself. Every milder method of redress is to be tried, before the nation makes an appeal to arms.

4. *Is an injury to an individual member of the state just cause of war?*—48.

It is, if redress be refused; but a nation is not bound to go to war on so slight a foundation; for it may of itself grant indemnity to the injured party, and if this can not be done, yet the good of the whole is to be preferred to the welfare of a part.

5. *Where one nation is bound by treaty to afford assistance, in a case of war between its ally and a third power, when is the assistance to be given?*—49.

The assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes arise, whether the government, which is to afford the aid, is to judge for itself of the justice of the war on the part of the ally, and to make the right to assist-

ance depend upon its own judgment. To give assistance in an unjust war, on the ground of the treaty, would be contracting an obligation to do injustice, and no such contract is valid. In doubtful cases, however, the presumption ought rather to be in favor of the ally, and of the justice of the war.

6. *When is the nation, so bound, not obliged to furnish the assistance?*—50.

It is not obliged to furnish it when the case is hopeless, or when giving the succor would expose the state itself to imminent danger. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, or contingent, for this would be to seek a frivolous cause to violate a solemn engagement.

7. *In the case of a defensive alliance, when is the assistance to be rendered?*—50.

The condition of the contract does not call for the assistance, unless the ally be engaged in a defensive war, for, in a defensive alliance, the nation engages only to defend its ally in case he be attacked, and even then we are to inquire whether he be not justly attacked. The defensive alliance applies only to a war first commenced, in point of fact, against the ally; and the power that first declares, or actually begins the war, makes what is deemed, in the conventional law of nations, an offensive war.

8. *With whom resides the right to declare war?*—51.

Many publicists consider the power as a part of the sovereign authority of the state, of which the legislative department is an essential branch. In England, France and Holland, the king alone declares war. In the United States, the power to declare war, as well as of raising the supplies, is confided to the legislature of the Union.

9. *How is war declared?*—53, 54.

In modern times, the practice of a solemn declaration made to the enemy has fallen into disuse. It has become settled by the practice of Europe, that war may lawfully exist by a declaration which is unilateral only, or without a declaration on either side. It may begin with mutual hostilities.

10. *Why is some formal public act essential?*—55.

To announce to the people at home, their new relations and duties growing out of a state of war; and to apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things.

11. *What effect has such an official act?*—55.

It operates, from its date, to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.

12. *How is war declared by the United States?*—55.

Through an act of Congress.

13. *How far does a state of war bind the subjects of the belligerents?*—55.

Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed.

14. *What right has a state over persons and property of the enemy, found within its territory upon the breaking out of war?*—56.

According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and to detain the persons as prisoners of war. Stipulations allowing foreign subjects a reasonable time, after a war breaks out, to recover and dispose of their effects, or to withdraw them, have now, however, become an established formula in commercial treaties.

15. *What is settled, in the United States, upon the point?*—59.

The Supreme Court has assumed the broad principle, that war gave to the sovereign full right to take the persons, and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself.

16. *In whom, here, does that right of confiscation exist?*—60.

In Congress; and without a legislative act authorizing its confiscation, property of the enemy could not be judicially condemned.

17. *How would such property be disposed of?*—60.

Until some statute, directly applying to the subject, be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.

18. *What is a hostile embargo?*—60.

It is an act of a hostile nature, and amounting to an implied declaration of war, though liable to be explained away and annulled by a subsequent accommodation between the nations.

19. *What effect has it?*—60.

The seizure is an act at first equivocal as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminate otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure *ab initio*. The property detained is then deemed enemy's property, and liable to condemnation.

20. *What are letters of marque and reprisal?*—61.

Reprisals by commission, granted to one or more injured subjects, in the name and by the authority of a sovereign, as a mode of redress for some specific injury.

21. *Are they compatible with a state of peace?*—61.

They are so considered.

22. *When may letters of marque and reprisal be granted?*—61.

The case arises, when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction. The reprisals may be made in support of the rights of a subject, as well as those of the sovereign, and for the acts of the subject as well as for those of the sovereign.

23. *When only is the commission of marque and reprisal to be used?*—61.

In a case clearly right—in *re minime dubia*.

24. *What does it authorize?*—61.

The seizure of the property of the subjects, as well as of the sovereign of the offending nation, and to bring it in to be detained as a pledge, or disposed of under judicial sanction, in like manner as if it were a process of distress, under national authority, for some debt or duty withheld.

25. *What was the rule as to the right to confiscate debts contracted by individuals in time of peace, and which remained due to subjects of the enemy at the declaration of war?*—62.

In former times the right to confiscate such debts was admitted as a doctrine of national law. Down to the year 1737, the general opinion of the jurists was in favor of the right.

26. *What is, at present, the rule as to such right of confiscation?*—65.

We may lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the Union, by a special act for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.

27. *What if property have been wrongfully taken by the state before the war and be in the country at the opening of the war?*—65.

Such property can not be seized, but must be restored.

28. *Why so?*—65.

Because to confiscate that species of enemy's property, would be for the government to take advantage of its own wrong.

29. *How does the declaration of war affect trading with the enemy?*—66, 67.

One of the immediate and important consequences of the

declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. This is equally the doctrine of all the authoritative writers on the law of nations, and the maritime ordinances of the great powers of Europe, and the received law of this country.

30. *From what does the interdiction flow?*—66.

Necessarily, from the principle, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other.

31. *What is the rule as to contracts made with the enemy, during war?*—67.

They are utterly void.

32. *How are commercial partnerships existing prior to the war, between the subjects of the two parties to it, affected by it?*—68.

They are dissolved by the mere force and act of the war itself.

33. *How are other contracts existing prior to the war, affected by it?*—68.

They are not extinguished; the remedy only is suspended.

34. *Why is the remedy suspended?*—68.

From the inability of an alien enemy to sue.

35. *What are ships of truce, or cartel ships?*—68.

A species of navigation intended for the recovery of the liberty of prisoners of war.

36. *Does the interdiction of trade apply to cartel ships?*—68.

It applies to them, and therefore all trade, by means of such vessels, is unlawful, without the express consent of both the governments concerned.

37. *May an ally of one of the belligerents, who carries on the war*

conjointly with such belligerent, have any commerce with the enemy?
—69.

He may not.

38. *Why is this?*—69.

When allied nations are pursuing a common cause, the community of interest, and objects, and action, creates a mutual duty not to prejudice that joint interest.

39. *What if the subject of a co-ally engage in trade with the common enemy?*—69.

It is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally, engaged in a trade with the common enemy, and thereby affording him aid and comfort.

40. *Are English judicial decisions on public law followed by the courts of the United States?*—69.

The English courts are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States on all the leading points of national law.

41. *In what consists the great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations?*—70.

They render certain and stable the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting.

LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

1. *Is it important to determine, with precision, what relations and circumstances impress a hostile character upon persons and property, in a maritime war?*—74.

It is; and the modern international law of the commercial world is replete with refined and complicated distinctions on the subject.

2. *When does hostile character, in a commercial view, or one limited to certain intents and purposes only, attach?*—74.

It will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, or by sailing under the enemy's flag or passport.

3. *What distinction does this hostile relation, growing out of particular circumstances, assume as valid?*—74.

The distinction which has been taken between a permanent and temporary alien enemy.

4. *In what does that distinction consist?*—72.

A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the adverse belligerent. But he who does not owe a permanent allegiance to the enemy, is an enemy only during the existence and continuance of certain circumstances.

5. *How far does the possession of the soil impress upon the owner the character of the country?*—74.

So far as the products of the soil are concerned, wherever the local residence of the owner may be. The produce of a hostile soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize, when taken in course of transportation to any other country.

6. *What if a person have a settlement in a hostile country by the maintenance of a commercial establishment there?*—74, 75.

He will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. For all commercial purposes, the domicile of the party, without reference to the place of birth, becomes the test of national character.

7. *What if he resides in a neutral country?*—75, 76.

He enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disadvantages, whatever they may be, of the country of his residence.

8. *Is he permitted to acquire a neutral domicile, that will protect a trade in opposition to the belligerent claims of his native country, if he emigrate from that country flagrante bello?*—76.

He is not. Vattel denies explicitly the right of emigration in a war in which his country is involved. It would be a criminal act. This doctrine is considered as settled in the United States.

9. *What limitation is there upon the principle of determining the character from residence?*—76.

The only limitation is, that the party must not be found in hostility to his native country. He must do nothing inconsistent with his native allegiance.

10. *What state of facts constitutes a residence so as to change, or fix the commercial character of the party?*—76.

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations. The *animus manendi* appears to have been the point to be settled. The presumption arising from actual residence in any place, is, that the party is there *animus manendi*, and it lies upon him to remove the presumption. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial.

11. *What if there be no animus manendi, and the residence be involuntary or constrained?*—77.

Then a residence, however long, does not change the original character of the party, or give him a new or hostile one.

12. *What, in each case, is the real subject of inquiry?*—77.

The *quo animo*; and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual, or only an implied residence.

13. *When the residence is once fixed, and has communicated a national character to the party, is it divested by a periodical absence or even by occasional visits, to his native country?*—77.

It is not.

14. *Must the residence be invariably personal, to impress with a national character?*—77.

The general rule is, that a neutral merchant may trade in the ordinary manner, in the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person.

15. *When does a national character, acquired by residence, cease?*—78.

It may be thrown off at pleasure, by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bona fide*, to quit the country *sine animo revertendi*.

16. *If a citizen of the United States should establish his commercial domicile in a foreign country, and hostilities afterwards break out between that country and this, would his property, shipped before knowledge of the war, be liable to capture?*—79.

It would.*

17. *On what ground?*—79.

On the ground that his permanent residence had stamped him with the national character of that country.

18. *Is the doctrine of enemy's property, arising from a domicile in an enemy's country, enforced strictly?*—79.

It is; and equitable qualifications of the rule are generally

* 8 Cranch, R., 253.

disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty.

19. *What is the rule as to Asia and Africa?*—77.

An immiscible character is kept up, and Europeans trading under the protection of a factory, take the national character of the establishment under which they live and trade. Foreigners are not admitted there, as in Europe and here, into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.

20. *What if a person connects himself with a house of trade in the enemy's country, in time of war, or continues, during a war, a connexion formed in time of peace?*—80.

He is considered as impressed with a hostile character, in reference to so much of his commerce as may be connected with that establishment. The rule is the same whether he maintains that establishment as a partner or as a sole trader.

21. *What if there be a partnership between two persons, the one residing in a neutral, and the other in a belligerent country?*—80, 81.

The trade of one of them with the enemy will be held lawful, and that of the other unlawful; and, consequently, the share of one partner in the joint traffic will be condemned, while that of the other will be restored.

22. *What rule obtains as regards the colonial trade of the enemy?*—81.

That a special license, granted by a belligerent to a neutral vessel, to trade to her colony, in those branches of commerce which were before confined to native subjects, would warrant the presumption that such vessel was adopted and naturalized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property.

23. *Does the English rule go further than this?*—81.

It does, and annexes a hostile character, and the penal consequences of confiscation, to the ship and cargo of a neutral engaged in the colonial or coasting trade of the enemy, not open to

foreigners in time of peace, but confined to native subjects by the fundamental regulations of the state.

24. *By what appellation is the prohibition, according to the English rule, known?*—82.

As the rule of 1756.

25. *Have the United States admitted the legality of the rule of 1756?*—83.

They have not, but have constantly and earnestly protested against it, and contended that the trade must have a direct reference to the hostile efforts of the belligerents, like dealing in contraband, in order to render it breach of neutrality.

26. *What effect has sailing under the flag and pass of the enemy?*—85.

It is another mode by which a hostile character may be affixed to property.

27. *Why is the rule that a hostile character may be thus affixed to property, necessary?*—85.

To prevent the fraudulent mask of enemy's property.

28. *Is there a distinction made in the English cases, as to this rule, between the ship and the cargo?*—85.

There is.

29. *What is it?*—85.

Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English cases have never carried the principle to that extent, as to cargoes laden before the war. If the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo.

30. *What is the doctrine in the United States on this point?*—85.

The doctrine of the federal courts in this country has been very strict on this point, and it has been frequently decided, that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to

the object of the voyage, or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war.*

31. *What is the rule concerning property in transitu, as to protection from capture?*—86.

That property which has a hostile character at the commencement of the voyage, can not change that character by assignment while it is *in transitu*, so as to protect it from capture. The ownership of the property is deemed to continue as it was at the time of the shipment, until actual delivery.

32. *Why is this?*—86.

It would lead to fraudulent contrivances, to protect the property from capture, by colorable assignments to neutrals. This illegality of transfer, during or in contemplation of war, is for the sake of the belligerent right, and to prevent secret transfers from the enemy to neutrals in fraud of that right, and upon conditions and reservations which it might be impossible to detect.

33. *What if property be shipped from a neutral to the enemy's country, under a contract to become the property of the enemy upon arrival?*—86.

It may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy.

* *The Julia*, 8 Cranch, R. 181. *The Aurora*, ib. 203. *The Hiram*, ib. 444. *The Ariadne*, 2 Wheat, R. 143. *The Caledonian*, 4 Wheat, R. 100.

LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN
RELATION TO EACH OTHER.

1. *What means are allowed, by the law of nations, as requisite to the end of war?*—89.

The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security.

2. *How have the earlier writers regarded a state of war, as to the degree of violence and destruction allowed?*—89.

If we follow them, there is no limitation to the career of violence and destruction. They have considered a state of war as a dissolution of all moral ties, and a license for every kind of disorder and intemperate fierceness. An enemy was regarded as a criminal and an outlaw, who had forfeited his rights, and whose life, liberty and property lay at the mercy of the conqueror. Every thing done against an enemy was held to be lawful. He might be destroyed, though unarmed and defenceless. Fraud might be employed as well as force, and force without any regard to the means.

3. *Have these barbarous rights of war been questioned?*—89.

Yes; they have been questioned and checked in the progress of civilization.

4. *Is there a difference in the rights of war, as carried on by land and at sea?*—92.

There is.

5. *What is the object of a maritime war?*—92.

The destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end; and it is allowed in maritime wars by the law and practice of nations.