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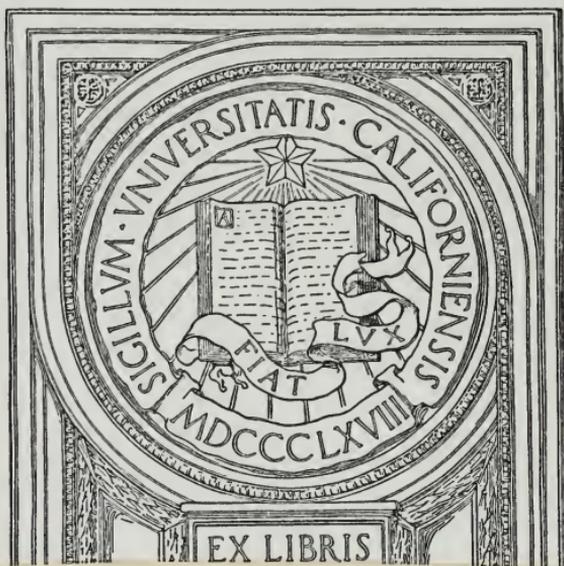
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OF

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BY JAMES KENT,

PROFESSOR OF LAW IN COLUMBIA COLLEGE.

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C O N T E N T S.

LECTURE THE FIRST.

*Of the Theory, History and Duties of civil
Government.*

LECTURE THE SECOND.

Of the History of the American Union.

LECTURE THE THIRD.

Of the Law of Nations.

TO WHICH IS ANNEXED,

*A Summary of the Course of Lectures in
Columbia College.*





DISSERTATIONS, &c.

LECTURE THE FIRST.

Of the Theory, History and Duties of
civil Government.

A STATE or body politic is usually defined to be the union of free individuals by common consent to promote their safety and happiness. The manner in which this union of wills and power is expressed and exercised, determines the nature of the government or form of the constitution. Many writers have supposed a state of mankind to have existed prior to the formation of any government. This is termed the primitive state of nature, in which there was an entire equality and independence, and no rule of obedience but what resulted from the sense of moral obligation. This condition of man is however at the same time represented, as having been intolerable, from the weakness of his faculties, and the violence of his passions. The strong would controul the weak, the crafty would impose upon the simple, separate rights and possessions (if any such there were) would every moment be invaded, and the state of nature become one constant scene

of untamed and unlimited injustice. Men were therefore according to these philosophers under the necessity of quitting this state of independence, of taking refuge under civil government, and of sacrificing a part of natural liberty in order to preserve the rest.*

This theory seems necessarily to infer that the institution of civil society, was a matter of expediency, rather than the course of our original destination, and that we could attain it only on the hard condition of renouncing a portion of natural right. I am inclined to agree with a discerning writer of our own,† that this view of the subject is not just. Man was fitted and intended by the great Author of his being, for society and civil government. It is to speak correctly the law of his nature, and by obedience to this law, he is so far from sacrificing any of his rights, that he preserves them all, brings them into security and exercise, and by this means is enabled to display the various and exalted powers of the human mind. What would have been the condition of mankind had they been enabled to live without government, it is impossible to know, and

* Barbeyrac's notes on Grotius, l. 1. ch. 1. § 1. Puffendorf's droit de la nature, l. 2. c. 2. Bulemaqui, vol. 2. part 1. ch. 3.—The imaginations of the poets are well known, and yet the Roman orator and philosopher is equally strong in his description of the state of nature. *Quis vestrum Judices, ignorat ita naturam rerum tulisse, ut quodam tempore homines nondum neque naturali neque civili Jure descripto, fusi per agros et dispersi vagarentur, tantumque haberent, quantum manu ac viribus per caedem ac vulnera aut eripere aut retinere potuissent?* Cicero, pro. p. Sextio, § 42.

† Chipman's Sketches 15. 70. 71. 225 —

idle to conjecture, since no such state was intended by the wise Dispensations of Providence. We might with equal propriety examine what would have been our situation without the faculty of speech, or the use of reason. Our civil and social rights are our true natural rights ; we can have no other ; and in free governments like our own, formed upon the plan of an harmonious coincidence with these rights, we make no renunciations, but enjoy in full perfection, all the liberty which was intended or granted by the laws of our social nature. Few persons I presume therefore, will be disposed to acquit the theories of Rousseau, eloquent as they be, from the charge of the utmost absurdity and extravagance, for he imitates the reveries of Xenophon and Plato, and reprobates society, family and property, as the cause of all injustice and calamity.*

It must follow from the principles which I have laid down, that the origin of civil society and government (for they are inseparably connected) must be nearly coeval with the human race. But inquiries of this kind are altogether useless, and were it otherwise, they would be altogether uncertain, since researches into the infancy of society must of course go far beyond the pages of genuine history, and terminate in the confusion and darkness of the fabulous ages. In whatever manner government in any nation first actually arose, whether from force, fraud or compact, is perfectly immaterial, with reference to the true grounds and rightful exercise of power. Freedom and

* Discours sur l'origine et les fondemens de l'Inegalite parmi les Hommes. liv. 2. Oeuvres tom. 1.

happinefs are natural rights, they are a part of our focial nature, and although in moft countries they may be but imperfectly enjoyed under the abfurd regulations of public policy, yet neither time nor ufage can impair the validity of the claim*

The moft ancient form of government is generally fuppofed to have been fimple monarchy. It arofe naturally from the patriarchal ftate, from family fubordination, and to men in the infancy of fociety, actuated with the love of war and plunder, it was the moft obvious and effectual mode of union. But whatever fketeh of government may have firft taken place (for the point is difputed) we find at leaft this fpecies of government univerfally prevailing in the earlieft times in Egypt, Indoftan, China, Affyria and Greece. Simple monarchy is beft adapted of any government for military exploits. It unites energy and promptitude, becaufe it moves by a fingle will, but in this government there can be no fecurity to perfonal rights. Man when left to his own controul, and armed with power, becomes a tyrant. Nor is there any falutary way by which he may be called to an account when he violates his duty. Every attempt will probably involve the community in war, and has ufually ended in the exchange of one tyrant for ano-

* And yet in this prefent age we find, however ftrange it may feem, the divine right of defpotifm, and duty of paffive obedience laid down by the Bifhop of St. Davids, at London, by Count de Morgenftierne, of Denmark, and by Count de Lignano, at Duffeldorff. See New A. Reg. for 1793, tit. Domestic Literature, pages 212, 281, 287.

ther. Monarchies by the wars which they are apt to foster, the exactions which attend them, and the disorder and oppression of the internal administration of justice, have generally proved pernicious to the industry and to the moral character of the people who sustained them, as well as scourges to human society. The progress of social improvement has no doubt meliorated the condition of mankind in modern times under every form of civil policy ; but Mr. Hume has affirmed,* and it appears to me much too strongly, that the present civilized monarchies of Europe are governments of laws and not of men, and that under them property is secure, industry encouraged, and the arts flourish. Without seeking for other instances to the contrary, the miseries which the inordinate ambition and long wars of Lewis the XIVth, brought upon his subjects, the degraded condition of Spain, and the cruel administration of Joseph, the late king of Portugal, are sufficient without recalling to memory the lively pictures in Tacitus or Suetonius, to render simple monarchy still an object of detestation to mankind.

The first specimens of a more free and limited government were exhibited to the world by the celebrated states of Greece. They abolished in time all their monarchies, and established at first aristocratical governments, in which the supreme power was entrusted to a select number of here-

* *Essays*, vol. 1. 98.

ditary archons or nobles. This species of government will have more wisdom and less energy than the other, because there are many experienced wills to be consulted. It is a government in many respects favorable to order and stability, and the principal Greek philosophers were so sensible of the miseries of popular licentiousness, which afterwards prevailed in their country, that they were led, as well as some modern writers,* to prefer a well regulated aristocracy to any other form of government.† But we are not to look here for security to the person and property of the citizen. The interests of the government and people are distinct, and the latter can have no controul over the public administration, but by resorting to force. Without a sympathy of interests between rulers and subjects, and the principle of amenability affecting the former, it is impossible there ever should be any regular freedom or permanent safety.

Democracy is the third species of government of the simple form. The entire powers of sovereignty in this government, according to the ancient and correct idea of it, reside in the whole body of the people, and are exercised by them in their collective capacity. This government (if indeed it may be called one) is favorable to emulation, talents, heroic enterprize and public spirit. It was the predominant feature in the governments of Greece and Italy during the lustre of the classical ages, but in those favored soils, it likewise unfolded all its imperfection and de-

* Burlemaqui, vol. 2. part 2. ch. 2.—† Arist. poli. 1. 4. ch. 2. 4. Plato, cited by Aristotle to that point.

formity. Faction, distrust, mutability, anarchy, proscriptions and tyranny, are the dreadful evils which history informs us have always attended the exercise of power, by a large heterogenous multitude. The sense of responsibility (one of the greatest securities of virtue) is lost, the voice of moderation is silent; every measure is precipitated by the quickness and blindness of passion, or the arts of some powerful demagogue, to gratify his ambition and resentment, for it is against the order of nature, as Rousseau* truly observes, that the many should govern the few. The ancient republics were not entirely destitute of the principle of representation, but still the collective assemblies of the people, were the ultimately efficient power, in the administration of the government, and gave birth to all those miseries which I have suggested.

It appears then that neither of the simple forms of civil government can be safe, or productive of the ends of the social union. A mixed government, and that modelled throughout on the principle of representation, is the only one which completely unites liberty with law.

The fatal catastrophe of the republic of Florence, which appeared with great splendor in the 15th century, but experienced the violent career of ancient Athens, taught Machiavel, a man of profound sagacity, under a general impression of this truth to recommend to his countrymen a mixed government, as essential to controul the velocity of the discordant members, and this same experience at home led him to approve of

* Liv. 3. of his social contract.

the compound institutions of Lycurgus, and condemn the more simple democracy of Solon.* The governments of Sparta, Carthage and Rome were, indeed mixed governments of considerable skill, and they were indebted to this quality for their strength and duration. They had all of them however very striking defects. They admitted the people collectively to a share in the government, whereas the people are utterly incapable of exercising the powers of government with safety in any other manner than through the medium of their representatives. They did not skilfully ballance the legislative department nor separate it from the others, and they were strangers to the efficacy of a single executive and an independent judicial. But the Spartan and Roman constitutions with all their inaccuracies, were the best finished of any political fabrics in the antient world ; they gave stability to those commonwealths for a long succession of ages, and contained the rough draft, and rude outlines of a government of the perfect kind.

It is from the antient Germans that our present ideas of a mixed and representative government are supposed to be derived. That great people from the time of their discovery by the Romans, were distinguished for their martial spirit, and their love of freedom. The energy of these two passions which imprinted such permanent features on all their subsequent political institutions, enabled them even at the height of the Roman power to strike terror into their armies, and on the

* Machiavel's discourses on Livy, b. 1.—His plan of government for Florence in his works, vol. 4.

banks of the Rhine and the Danube to prescribe boundaries to the progress of their dominion. It was their custom as they observed to Julius Cæsar,* delivered down to them from their ancestors, to oppose, not to implore whoever should make war upon them. It was the descendants of the same people, and animated with the same spirit, who broke through the restraints of foreign discipline and policy, and poured like a flood upon the provinces of the western empire. The Roman language, sentiments, and manners, together with their arts, jurisprudence and government, were all carried away by a force which nothing could withstand; and the inhabitants of Scythia, Sarmatia and Germany, as yet in the infancy of civil society, have the credit of triumphing over the monuments of art and wisdom, and breaking in pieces the most extensive monarchy, which had ever insulted and enslaved mankind.

This great revolution is a most interesting speculation, and affords a wide field of reflection with respect to the empire which it destroyed, and the alteration it gave to the genius, policy, governments and character of Europe. All the leading features of a free and limited constitution, a general council of the representatives of the nation, illustrious senators distinguished for their wisdom and authority, and chieftains chosen to direct the application of the national forces, are supposed to be found in the political institutions of the antient Germans.† In every stage of their

* De bel. Gal. l. 4. § 6.

† Doctor Gilbert Stuart, in his *Dissertation on the Antiquity of the English Constitution*, has maintained these

conquests, these northern Barbarians displayed the outlines and influence of this mixed authority, and on their final settlement in the countries which they invaded and subdued, they were insensibly led to a more marked but still inaccurate distribution of the powers of government; and to establish their diets, States, Cortez, Witte-nagemots, or Parliaments, which were only different names for the supreme assemblies of the nation to which they had been accustomed in the forests of Germany. On the continent of Europe the degeneracy of the feudal system, the influence of the papal hierarchy, and the force of standing armies, enabled the kings to destroy the irregular freedom of the Gothic governments, to subdue the aristocracy, and abolish the representation of the people. But in England, from a fortunate concurrence of circumstances, the commons were not only enabled to retain their original station, but constantly to meliorate the blessings, and increase the importance of their political condition; and this they had the good fortune to do, notwithstanding all the violence of the Norman princes, the haughty race of the Tudors, and the unceasing spirit of despotism in the house of Stuart. The English nation have accordingly been long celebrated for the wisdom

points with a quickness and deepness of penetration and a vigor of style, equal perhaps to what appear in the nervous and profound text of Tacitus on which he comments.—But Mr. Whitekar in his History of Manchester, b. 1. ch. 8. has discovered these outlines of mixed government even in the Celtic Kingdoms; the obscure learning of which he has explored with the acuteness and erudition of a consummate antiquarian.

of their constitution. It aims in theory to unite the decision of monarchy, the stability of aristocracy and the freedom of a republic without any of their corresponding vices or defects. Although it is by no means so perfect in practice, yet there are many of its principles which are worthy of universal adoption. The admirable plan of their judicial polity, and the influence of a popular representation, have for a long period of time, infused such energy and spirit of justice into their political system; that the English nation since the æra of their revolution, have enjoyed greater security of person and property, than ever was enjoyed at Athens, Sparta, Carthage or Rome, or in any of the commonwealths of Italy, during the period of the middle ages. They have the pre-eminent advantage of having separated with unusual precision the different departments of government, and ascertained the efficacy of legislative checks and ballances; of having established unity in the executive department, and given independence to the judicial. These I take to be primary features in the skilful organization of a free constitution, and they come recommended to us by the strong language of experience, and the weight of the most respectable authority; since they have received the universal approbation of our own countrymen, and been incorporated into those political fabrics, which, I shall endeavor in the course of these lectures, to examine and illustrate.

But while I pay the just tribute of respect to a government, to which we in this country have been greatly indebted for the excellence of our constitutional principles, and the wisdom of our

municipal law, I cannot entirely agree with the ingenious citizen of Geneva,* that in England, liberty has at last fully displayed her form, secured an asylum, and erected her temple. The English government, even in its most perfect state, contained institutions which are important, but I trust unnecessary abridgments of freedom. It always upheld an established church with exclusive privileges, and hereditary orders with large powers, and no responsibility. And if so deep an observer as Mr. Hume, at the distance of half a century ago,† had reason to conclude the equilibrium lost, and that the English constitution was degenerating into absolute monarchy, we at this day are perhaps better warranted in the same conclusion. The representation of the people in the house of commons, is become so unequal and so imperfect as to be indeed but a shadow of representation.‡ About one half of the commons, says Mr. Paley,§ are elected by the people, the other half come in by purchase, or by the nomination of single proprietors of great estates. This must give to the aristocracy an as-

* De Lolme, vol. 2. 137. 138.—† Essays, vol. 1. 51. 538. 539.

‡ It is stated in N. A. Reg. for 1793, under Domest. Lit. 221. that 306 members constituting a decided majority of the commons are returned by the influence of 71 peers, 91 commoners and the treasury. One of the societies, for reform in their petition to parliament in 1793, stated that 150 commoners owed their election to the peers entirely, and that 40 peers by their Burgage Tenures, returned 81 members more. This they offered to prove, but it was not denied. See also 1 Burghs Dif. 39.

§ Principles of moral and political philosophy, 369.

tendency over the other house, in violation of the spirit and genuine ballance of the constitution. The king also, not only by means of his acknowledged authority, but by the indirect and steady influence of the nobility, the church, the national debt and the army, possesses a mass of power unchecked by his accountability and irresistible in its operation. This influence of the crown is even defended by the celebrated moral writer I have just mentioned, as a necessary ingredient in the British constitution, and he goes so far as to consider an independent parliament as incompatible with the existence of the monarchy.*

A further experiment was still to be made in the science of civil polity, whether all the blessings of a mixed and well ballanced constitution might not be obtained, by introducing the principle of representation and responsibility into every part of it, and thereby abolishing entirely hereditary orders with all the danger of their destructive influence and unequal appendages. Such a noble experiment has been made in these United-States, and when we consider the peculiar advantages under which as a nation we make it, arising from a general diffusion of knowledge, a tolerably equal distribution of property, and a moral character formed with mildness and with a love of order, we have reason to presume the experiment will be successful, and will recommend itself to the approbation of mankind. And yet with the most ardent wishes for its success, I will not dissem-

* Paley, 373. 377.

ble my fears and apprehensions, when I reflect on the past, and anticipate the future. The people of America ought to contemplate with reverence the example they are setting, the anxious eyes which from every quarter are upon them, the trust confided to their hands, and their solemn responsibility for the use of it, and then they should steadily maintain the virtues which such a contemplation inspires. Our most formidable enemy, the one most to be dreaded, and most to be guarded against, is the spirit of faction, which can match all the intrigues of courts or princes for insinuating a deadly poison through every pore of the body politic; and by the engines of calumny, corruption and violence can assault, shake, weaken and finally prostrate every barrier of safety.

Having thus examined, in a cursory manner, the theory and progress of civil government, as it has been exhibited on the eastern continent, it may not be improper in the remainder of this discourse, to notice a few of the most important heads or objects with which government is or ought to be concerned.

The regulations of the lawgiver should always have a steady relation to the state of society, its industry, wealth, trade, morals, genius, extent and connection with other nations. The president de Montesqueu took a comprehensive survey of all these relations, and which form what he calls the *spirit of laws*, in a work sometimes devoted to the conceits of fancy, but generally eminent for deep thought, and extensive erudition. It may however I think be justly concluded, that government and laws will as often com-

municate, as they will follow the spirit and manners of a nation; and this truth serves to illustrate the importance and dignity of the business of legislation. Its effects may form the moral character of a distinct generation.

It is the fashion of the European governments, to perplex the industry of their subjects with a vast multitude of positive regulations. Many of these have very little connection with the advancement of the national prosperity, and are an unnecessary, and therefore an oppressive violation of the free circulation of labor and the produce of labor. The eminent author of the *Inquiry into the nature and causes of the wealth of nations*,* simplifies extremely the cares of government, and reduces all the duties of the sovereign power to three, the duty of protecting the society from foreign violence, the duty of protecting every member from domestic injury, by establishing an exact administration of justice, and lastly the duty of erecting and maintaining certain public works and institutions. These duties are almost in so many words recognized, and declared to be the end of the government of the union, in the preamble to the constitution of the United-States. The business of defending society from external injury, is one of the obvious duties of government. This involves in it the right of negotiation, of raising armies, providing for their support, declaring war and concluding peace. But the duty of protecting every man's liberty and property by means of a prompt, uniform and impartial administration of the law, is of the utmost im-

* Vol. 2. 203.

ment to the real and permanent happiness of society. One of the most accurate observers in the present age,* says he looks upon the whole apparatus of government, as having ultimately no other object or purpose but the distribution of justice.

As connected with the duty of a vigorous application of the law, government should take care that laws be uniform and equal in their operation; uniform that the rights of property may receive their just value and security, and equal, that the meanest individual may partake of his due proportion of the social enjoyments. Property should have a free circulation, and free employment, without any of the fetters of entailments and perpetuities. These are inventions no less repugnant to the dictates of sound policy, than injurious to the equal rights of the rest of the community. They foster excessive inequalities of power and property, invite to indolence, damp enterprize, facilitate corruption, unduly widen distinctions, and humble the poor under the proud superiority of the rich.† On the same ground monopolies, except so far as they are tolerated in a limited degree, for the improvement of arts, and the encouragement of genius, are justly and generally reprehensible. The particular exemptions from public contributions, which are granted to the privileged orders both civil and ecclesiastical in many parts of Europe, are in the spirit of monopolies and are unjust. The

* Humes' Essays, vol. 1. 35.

† Lord Kains in his Sketches, vol. 2. 523. has described in strong colours, the moral and political evils of the Scotch Entails.

French clergy and nobility before the late revolution generally enjoyed this exemption, and it remains to the credit of M. de Colonne that he conceived, while at the head of the finances of France, the bold and wise project, of taxing all property equally, whether owned by the king, nobles, clergy or peasants.* Nor on the other hand ought there to be any permanent disqualifications annexed by law to any particular class of the people. Accordingly the provision which is to be found in the constitutions of this state and of South-Carolina, excluding the clergy from civil offices, must be condemned as partial and oppressive.

Government should also endeavour to render the rule of obedience plain and intelligible. A knowledge of the laws which are obligatory upon all, should be accessible to all. Pains should be taken that they be fully promulgated, and that no person be punished under any possible circumstances for a breach of a law which he could have never heard or understood. This renders *ex post facto* laws so properly reprobated by the moral feelings of mankind. The mode of promulgating laws adopted by Caligula,† rendered them a mere trap to the people, nor is that principle of the English law much less unjust,‡ by which when no specific day is mentioned for a statute to begin, it takes effect by legal operation from the first day of the session, a day which may frequently be some months before it was actually passed.—The attention which has been repeated-

+ - not law

- for by a

statute -

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* N. A. Reg. for 1788, pa. 18. 31, &c.

† Suet. Cag. § 41. — ‡ 4 Durnf. & East. 661.

from the time

it receives the Royal signature. — see,

ly paid by our national legislature, to produce a very general circulation of the laws of the union, and to bring home to every man's acquaintance the rule of his obedience, is evidence of an enlightened sense of their own duty and of the true foundations of order.*

The promotion of knowledge is another business of government of peculiar obligation in free states. Without the powerful aid of ignorance, wicked men could do but little harm in society. The most terrible mischiefs which can assail commonwealths, the painful vibrations between the extremes of anarchy and tyranny, are produced by the union of the vicious and the ignorant. It is the duty of a wise government to bestow a constant effort to dissolve this confederacy, by communicating light and knowledge, and with them, peace and happiness, a sense of their interests, and a love of order to the people. Some of the state constitutions, have wisely ordained public instruction by a fundamental provision in the government. The establishment of schools throughout all the towns in the Eastern states, and which has lately been imitated by us, does the highest honor to the good sense and enlightened policy of our country, since they help to diffuse every where among the people a knowledge of their rights and understanding to discern, and spirit to adopt the best means to preserve them.

It ought not however to be forgotten, that amidst all the regulations of government, none of them should interfere with the freedom of speech, and of action, the publication of our sen-

* Laws U. S. vol. 1. 26. 87. vol. 3. 245.

timents, and the enjoyment of religious worship, so long at least as these rights are exercised, as all rights ought to be, in perfect harmony with our social and political obligations. For the moment they transgress these bounds they cease to be rights, and become acts of injustice. And yet how few governments in the world have acted with moderation, even when their subjects were in the legitimate practice of these privileges. They have too generally marked the limits of thought, checked the range of free inquiry, and associated with the ministers of religion to oppress mankind with the intollerant spirit of an established church. Ecclesiastical establishments have most universally been deemed essential to good government and the maintenance of public order.* But the United Netherlands had the honor more than a century ago, of undermining the force of this opinion, and of teaching men by their own example, that they could live happily together as citizens of the world, associated by the common ties of humanity and the bonds of peace, under the impartial protection of indifferent laws, and with equal freedom of speculation and worship.† The United-States have gone a step beyond them, and effected an explicit and total separation between religion and civil policy. This is setting a new, a liberal, and a just precedent to mankind. But I apprehend

* Domat's Treatise of laws, ch. 10.—Woodd. Elements, 82, and the writers there quoted. Bishop Warbuton in his divine Leg. vol. 3. 27. says, that an established religion with a test law, is the universal voice of nature.

† Temple's works, vol. 1. 181.

we should grossly abuse it if government were to abandon all patronage of religious instruction, and all superintendance of the cultivation of public morals.* A general conviction of the reality of moral obligation and future retribution, have always been found necessary to give due consideration and efficacy to the sanctions of civil law. All offences at least, which strike at the foundations of natural rectitude, and public decorum, are undoubtedly within the cognizance of human legislators. The entire abolition for instance of the infamous mysteries of Bacchus, by order of the Roman senate, as it is told us by Livy,† was a measure never to be denied, as lawful, wise, and indispensable.‡

I would observe lastly, that as civil government is the creature of the people, and intended for their happiness, they have a clear and perfect right to alter it, whenever they think proper, and to whatever form they shall deem most likely to attain this beneficent end. This alteration however they are bound to make, with the least in-

* Mr. Paley in his Principles of Philosophy, b. 6. c. 10. vindicates religious establishments with complete toleration, as the best means of promoting religious instruction. This is similar to the principle in the constitution of Massachusetts, and his reasoning is ingenious and persuasive, though I cannot believe a religious establishment in any shape, to be the *sine qua non*, the indispensable requisite, to the successful propagation of the essential truths of religion and morals.

† Lib. 39.

‡ See Doctor Taylor's Comments on this celebrated *senatus consultum marcianum de Bacchanalibus, coercendis*, Elements of the civil law, 545, to the end. He admits it to have been only a fair and reasonable measure to maintain the public security.

convenience to public order, and the least possible injury to the social rights of every member of the state. It is an excellent provision recently introduced into politics, to have government contain within itself the principle and means of its own improvement. It can in this way without the slightest interruption to justice, accommodate itself from time to time, to the progress of manners and the lessons of experience.

With these observations on government in general, I shall proceed in the next lecture to an historical review of the origin, progress and final consolidation of the union of the United-States.





LECTURE THE SECOND.

Of the History of the American Union.

ACCORDING to the plan which I have purposed to pursue in the following lectures, I shall consider the relation we stand in to the government of the United-States, by a general survey of its constitution and laws, before we proceed to a more particular examination of the municipal institutions of our own state. The government of the union was erected by the free voice of the people of America for their common welfare; they have accordingly clothed it with the principal attributes of political sovereignty, and from the connection which it creates between the citizens of the several states, and the various and extensive national duties, which it imposes, it has a pre-eminent claim to our consideration.

The association of the American people into one body-politic, took place while they were yet colonies of the British empire, and owed allegiance to the British crown. That the union of this country was the *palladium* of its liberties,

had indeed been known and avowed by many of our enlightened patriots, long before the late revolution, or the oppressions of the British government which produced it. The people of the New-England colonies were very early in the habit of confederating together for their common defence. We find the united colonies of Massachusetts, Plymouth, Connecticut, and New-Haven, in the first periods of their colony history, ratifying and subscribing in due form, articles of a confederation, and even providing for the reparation of its breaches. They declared their league to be offensive and defensive, firm and perpetual, and vested in an annual congress of commissioners, delegated from each colony, the authority to regulate their general concerns, and especially to levy war and make requisitions of men and money, upon the several members of the union in a ratio to their respective numbers. This confederacy subsisted for upwards of forty years with the countenance of the government in England, and was dissolved at last under king James II. in the year 1686.*

But the people of this country continued after the fall of this distinguished league, to afford other instructive precedents of associations for their safety. A congress of governors and commissioners from other colonies as well as from New England, was occasionally held, the better to make arrangements for the protection of our interior frontier, of which we have an instance at Albany in they ear 1722;† and a much more

* Hazard's State Papers, 496. 583. 590. Hutchinson's Hist. of Massachusetts, vol. 1. 124. 126.

† Smith's Hist. of New-York, 171. Belknap's New-Hampshire, vol. 2. 370.

interesting congress was held there in the year 1754, which consisted of commissioners from New-Hampshire, Massachusetts, Rhode-Island, Connecticut, New-York, Pennsylvania, and Maryland, and was called at the instance of the king, to take into consideration the best means of defending America, as a war with France was then apprehended. These commissioners asserted and promulgated some invaluable truths, the proper reception of which in the minds of their countrymen, prepared the way for their future independence and our present fame. They unanimously resolved that a UNION of the colonies was absolutely necessary for their preservation. They likewise rejected all proposals for a division of the colonies into separate confederacies, and adopted a plan of federal government, consisting of a general council of delegates, to be chosen by the provincial assemblies, and a president-general to be appointed by the crown. In this council were vested, subject to the negative of the president, many of the rights of war and peace, and the right to lay and levy imposts and taxes, and it was to embrace all the colonies from New-Hampshire to Georgia. But the times were not yet ripe, nor the minds of men sufficiently enlarged for such a comprehensive proposition; and this bold project of a continental union had the singular fate of being rejected, not only by the king, but by every provincial assembly.* We were to remain some years longer separate and alien commonwealths, emulous of

* Franklin's Works, pa: 85. Edit. London, 1779. Belknap's New-Hampshire, vol. 2. 285.

each other in obedience to the parent state, but jealous of each other's prosperity, and divided by policy, interest, prejudice and manners. So strong was the force of these considerations, and so exasperated were the people of the colonies against each other in their disputes about boundaries, that Doctor Franklin in the year 1761 ventured to say, that a union of the colonies was absolutely impossible, or at least without being forced by the most grievous tyranny and oppression.*

The seeds of union however had been sown, and its principles were to gather strength, and advance towards maturity, when the season of common danger approached. When the first unfriendly attempt upon our liberties was made by means of the stamp-act, in the year 1765, a congress of delegates from nine colonies was formed at New-York, at the instance and recommendation of Massachusetts; and they framed a bill of rights, in which the sole power of taxation was declared to reside in the colonial assemblies.† This was only a preparatory step to a more extensive and permanent union, which took place in September 1774, and thereby laid the foundations of this great republic. The more serious and impending oppressions of the British parliament at this last critical æra induced the twelve colonies which spread over this vast continent, from Nova-Scotia to Georgia, to an interchange of political opinions, and to concur in choosing and sending delegates to Phila-

* Franklin's Works, 192. 155.—† Belknap's N. Hampshire, vol. 2. 326.

delphia, "with authority and direction, to meet and consult together for the common welfare." In pursuance of their authority this first continental congress, whose names and proceedings are familiar to the present age, and will live forever in the memory of posterity, took into consideration the afflicted state of their country; asserted by a number of declaratory resolutions, what they deemed to be the unalienable rights of English freemen; pointed out to their constituents the system of violence which was preparing against those rights; and bound them by the most sacred of all ties, the ties of honor and their country, to renounce commerce with Great-Britain, as being the most salutary means to avert the one, and to secure the blessings of the other.* These resolutions were received with universal and prompt obedience, and the union being thus auspiciously formed, it was continued by a succession of delegates in congress; and through every period of the war, and through every revolution of our government, it has been revered and cultivated as the tutelary guardian of our liberties.

In May 1775, a congress again assembled at Philadelphia, and were invested by the colonies with very ample discretionary powers. They were to "concert, agree upon, direct, order, and prosecute," such measures as they should deem most fit and proper, to obtain a redress of American grievances, or in general terms, they were to take care of the liberties of the commonwealth.† Soon after their meeting, Georgia ac-

* Journals of Congress, vol. 1.—† Journals of Congress, vol. 1. 74. —

ceded to and completed the confederacy. Hostilities had already commenced in the province of Massachusetts-Bay, and the unconditional sovereignty of the British parliament over the colonies, was to be asserted by an appeal to arms. Congress charged with the general interests, and superintending direction of the union, and supported by the zeal and confidence of their constituents, prepared for defence. They published a declaration of the causes and necessity of taking up arms, and forthwith proceeded to levy and organize an army, to prescribe rules for the regulation of their land and naval forces, to emit a paper currency, contract debts, and exercise all the other prerogatives of an independent sovereignty, till at last on the 4th day of July, 1776 they took a separate and equal station among the powers of the earth, by declaring the united colonies to be **FREE AND INDEPENDENT STATES.***

This memorable declaration, in imitation of that published by the United Netherlands on a similar occasion, recapitulated the oppressions of the British king, asserted it to be the natural right of every people to withdraw from tyranny, and made a solemn appeal to mankind, in vindication of the necessity of the measure. By this declaration, made in the name, and by the authority of the **PEOPLE**, these United-States were absolved from all allegiance to the British crown, and all political connection between them and the state of Great-Britain was totally dissolved. The principles of self-preservation, and of social happiness, gave a clear sanction to this act of separation.

* Journals of Congress, vol. 1. and 2.

tion. When the government established over any people becomes incompetent, or destructive to the ends for which it was instituted, it is the right, and the duty of such people, founded on the law of nature, and the reason and practice of mankind, to throw off such government, and provide new guards for their future security. And yet however just such a proceeding may appear, to the mind of an American freeman, professor Wooddeson observes,* that he had met with nothing sufficient to inform *his* judgement on the question, whether colonies have any right, and in what situation of affairs, to separate from the superior state.

The end of government is social happiness, and when colonies from their distance, or separate interests, find the government of the parent state to be inconvenient, and when their resources place them in a condition to protect themselves, the question may very fairly be reversed, and asked with what justice can the superior state command their allegiance, and a sacrifice of their own convenience to the grandeur of another community? The answer is still more obvious, when one part of a nation is not only incompetent from its local situation, to communicate to the other, the equal blessings of the government, but is inclined to treat it with injustice.

The history of mankind does indeed abundantly prove that the government of remote provinces is generally attended with oppression. It is well known to all who have looked into an-

* Elements of jurisprudence, lec. 2.

cient history, that the numerous provinces of the Roman empire, even during the times of the republic, were miserably plundered by the rapacity of their armies, and the exactions of their proconsuls. The splendid establishments which in more modern times have successively been made in the East and West-Indies by Spain, Portugal, Holland, France, and England, have been founded in violence, and maintained by force, fraud, and arbitrary authority. It is laid down as a part of the English common law,* and has more than once been recognized by statute, that the parliament of Great-Britain has a right to make laws for its colonies. Every commercial country in Europe, has erected its system of colonization on an oppressive monopoly, and has totally forgotten, or wilfully perverted the interest of the colony, in the eager pursuit of aggrandizing itself. But the establishment of the republics of Switzerland and Holland, bears such a striking analogy to that of the United-States, in the causes which produced them, and in the manner in which they were conducted, that without considering them merely as illustrious precedents, they are deserving of attention in our inquiries into the foundation of our own independence.

Switzerland on the settlement of the northern nations in the southern provinces of Europe, fell under the dominion of the French, and afterwards of the German empire. She acknowledged the counts of Hapsburgh for her immediate protectors, and faithfully preserved her alle-

* Cowp. Rep. 204.

giance, after that family, under the well-known name of the house of Austria, succeeded to the imperial crown. But altho' the several cantons were fiefs of the empire, yet like these states while they were colonies of Great-Britain, they enjoyed many local priviledges, and charter rights, and some of them in particular, of being governed by magistrates of their own appointment. They claimed so early as the ninth century, by donation from the emperors, the privilege of making their own laws, and forms of government. When the emperor Albert meditated their ruin, and claimed their unconditional submission, the answer of the three cantons of Uri, Schewitz and Underwalden was mild and persuasive. "They flattered themselves they said, that he would maintain them in their rights, since they were ready to fulfil their obligations to him." But he refused to listen to their remonstrances, violated their priviledges, and placed wicked and tyrannical governors over them. The tyranny of the imperial bailiffs, became at last insupportable, and those three cantons in the year 1308 threw off by force the yoke of their oppressors, and confederated together for their common defence.* After the war with the emperor had begun, they entered into a more solemn alliance at Brunnen, which a Swiss historian terms the basis of the present Helvetic Confederacy;† and by which they engaged to assist each other with mutual expence, and not to enter into any negotiation or alliance without the consent of

* Histoire de la Confed. Helv. par Watteville liv. i.

† Watteville, liv. 3.

all.* The house of Austria carried on an implacable war against them for more than a century, with fruitless expectations of conquest, and a prodigal expenditure of treasure and blood. That celebrated confederacy, which originally consisted of only the three cantons of Uri, Schwitz and Underwalden kept continually increasing in strength, by the accession of other cantons from conquest or alliance ; but the union of the present thirteen cantons was not completed for two centuries,† nor was their independence fully and finally acknowledged by the house of Austria till the treaty of Westphalia.‡

The united netherlands were formerly a part of the immense dominions of the Spanish empire, but the violent government of Philip 2d. and the unrelenting intollerance of the inquisition, drove those distant provinces to union and resistance. In 1579 by the celebrated treaty of Utrecht, they entered into a league for their mutual defence, and that treaty is considered at this day as the bond of their union, and the foundation of their republic. But although they had for some time made open resistance, to the force of Spain, yet it was not till the 26th of July, 1581,

* It is worthy of notice that the earliest instrument of union among the Swiss cantons (1315) begins in the name of the people, like the constitution of the United-States. The deed runs thus “ a cette cause nous les *Payfans* d’ Ury, de Schwitz, et d’ Underwalden faisons ascavoir.” Leibnitz *Coldex* dipl. 69, quoted by Ward in his law of nations, vol. 2. 275.

† Hist. de Watteville *passim*, and Cox’s Travels in Switzerland, vol. 1. 273 to 283, et *passim*.

‡ By Appenzel in 1513.

after all hopes of reconciliation were lost, and the authority of Philip had been for some time virtually renounced, that the confederated provinces, equally distinguished for their forbearance and firmness, solemnly declared themselves independent states, and absolved from all allegiance to the Spanish crown.* It is well known that Spain continued to make long and powerful efforts to reduce them to obedience, till at last exhausted herself, she was reluctantly compelled to a permanent recognition of their independence at the treaty of Westphalia; a treaty memorable in diplomatic annals, for casting so many deep shades over the *star of the house of Austria*.

But to return to the history of our own government, the general sentiment of the importance of the union appears evident in all the early proceedings of congress; and even as soon as the æra of our independence, it was thought expedient for its more perfect security, to define with precision, and by a formal instrument, the nature of our compact, the powers of congress, and the residuary sovereignties of the several States. On the 11th of June, 1776, congress undertook to digest and prepare the form of a confederation.† But the business was attended with uncommon embarrassment and delay, and notwithstanding these states were then surrounded with the same eminent dangers, and contending for the same illustrious prize, it was not till the 15th November, 1777, that congress could so far

* Watson's Philip, 2d. vol. 2. 66. 122. Van Bynk. Q. pub. J. l. 1. ch. 23. l. 2. ch. 1.

† Journals, vol. 2.

unite the discordant interests and prejudices of thirteen distinct communities, as to agree to the articles of confederation. And when those articles were handed to the states for their perusal and ratification, they were expressly declared to be the result of impending necessity, and of a disposition for conciliation; and that they were agreed to not for their intrinsic excellence, but as the best system which could be adapted to the circumstances of all, and at the same time afford any tolerable prospect of general assent.*

These celebrated articles met with still greater obstacles in their progress through the states. Most of the legislatures indeed ratified them with a degree of promptitude, which did the highest honor to their spirit of accommodation, but Delaware did not accede to them till the year 1779, and Maryland explicitly rejected them.† She instructed her delegates in congress to refuse assent to the confederation, until it was amended by an article, appropriating the new lands in the western parts of the union, as a common fund to defray the expences of the war.‡ These lands were claimed by individual states, as lying within their separate limits and jurisdiction, but several of them from a deep sense of the necessity of the union, empowered their delegates to consent to an unconditional ratification of the articles, although Maryland should withhold from them her ultimate sanction;§ and the legislature of one of the states, that of New-York, even consented

* Journals of Congress vol. 3.—† Journals of Congress, vol. 7.—‡ Journals, vol. 5. 268.

§ Journals, vol. 5.—Laws of New-York, vol. 1. 51.

to a release of the unsettled lands in the western parts of it, for the use and benefit of the union.* The refusal of Maryland so long persisted in, gave encouragement to our enemies, and injured the common cause at home and abroad: These considerations at last induced her to make a generous sacrifice of her pretensions, and on the 1st of March, 1781, the articles of confederation received the unanimous approbation of the United States.†

The difficulties which impeded the framing and adopting the articles of confederation, even during the season of war, and which nothing at last but a sense of common danger could surmount, form a striking example of the mighty force of local interests, and discordant passions, and ought to teach a lesson of moderation to political councils.

Notwithstanding the articles of confederation, conferred upon the United States in congress assembled (although in a very imperfect manner) the chief rights of political supremacy, the *jura summi imperii*; yet they were in fact a limitation of the original undefined sovereignty of the union, which we have seen was delegated to congress by the colonies in the year 1775, and had been in free and constant exercise. A remarkable instance of this, appears on the Journals of congress the latter end of the year 1776, for when the progress of the British arms had excited very alarming apprehensions for our safety, congress transferred to their commander in chief,

* Laws of New-York, vol. 1. 53.—† Journals of Congress, vol. 7.

for the term of six months, compleat dictatorial power over the liberty and property of the citizens of the United States ; in the same manner as the Roman senate, in the critical times of their republic, were wont to have recourse to a dictator "*ne quid respublica detrimenti capiat.*"* Such loose undeterminate authority as the union originally possessed, is absolutely incompatible with any regular notions of liberty. Although it was exercised in the instance before us, as in other strong cases, with the best intentions, and from the impresson of an irresistable necessity, yet such a sovereignty cannot be durable. It must either dwindle into insignificance, or degenerate into a despotism.

The powers of congress as enumerated in the articles of confederation, were perhaps competent to all the purposes of the nation, had they been duly distributed, among the departments of a well organized government, and been carried down through the medium of a continental, judicial and executive, to the individual citizens of the union. The high authorities of war and peace, and the right to make unlimited requisitions of men and money, were confided to congress, and the exercise of them rendered obligatory upon the states. But in imitation of all the former confederacies of ancient Greece, and of modern Europe, the articles of confederation carried the decrees of the federal council, to the states in their sovereign or collective capacity. This was the greatest defect in our confederation, it finally brought on its ruin, and has proved

* Journals, vol. 2. 508.

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pernicious or destructive to all the other governments which have adopted the principle. Disobedience to the laws of the union must either be submitted to by the government to its own disgrace, or those laws must be enforced by arms. The mild influence of the magistracy can have no operation against an organized community. The histories of the federal governments of Greece, Germany, Switzerland, and Holland accordingly afford melancholy instances, of destructive civil war springing from the disobedience of the separate members. I will mention only a single instance to this effect, and that from the generally uninteresting annals of the Swiss cantons. By one of the articles of the Helvetic alliance, the cantons are bound to submit any difference which may arise between them to arbitrators. In 1440 a dispute took place between Zurich on the one side, and Schweitz and Glaris on the other, respecting some territorial claims. The former refused to submit to a decision against her, and the contending parties took to arms. All Switzerland was armed of course against Zurich the refractory member. She fled for protection to her ancient enemy the house of Austria, and the controversy was not terminated in favor of the federal decrees, till after six years of furious and destructive war.*

Had there been sufficient energy in our late federal government to have enforced its constitutional requisitions, it might have proved in the end destructive to public liberty; for the con-

* Hist. de la Confed. Helv. par Watteville, liv. 5.

gress was a most unfit depositary of political power, since all the authority of the union was conferred in one complicated mass of jurisdiction to a single body of men.

There was no provision in the articles of confederation which enabled congress to add a sanction to its laws. In this respect it was more defective than some other federal governments. The amphycletic council had authority to fine and punish by coercion their refractory States. The diet of Germany can put its members under the bar of the empire by which their property is confiscated, and is aided likewise in enforcing obedience to its laws, by a federal judiciary and executive. Congress were even restricted from any constructive assumption of power however essential it might have been deemed to the complete enjoyment of that which was given. This is also the construction given to the treaty of Utrecht, which may very aptly be termed the *articles of confederation* of the Dutch republic. Under this treaty each province is considered by their civilians, as retaining the *summum imperium* in all cases in which it has not been *expressly* ceded. Nay although this fundamental charter of their union has declared that neither peace or war can be made without the unanimous consent of the states, President Van Bynkershoeck has thought it susceptible of a serious discussion, how far each state separately may send ambassadors to a foreign power, and levy war.* The sentiments of this learned writer, and who in this instance, *incedit per ignes*

* Q. pub. Jur. l. 1. ch. 23. 24. lib. 2. ch. 4.

suppositos cineri doloso, are the more to be admired when we consider the natural tendency which federal governments have always manifested, to dissolve their allegiance to a common head.*

The confederation was also defective in not giving complete authority to congress to interfere in contests between the several states, and in not guaranteeing a free government to each state and protection against rebellion. A reciprocal guarantee of their respective forms of government, and of assistance in cases of domestic violence, are the only things desirable in the Swiss confederacy, for in almost every other respect, it does even deserve the name it bears of a *defensive* alliance; so loose and almost disjointed is their union.†

The states-general of the Netherlands have also no competent jurisdiction to interfere in case of rebellion in any of the provinces, or of disputes between two or more of them. But they have not had the good fortune of the United

* The government of the United Provinces while it operates within its constitutional bounds is indeed more absolutely nerveless, than any other government which has yet appeared in ancient or modern times. The states-general can neither make war, peace, alliances or raise money, without the consent of every province, nor the provincial-states conclude these points without the consent of every city having a voice in their assemblies. The consequence is that the federal head is frequently under a necessity altogether irresistible, of making usurpations on the constitution, and dispensing with the requisite unanimity. This was done in the years 1648, 1657, and 1661, as well as in the strong instance given by Sir William Temple, and of which he was the author. Temple's works, vol. 1. 115. 128. 337-

† Cox. vol. 1. let. 12.

States in their attempts to correct the errors of their government. In 1651 they endeavored to remedy these last defects but failed.*

In many respects our confederation was superior to those of Germany, Holland or Switzerland, and particularly in the total prohibition it imposed on the separate states with respect to foreign and domestic negotiations, and the maintenance of land and naval forces in time of peace. But in the leading features which I have suggested, and in others of inferior importance, it was a most unskilful fabric, totally incompetent to fulfil the ends for which it was erected, the public safety and peace. Indeed all the federal governments which have hitherto appeared in the world (except perhaps the Achæan league if we can judge from the fragments of its story) are to be classed among the most defective political institutions, which have been erected by the labor of mankind for their security.† Their

* Van Bynk. *Quæst. pub.* J. lib. 2. ch. 23. 24. These remarks were written before the recent conquest of Holland by the arms of France. What complexion the Dutch confederacy may hereafter wear, it is impossible to say. Every enlightened friend of mankind will unite in the wish, that their government may become more efficient, and their people more free.

† M. de Meeran is said to have published in 1782 a very ingenious and elaborate "Discourse concerning the Achæan, Helvetic, and Belgic confederacies," in which they were compared together, and the origin, nature and object of them fully developed. So M. Simon Van Slingelandt, who was grand pensionary of Holland, has devoted two volumes, to the history, constitution and defects of the government of the United Provinces. I regret that neither of these interesting works have been within my command.

history has been uniformly marked with imbecility, disobedience, turbulence, and anarchy. The principle of the eloquent Rousseau* will be found to be indispensable to the success of this species of government, that the limits of the local administrations should be carefully marked, but that nothing should be able to break the tie of the *common legislation and subordination to the body of the republic.*†

Scarcely had our confederation been ratified by all the states, when they began to fail in a prompt and faithful obedience to its laws. As danger receded, instances of neglect became more frequent, and by the time that our independency was finally established at the treaty of peace in 1783, the vices of the government had begun to display themselves with alarming rapidity. The delinquencies of one state became a pretext or apology for those of another. The idea of supplying the pecuniary exigencies of the nation from requisitions on the states, was soon found to be altogether delusive. Our national engagements seemed to be totally abandoned. Even the contributions for the ordinary expences

* Considerations on the government of Poland, ch. 5.

† The Hanseatic league was one of the most curious federal republics in story. It exercised all the rights of sovereignty as a federal republic by a congress of deputies from the several cities. It made war and peace, contracted alliances, inflicted punishments, &c. and yet it was composed of cities *lent* as it were by several sovereigns towards its formation, and which like an enchantment was dissolved, as soon as the nations choosed to withdraw their cities, which they did from a jealousy of its increasing strength. Ward's Law of nations, vol. 2. 276, to 291.

of the government, fell almost entirely upon Pennsylvania and New-York. Attempts were early made by congress, and in remonstrances the most manly and persuasive, to obtain from the several states the right of levying a general impost, for the sole purpose of providing for the discharge of the public debt. It was found impracticable to unite the legislatures throughout the union, in so just a donation. Interfering regulations of trade, and interfering claims of territory were dissolving the friendly attachments; and the sense of common interest, which had united us during the war. Symptoms of distress, and marks of humiliation, were fast approaching upon us as a nation, and well justified the observation of an intelligent witness of our affairs, "that each state yielding to the voice of immediate interest or convenience, successively withdrew its support from the confederation, till the frail and tottering edifice, was ready to fall upon our heads, and to crush us beneath its ruins."*

The Germanic confederacy experienced a similar fate the latter part of the 15th century. The usurpations of the members was carried so far, as to destroy all subordination and allegiance to a federal head; and distress, violence, desolation, and anarchy, spread over every part of the empire, and continued, until Maximilian by the institution of the imperial chamber, and the aulic council, re-established public order, and restored some degree of vigor to the imperial authority.†

* Federalist, vol. 1. 95.

† Robertson's Charles, 5th vol. 1. 182. 183.

The first effort to relieve us came from Virginia in a proposition for a convention of delegates to regulate our commerce with foreign nations. The proposal was well received by the other states, and several of them sent delegates to Annapolis, who met in September, 1786. This little convention being only a partial representation of the states, and being deeply sensible of the radical defects of our system of federal government, thought it inexpedient to attempt a partial, and probably only a temporary alleviation of our national calamities ; but concurred in a forcible application to congress, for a general convention, to take into consideration the situation of the United States, and to devise such further provisions, as should be necessary to render the federal government adequate to the exigencies of the union. Congress pursued the important idea suggested by the meeting at Annapolis, and recommended a convention of delegates to be appointed by the several states, for the purpose of reviewing, amending, and altering, the articles of confederation. All the states except Rhode-Island acceded to the recommendation, and appointed delegates, who met in a general convention at Philadelphia, in May 1787.

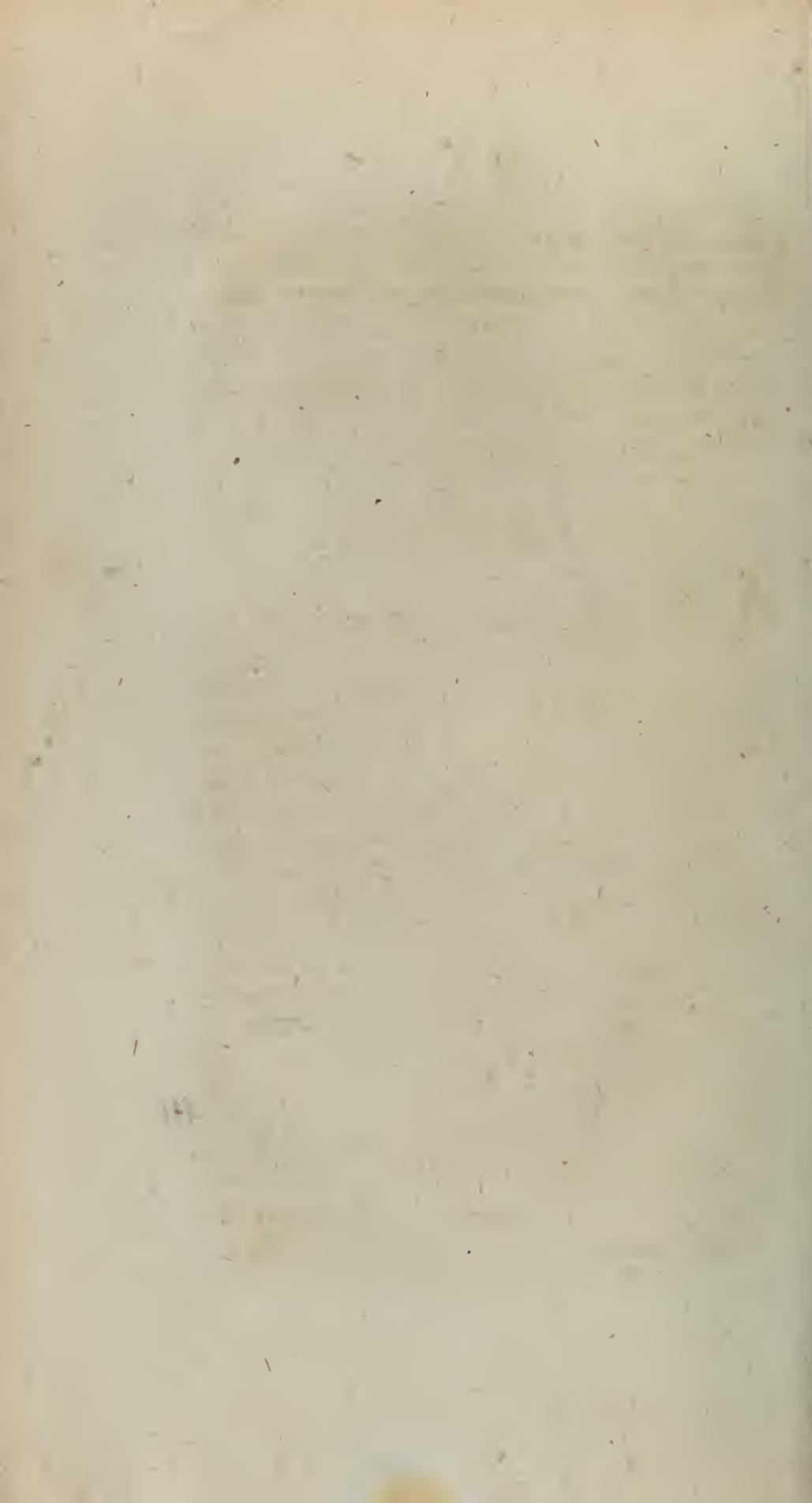
We are now arrived at a crisis most solemn, and an æra most eventful to our future fortune and glory. All the fruits of the revolution, and perhaps the final destiny of republican government, were staked on the transactions which were then to be unfolded. Happily for this country, and probably for the liberties of mankind, this convention combined a very rare assemblage of talents, candor, patriotism and the public confi-

dence ; and after several months of tranquil deliberation, they agreed with unexampled unanimity, to the plan of government which now forms the constitution of this country. This plan was directed to be submitted to a convention of delegates in each state, for their assent and ratification. This was laying the foundations of the structure of our national polity, where alone they ought to be laid, on the broad consent of the people. The constitution underwent a severe scrutiny, and long discussion, not only in public prints, and in private circles, but with the very distinguished characters who composed these state conventions. Near a year elapsed before it received the ratification of a requisite number of the states. New-Hampshire was the ninth which adopted the government, and thereby according to one of its articles gave it a sufficient establishment. She was immediately followed by the powerful states of Virginia and New-York, and on the 4th of March, 1789, the government was duly organized and began its operations. North-Carolina and Rhode-Island withheld some time longer their assent, their scruples however were gradually overcome, and in June, 1790, the constitution received the complete ratification of all the members of the former confederacy.

Such an amazing effort of deliberation as the peaceable adoption of this government, under all the circumstances which attended it, is literally without example. It must indeed be a source of high satisfaction to every American, who reflects seriously on the immensity of the undertaking, the manner in which it was conducted, the felicity of its issue, and the fate of similar experiments in some other nations of the earth.

We shall now proceed to a particular examination of this constitution. But it may be proper previously to examine the relations which our new situation as an independent people have created with regard to the rest of the world. This will include a brief review of the Law of Nations, which will be attempted, however imperfectly, in the next lecture.







LECTURE THE THIRD.

Of the Law of Nations.

AFTER the United States ceased to be annexed to the British empire and became an independent community, they continued by their own act and consent, to be subject to that system of rules which reason and custom have established among the civilized nations of Europe, and which goes under the well known denomination of the Law of Nations. The faithful observance of this law is essential to universal happiness. Its noble aim is to preserve peace, kind offices, and good faith, amongst mankind in their national intercourse, and to restrain in time of war, the tendency of the human passions to rapacity and cruelty. The Law of Nations forms therefore in every country, a most interesting title in a code of jurisprudence. It was always considered in England in its full extent as a branch of the common law ;* and although that law has been transfused into the domestic policy of the several states, yet in a national point of view we are and

* 3 Burr. 1480. 4 Burr. 2016.

ought to be, only one people. The constitution of the United States has accordingly and with great propriety, placed the cognizance of this law, or the right to define its extent, and punish its infractions, under the authority of the general government.

States or bodies politic are moral persons, because they have a public will capable as well as free to do right and wrong. They are accordingly susceptible of moral obligation, and fit objects of retributive justice. As they are perfectly equal and independent with regard to each other, they can have no superior to resort to for redress or protection, nor no rules to guide them in their mutual intercourse, but such as are deduced from the *Law of Nature*, and express or implied consent. On these two foundations rests the whole volume of public right, and it is generally in consequence of them subdivided into two constituent branches, which are termed the *necessary*, and the *positive* Law of Nations.*

But although the Law of Nations is founded partly on principles of natural right, it is supposed to derive its form, manner and application *wholly* from positive institutions founded on consent. And a late well informed writer† concludes, from the discordant opinions of mankind, that revealed religion is the only foundation of the moral obligation of the Law of Nations, and that natural reason or religion is too variously applied by different people to be the ground of an uniform rule. This doctrine has too great a

* Vattel's Preliminaries.—† See the first five chapters of Ward's Enquiry into the foundation and Hist. of the Law of Nations in Europe.

tendency, though without any such intention in the writer, to weaken if not actually to overturn a belief of the existence and force of the natural law of morality; a law which in its general axioms has been pretty universally felt, and well understood, from the joint result of the impressions of the moral sense, and the deductions of reason. The Law of Nations contains however in its compound state, such a large infusion of elements derived from usage and positive institution, and the uniform application of the remoter consequences of natural law, to the immense variety of national duties is so difficult, that this same excellent writer is more indisputably warranted in his positions, that the Law of Nations as it is commonly laid down by writers, is not the Law of *all* Nations, but only of such sets or classes of nations as are united by similar religions, systems of morals and principles of policy: That there may be and really is, a different Law of Nations among different sets of nations; and that a class of nations under one law, may be known from their habit of making alliances and treaties together, sending and receiving ambassadors, and of studying and following the same writers and codes of public jurisprudence.

The Law of Nations therefore as understood by the European world and by us has received its principal cultivation in modern times. The most refined states of antiquity, knew no distinction between a stranger and an enemy,* nor no rights which belonged to an enemy surren-

* Cicero de Off. 17. and the cases cited in Ward's Law of Nations, vol. 1. 174, to 176.

dered at discretion to protect him from bondage and death.* The domestic slavery of the Greeks and Romans, which was carried to a dreadful extent during the illustrious periods of their history, was chiefly supplied from captives taken in war, and notwithstanding they are so justly celebrated for their arts and wisdom, yet in the general scope of their laws of war and peace, those distinguished people were on a level with the barbarous nations who surrounded them. The Grecian annals are crowded with instances of ferocity and cruelty, and so little were mankind acquainted with the rights of property, or the necessity of public order, that in the times of Solon and Pisistratus, piracy was reckoned an honorable employment.†

444 The Romans exhibited much greater instances than the Greeks of the influence of regular law, and there was a marked difference between them in their intercourse with foreign powers. And yet what little attention *they* were accustomed to pay to the voice of justice or humanity, appears but too plainly from their triumphs, their interpretation of treaties, their rules of war, and the whole series of their rapid conquests. At the zenith however of the Roman greatness, the enlarged and philosophical mind of Cicero was struck with indignation at the barbarous excesses in which his countrymen had indulged their military spirit. Mankind he justly discerned were

* Grotius lib. 3. ch. 7. § 1. 2. and the authorities there cited. *Jure gentium servi nostri sunt qui ab Hostibus capiuntur aut qui ex ancillis nostris nascuntur.* Digest lib. 1. tit. 5.

† Justin l. 43. c. 3.

not intended to live in eternal enmity with each other, and he recommends beneficence, liberality and justice towards other people as agreeable to the law of nature.* These sentiments appear to have gained ground in the Roman state and in the latter ages of the empire when the spirit of conquest was exhausted, and their municipal law became highly cultivated, we find the Law of Nations recognized as a part of the natural reason of mankind;† and the civil law was destined to become in some measure a national guide to posterity, and to be appealed to by modern civilians as one authoritative evidence of the decisions of the Law of Nations.‡ Still the Roman code in its highest state of improvement, was an imperfect transcript of the precepts of natural justice on the subject of public law. It retained a portion of the ancient ferocity, for want of the influence of a more enlightened system of morality, and the civilizing restraints of commerce.§

But the irruption of the fierce tribes of Scythia and Germany, overturned all that was gained by the excellent system of the Roman jurisprudence, swept away every thing that was wise, and every thing that was elegant among the an-

* De Off. 111. 112.—† Taylors civil law, 128.

‡ Grotius Dis. Prel. § 54. 56.—Stratran's preface to Domat 9. 18. Beaver's Hist. of the Roman law, 135.

§ What an unsocial barbarous doctrine, a doctrine fit only for Savages is laid down in the digests! Si cum gente aliqua, neque amicitiam, neque hospicium, neque fædus amicitiae causa factum habemus; hi hostes quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit: et liber homo noster ab eis captus, servus fit, et eorum. *Idemque est si ab illis ad nos aliquid perveniat.* Dig. L. 49. Tit. 15. L. 3.

cients, and threw the science of national right back into its original barbarity. Mankind were once more doomed to live in distrust of each other, and to regard a stranger and an enemy as almost the same.* Piracy, rapine, and incessant hostilities, deform the face of Europe during the whole period of the middle ages. But on the approach of modern times, when order and knowledge began to arise and diffuse their influence, the Law of Nations as well as other sciences became an object of attention. The melioration which from various causes had taken place in municipal establishments, the revival of the study of the civil law, and the extension of its rules to the conduct of nations, and the progress of the arts and of commerce, could not fail to make favorable impressions on the Law of Nations, and contribute to its improvement. Yet with all these aids, and that derived from several important institutions which at that time prevailed in Europe,† the Law of Nations so late as the

* Mr. Barrington in his observations on the statutes chiefly the more ancient, pa. 22. has collected instances from the laws of the ancient Wisigoths, Saxons, Sicilians, and Bavarians, which restrain by penalties the plunder of shipwrecked goods and the abuse of shipwrecked persons. The necessity and existence of the laws are evidence of the ferocity of the times. But by an express law in Wales, madmen, lepers and *strangers* were excluded from civil protection.

† Mr. Ward in his enquiry into the foundation and history of the Law of Nations in Europe mentions five institutions as contributing in a particular manner to improve the Law of Nations. These were the feudal system—The concurrence of Europe in one form of religious worship and government—The institutions of

beginning of the last century, had scarcely attained to any considerable degree of precision, justness, or efficacy. It was still as Barbeyrac has observed* in a frightful chaos, when the pre-eminently learned and moral Grotius undertook the necessary task, of digesting into one systematic code the principles of public right, of explaining them to the christian powers, and most persuasively exhorting them to the observance of faith, and the cultivation of peace.† Altho' he has very greatly encumbered his pages with apothegms from the ancient poets and philosophers, and followed too closely the doctrines of the Roman law; yet the tendency of his wonderful work, has been to enlighten mankind on the subject of national rights, and national duties, to humanize their manners, and by consequence to civilize the hostilities of modern Europe. This great master was followed by a succession of eminent disciples, among whom Puffendorf, Barbeyrac, Van Bynkerhoeck, Burlamaqui, Wolfius, and Vattel have attained the highest rank in authority and reputation. These writers therefore who have devoted their lives to researches into the Law of Nature as applicable to the conduct of public bodies, and who have collected the usages which have received the sanction of the most civilized states, are justly resorted to

chivalry—the frequent negotiations, alliances, and conventions between different powers—and lastly the settlement of a scale of political rank and precedency.

* Pref. to Grotius.—† Conclusion of Grotius
De jure belli et pacis.

as decisive authorities in doubtful or disputed questions. But as the Law of Nations has kept pace with the cultivation of morals, and the refinements of commerce, the remark of Van Bynkershoeck* is undoubtedly just, that the modern precedents and writers are deserving of superior attention.

Having thus given a summary sketch of the history of the Law of Nations, I shall proceed to examine its principal injunctions, with respect to the external duties and rights of a nation, in the several relations it may be placed in, of peace, of war, and of neutrality.

I. As the end of this law is the happiness and perfection of the general society of mankind, it accordingly enjoins upon every nation the punctual observance of justice, good will, and benevolence towards its neighbours.† This is no less the policy than the duty of nations. In pursuance of this principle they ought to promote a fair and free intercourse together in the way of commerce, in order to supply each other's wants, and promote each other's prosperity. The variety of climates and productions on the face of our globe, and the facility of communication by means of rivers, lakes, and the ocean, point out a liberal intercourse as the natural destination of society. But as every nation has a right and will exercise it, of judging for itself on the policy of its commercial arrangements, the general freedom of trade is but an imperfect right, and must of course submit to such regulations as each

* *Proeme ad Quaest. pub. J.*

† Vattel's Preliminaries §. 12. 13—b. 2. c. 1. § 2. 3.

nation thinks fit to prescribe for itself. This introduces the utility and the practice of commercial treaties, which occupy so large a space in the diplomatic codes of the present day.*

Nations are all equal in their rights, so they ought to receive from each other equal consideration, whatever may be their relative dimensions or strength, or however they may differ in government, religion, or manners. It is a consequence of this equality and independence of nations, that each has a right to govern itself as it thinks proper, and no other has a right to interfere and dictate a form of government, or religion or internal administration for another.† No nation however had a contention within itself, but the ancient Romans with their usual insolence, immediately appeared upon the stage of action, and made themselves judges of the contest; and it was by the violation of this right, but with masterly policy, that they dissolved the Achæan league, by decreeing that each city should be governed by its own laws, independent of the general authority.‡ The late interference of Russia and Prussia in the affairs of Poland, and overturning their new and comparatively free and vigorous constitution, was a much more aggravated, and a most abominable instance of the same atrocious injustice. But every foreign power says Vattel,§ has a right to succour an oppressed people who implore their assistance against

* Vattel, b. 2. ch. 2.—† Vattel, b. 2. ch. 3. 4.

‡ Livy, b. 33. c. 30. Florus, lib. 2. ch. 7. Monteq. confid. sur les causes de Grand et de Decad. des Romains, ch. 6.

§ B. 2. c. 4. § 56.

an insupportable tyranny. The assistance that England gave to the United Netherlands when they were struggling against Spain, and the assistance that France gave to this country at the æra of our happy revolution were accordingly just. And yet care must be taken that this exception to the general rule be not abused. It would be the highest injury for a nation under color of it, to consummate the projects of its ambition, by sowing discontents, violence and rebellion in neighbouring states.*

Nations may use their own resources and property as they shall deem best, provided they do not violate the perfect rights of other nations, nor infringe the indispensable duties of humanity. They may contract alliances with particular nations—They may give and receive particular privileges, and thereby create a new set of rights and duties, which form the *conventional* law of nations ; a law which constitutes a very diffuse and interesting chapter in the public jurisprudence of almost every people, and of which the treaties of commerce I have already mentioned, are a part. Treaties of every kind when made by the competent authority, are morally obligatory, and ought to be observed with good

* Mr. Wilde the professor of civil law in the university of Edinburgh in a recent publication, considers rational fear, and *generous succour*, as being each of them justificatory reasons for war. This last juridical thesis he animatedly maintains (but on too broad a scale by far) with a view of vindicating the present confederacy against France ; for he sympathizes over the fallen fortunes of the French monarchy, with true passion shall I say or rather with the intemperate ravings of Quixotic devotion.

faith. Their construction should be according to the intent of the parties, and in furtherance of the end in view. How base and perfidious was the interpretation of a treaty in the instance given by Cicero,* in which a General concluded a truce with the enemy for thirty days, but ravaged their territory in the night under pretext that nights were not included in the truce ! The peace of a community often depends on the construction of treaties and it is a wise provision in the constitution of the United States which makes them the law of the land, and refers the cognizance of them as well as of other laws to the national judiciary, where we may be sure they will receive an impartial explanation, and be carried into faithful practice. And it may not be useless to observe at a period when changes in the form of governments are becoming frequent, that it is a clear position of the Law of Nations that treaties remain in force notwithstanding any revolution of the government. The body politic is still the same, although it may have a different organ of communication.†

The extent of the domain of a nation, is often a question of delicacy, and sometimes a cause of war. As far as a nation can conveniently occupy, and that occupancy is acquired by a lawful prior act or by treaty, it has a right to exercise exclusive jurisdiction. But navigable rivers which flow through a territory, and the bays and sea coast adjoining it, although they may not be capable of constant occupancy, yet they belong exclusively to the sovereign of that territory, as

* De Officiis 15.—† Burlamaqui, vol. 2. 241.

being necessary to the safety and peace of the nation, and necessary to the undisturbed use of the neighbouring shores.* The English claim to the dominion of the sea was carried to an extravagant excess by their ancient law ; they considered all the surrounding seas as within the jurisdiction of the king,† and the great names of Selden‡ and Sir Matthew Hale§ have given a sanction to these maxims of national pride.¶ It seems now to be pretty clearly and rationally settled, that the national territory, and of course the national jurisdiction, extends into the sea as far as the power of arms or cannon shot will reach, but no farther.¶¶ The legislature of the United States has lately recognized this rule as part of the Law of Nations, by authorizing the district courts to take cognizance of all captures made within a marine league of the American shores.¶¶¶

As connected with the friendly intercourse of nations, the admission of strangers ought to be free except in cases where it would produce prejudice or danger. This admission cannot indeed

* Grotius, b. 2. c. 2. § 12. c. 3. § 7.—Puff. b. 3. c. 3. § 4. b. 4. c. 5. § 3. 8.—Vattel. b. 1. ch. 22. 23.

† 4. Com. Dig. 260. 427.—‡ In his *mare clausum*.—§ Hargrave's law tracts 10.

¶ This claim of the British empire to the dominion of the sea is still advocated by the English Jurists. Doctor Wooddeson in his Elements of Juris, lec. 4. considers as *strong reasons* for it, that it has been signalized with victories, and often recognized. The Roman emperors, Augustus, Tiberius or Nero had an equally valid title to the dominion of the earth, to the perpetual servitude and humiliation of mankind.

¶¶ Van Bynk. Q. pub. J. l. 2. c. 21. l. 1. c. 8.—Vattel, b. 1. ch. 23.

¶¶¶ Laws of the United States, vol. 3. 100.

be demanded as a perfect right, but in all cases in which it is permitted, the public faith is thereby stipulated, to protect the stranger's person and property; while he on the other hand is bound to a perfect obedience to the law, and is amenable equally with the natives for infractions of it.* Ambassadors form an exception to this rule, they being exempted from any responsibility to the laws of the country in which they reside, in order to enable them the better to fulfil their trust. As they are representatives of the sovereign power, and are requisite among nations for mutual negociations, their persons have in all ages and among every people been deemed inviolable. Some very honorable examples of respect for the right of ambassadors, when their priviledges might justly have been deemed forfeited, are to be found in the Roman annals, amidst all the intemperance of their military spirit.† But if ambassadors are so totally regardless of their duty, and of the object of their priviledge as to abuse and attack the law or government of the nation to whom they are sent, application can be made for their recall, or they may be ordered and sent away, or even personally confined, if the safety of the state, which is paramount to all other considerations should absolutely require it; but they cannot in any case be made subject to the civil or criminal jurisdiction of the country.‡ Every sovereign state has a right to send and receive public ministers; yet if a state be divided

* Vattel. b. 2. § 100. 123. 132.—† Livy, lib. 2. c. 4. lib. 30. c. 25.

‡ Vattel, b. 4. c. 7. l. 2. § 5. 6. 94.—Ward's Law of Nations, vol. 2. 492. 515. 519 to 552.

by faction or civil war, Van Bynkershoeck* concludes that this right belongs to the ruling party in whom *set rei agendi Potestas*. This is placing the right in the government *de facto*, but the power to whom the ambassador is sent may still exercise his discretion whether or no he will receive him.

II. These are the principal dictates of the Law of Nations relative to a state of peace, and were they generally and duly obeyed, a new order of things would arise, and spread a brighter light over the face of human affairs. Peace is said to be the natural state of man.† It is the state most undoubtedly which is dictated by reason, and the social principle, but the history of mankind is such a steady delineation of the state of war, that it gives color to the Heresy of Hobbes,‡ that the natural state of man is a state of war of all against all, for nations are in the same situation with respect to each other that individuals are supposed to have been in, before the origin of civil government.

The right of self defence is obviously a part of the law of nature, and it is the indispensable duty of society to protect its members in the enjoyment of their perfect rights both of person and property. This is indeed a fundamental principle of the social contract. An injury either done or threatened to the perfect rights of the nation is reckoned by Vattel,§ a justificatory cause of war. The state of war produces two distinct classes of rules, the one applicable to the

* Quæst. pub. Jur. l. 2. c. 3.—† Vanel, b. 4. c. 1. Burlamaqui, vol. 2. 170.—‡ Leviathan, part 1. ch. 13.—§ B. 3. c. 3. § 26.

belligerent parties, and the other to the neutral nations.

The professor Burlamaqui,* a writer of amiable morals, will not allow a war to be undertaken until every milder method of recovering our right has been tried and found unsuccessful. This sage injunction is generally declared by the writers on natural law, and it is so moral and just that it ought to be indispensably observed. In the ancient republics the right of declaring war resided with the people, who retained in their collective capacity the exercise of the sovereign power. Among the ancient Germans it belonged also to the same assemblies as we are informed by Tacitus,† “*de minoribus rebus principes consultant, de majoribus omnes,*” and it continued afterwards in the same channel and resided in the saxon Wittenagemote.‡ But in the monarchies of Europe which arose out of the ruins of the feudal system, this important prerogative was generally transferred to the King as head of the executive department, and Rousseau§ considers it as properly of an executive nature. It has however for centuries past been very wantonly exercised by European princes, with very little attention to the permanent welfare of their subjects, who are always doomed to bear its burthens, and feel its miseries. Puffendorf|| and other writers¶ more correctly I think consider this power as belonging to the sovereign authority of which the legislature must form a pre-eminent

* Vol. 2. 201. 204.—† De M. G. c. 11.

‡ Millar's View, 131.—§ Social contract, book 2.—|| B. 8. c. 6. § 10.—¶ Vattel, b. 3, c. 1. § 4.

part. Accordingly in the new form of government which was adopted in Sweden in the year 1772, the right of making war was vested in the states or legislative body of the kingdom.* The same thing was done in the limited constitutions which were ratified in Poland and France in the year 1791. So the constitutional policy of this country has wisely confided the exercise of this power to the Legislature of the union, and we may fairly presume that nothing but some flagrant injustice, strongly affecting our rights, and which cannot receive a pacific adjustment, will ever prevail with the representatives of the people to declare war.

It has been usual to precede hostilities by a public declaration. The ancient Romans entered on war with great solemnity. They sent a herald to the enemy's borders to demand redress, and if justice was not done within thirty-three days, the herald returned and hurled a spear into their territory.† War with them was held unlawful without a previous declaration.‡ But the modern civilians are divided in opinion as to its necessity and it is now mostly laid aside in practice. It is essential however that some public act should announce to the people their new condition with regard to a foreign nation, and authorize their aggressions. With us as I have before observed, war can only be commenced by an act or resolution of congress which would have all the publicity of the most solemn declaration.

Grotius argues with a lively sense of humanity, against the lawfulness of inflicting any unneccessa-

* Catteau's view of Sweden, ch. 5.—† Livy, l. 1. 32. Adam's Roman antiq. 361.—‡ Cic. de Off. 16.

ry cruelty upon our enemies.* In this he has been followed by Burlamaqui,† and Vattel,‡ and they ably contend that the principles of justice and public good, arrest the exercise of unreasonable severity. On the other hand Van Bynkershoek asserts that all the improvements of Grotius are deduced from modern manners, and not from right and justice. He considers war as dissolving all the moral ties, that its object is to destroy the enemy, and that although it may be generous and magnanimous to abstain from the use of poisoned arms, and from putting prisoners to death, these are not matters of strict obligation.§ Wolfius was led, and probably from too great a deference to the practices of antiquity, to adopt similar sentiments so abhorrent to the feelings of M. Vattel ;|| but happily for mankind they are now justly and generally exploded in all civilized states. And were I to imitate the practice of Van Bynkershoek who relies very much on the ordinances of the states-general of the United Netherlands as authorities in the course of his treatise on public right, I might with equal confidence appeal to the decisions of congress during the late war, who resolved that even the confinement of one of their generals who was taken prisoner by the enemy, was against the Law of Nations, and rights of humanity.¶

Depredations on the peaceable husbandman and despoiling the enemy's territory are still too much sanctioned by the prevailing usage of na-

* Lib. 3. ch. 4.—† Vol. 2. 207. 211.—‡ Book 3. ch. 8.—§ Quæst. pub. J. l. 1. ch. 1. 2. 3.

|| Preface to his Law of Nations.—¶ Journals, vol. 3. 71.

tions. How humane, how worthy of imitation was the practice of Cyrus, if we may give credit to the philosophical romance of Xenophon,* who gave orders to his army when marching into the enemy's borders, not to disturb the peaceable husbandman by the devastations of war!. M Vattel condemns any cruel spoliations of a country without palpable necessity, and speaks with a just indignation of the burning of the palatinate by the great Turenne, under the orders of Louvois the implacable war minister of Lewis the fourteenth.

The practice of privateering or plundering of merchant's property on the high seas is still the disgrace of modern Europe. Its excesses are generally endeavoured to be checked by requiring security from the owners of privateers, and rendering some judicial condemnation of the property captured requisite to its complete transfer.† But with all this precaution it strongly invites to and nourishes a spirit of ferocity and piracy. With the Romans as Cicero informs us,‡ none but a sworn soldier had a right to fight the enemy. And indeed the French legislature soon after the breaking out of the war with Austria in 1792, passed a decree for the total suppression of privateering;§ but I am sorry to observe that this liberal decree just arose for the honor of the nation, and was immediately overpowered by the increasing tempest of the revolution.

* Cyropædia, lib. 5.—† Bynk. Q. pub. J. l. 1. ch. 29.—Answer of England to Prussia on the Silesia loan.
‡ De Officiis, l. 1. ch. 36. 37. and see also Plutarch Quæst. Rom. 39.—§ N. A. Reg. for 1792, pa. 148.

Several of the early writers on the Law of Nations seem to authorise confiscation of the debts which were contracted by individuals in time of peace and remain due to the enemy, and several distant precedents are to be found in support of the position.* But this ancient and rigorous custom is now justly exploded, as being impracticable,† immoral, repugnant to good faith, and the interests of commerce. So property of the enemy's subjects in public funds is considered as under the protection of national engagements, and it is sacredly regarded and every where exempted from seizure and confiscation.‡ The same principle extends protection to the person and goods of such of the enemy's subjects as are found in the hostile country at the commencement of the war. By giving foreigners an entrance into his territory and permission to possess property, the sovereign tacitly pledges the public faith to afford them security.§ It is much to the honor of the English common law that the same doctrine was long ago recognized by its decisions.||

* Grotius, l. ch. 1. § 6. l. 3. ch. 8. § 4—Barbeyrac's notes thereon.—Puffendorf, l. 8. ch. 6. § 17.—Van Bynk, l. 1. ch. 7.

† M. Voltaire in his *Essay sur l'histoire generale*, gives a striking instance of the impracticability of confiscating debts, and of the firmness of Spanish faith. When war was declared between France and Spain in 1684, the king of Spain endeavoured to seize the effects of the French in Spain, but not a single Spanish factor would betray his French correspondent.

‡ Vattel, b. 3. ch. 5. Answer to the Prussian Memorial.
§ Vattel, b. 2. ch. 8. § 104. b. 3. ch. 4. § 63. ch. 5. § 76.
|| Bro. Abr. tit. proprietie. 38. forfeiture. 57.

It has become fashionable of late in public treaties to make stipulations in favor of the rights of humanity, and to moderate the severities of war. The treaty between the United States and Prussia is peculiar in this point of view, and deserves notice as one of the most philosophical treaties that is any where to be met with. If war should take place between the two nations, it provides* that the merchants of either country residing in the other shall be allowed nine months to collect their debts, settle their affairs and depart. That women, children, cultivators of the earth, artizans, and all others whose occupations are for the common subsistence and benefit of mankind, shall not be molested in their persons or property by the armies of the enemy.—That trading vessels shall be allowed to pass free, and no private armed vessels shall be commissioned by either party ;—that all prisoners of war shall in general be humanely used, and that these articles shall be as sacredly observed in the state of war, as the most acknowledged articles in the Law of nature and Nations. With what fidelity the fierce passions of public hostility will permit these generous provisions to be observed, remains yet to be known ; but such a formal and authoritative condemnation of the barbarities of war, such a solemn political sanction of the moral obligations, must still be deemed a noble effort, towards a state of more perfect, and more universal civilization.

III. But I hasten to consider the rights and duties of a neutral people. These form a very interesting part of the Law of Nations, and ought

* Art. 23.

in a particular manner to be known and studied in the United States, if we can but be permitted to remain in that state of peace and amity with all mankind, which our distance from the great powers of Europe, and our truest policy, so strongly recommended. The example of the happy cantons of Switzerland ought to have a powerful influence upon the opinions of our fellow citizens. They declared in their answer to the British minister who endeavoured to draw them into the confederacy against France, that a rigid and exact neutrality was the principle of their constitution, and the invariable maxim of their ancestors, and that its observance for several centuries had produced a salutary influence, not only on their external safety, but on their internal peace.

It belongs not to a common friend to judge between the belligerent parties, or determine the justice or injustice of the war.* A neutral nation must conduct with perfect impartiality as far as respects the existing war, and not favor one power to the detriment of the other. This does not extend however to prohibit the fulfilment of antecedent engagements. They may be kept consistently with an exact neutrality, unless indeed they go so far as to require the neutral nation to become an associate in the war.† But

* Van Bynk. l. 1. ch. 9.—Burlamaq. vol. 2. 210.

† Vattel, b. 3. c. 7. § 104. 105. We have an instance so late as 1788, of succours of ships and troops being furnished conformable to a former treaty ascertaining their number, by Denmark to Russia in the war then existing between Sweden and Russia, and still amity and peace preserved between the crowns of Sweden and Denmark.—N. A. Reg. for 1788. tit. public papers—pa. 99.

if a neutral power be under contract or engagement to afford determinate succours to one party, it is said he is not bound to give them if his ally was manifestly the unjust aggressor. In this solitary instance according to Van Bynkershoeck, and indeed Vattel the neutral may examine into the justice of the war, to see whether the *casus fœderis* exists.* And yet to authorize in any case as a preliminary step an ethical examination of this kind by the party interested, affords so uncertain, so unprecise a criterion for determining the existence of national obligation, and holds out such temptations to evasion, refinement and casuistry, that this rule has been justly questioned by other writers.

The only restriction which the Law of Nations imposes on the general trade and intercourse of neutrals with the belligerent powers, consists in the prohibition to furnish either of them with military or naval stores, because these are directly auxiliary to acts of war.† Such goods go under the name of *contraband*, and this term may include not only the immediate means of hostility, but even provisions and other necessaries when carried to a besieged town, camp or port.‡

* Van Bynk. Q. pub. J. l. 1. ch. 9. 10—Vattel, b. 2. c. 12. § 168.

† Barbeyrac's notes on Puff. l. 8. c. 6. § 8.—Ruthf. inst. b. 2. c. 9. 19. Burlamaq. vol. 2. 235. Vattel, b. 3. c. 7. § 112.

‡ Grotius, l. 3. c. 1.—Bynk. l. 1. c. 11. Vattel, b. 3. c. 7. § 112.—Loccenius *de Jure maritimo*, lib. 1. c. 4. n. 9. considers *provisions* as generally contraband, but Valin in his commentaire, tom. 2. 264. is expressly against him, *de droit commun, la prohibition aux vivres et munitions de bouche, n' a lieu en cette partie que par rapport aux places assiégées ou bloquées.* The

In every other respect I apprehend neutrals are to receive no interruption to their ordinary pursuits, but that the war among others, should be to them as if it did not exist.* To prevent all misunderstanding and dispute, and to meliorate the commerce of the contracting parties, it is usual in commercial treaties, to specify the particular articles which shall be deemed contraband, and those treaties usually abridge, and sometimes, though very rarely extend the restrictions imposed by the Law of Nations.

The right of confiscating contraband goods extends to authorize the searching of neutral vessels,† but this is done at the peril of the party who searches, and if no contraband property be found, and the neutral has acted with candor and good faith, he is responsible to the neutral for damages.‡ And not only contraband goods but the enemy's property is seizable on board of a neutral ship as long as she is beyond the limits of the neutral jurisdiction.§ This seems to be a clear and established position of the Law of Nations. It has however been sometimes contested by particular nations whose interests it strongly opposed. This was the case with the Dutch in the war of 1756, and it occasioned Lord Hawk-

The marine ordinance of Lewis 14th. included *horses* and equipage transported for military service within the list of contraband, *parce que cela a beau coup d' analogie avec les munitions de guerre.* Valin, *ibid.*

* Bynk. l. 1. ch. 11.—Valin, tom. 2. 265.—† Vattel, b. 3. c. 7. § 114.—‡ *Saloucci and Johnson*, K. B. Hil. 25. G. 3.—§ Bynk. l. 1. ch. 14. Vattel, b. 3. c. 7. § 115. Answer to the Prussian memorial.

bury to write and publish a discourse very conclusive in favor of the legality of the doctrine, But particular treaties have of late frequently inverted this rule on account of its inconvenience to common traffic on the ocean ; for I know of no usage next to that of authorized privateering, more liable to abuse, or which has exposed neutral flags to greater vexation, insult, and rapacity. The treaties between the United States and France, Holland, and Prussia, provide accordingly, that in case one of the parties be engaged in war, the neutral bottoms of the other shall protect enemy's property. These stipulations are then to be considered so far as exceptions to the operation of a general rule, which each nation is left at its own liberty to exact or surrender. On the other hand the effects of neutrals found on board of the enemy's vessels are free, and not liable to confiscation, for they have an undisputed right to avail themselves of the assistance of their friends.* This is a principle as fully settled as the other, though like that it is often altered by positive agreement.

While the neutral power is thus bound to abstain from any interference in the hostilities of its neighbours, the belligerent governments are under equal obligations on their part to respect the rights of the neutral people. It is unlawful to commit hostilities within the territory of the neutral power. This territory we have already seen, not only includes the harbors, bays, and rivers adjoining the land, but the surrounding sea to the extent of a marine league from the shore.

* Van Bynk. l. 1. ch. 13.—Vattel, b. 3. c. 7. § 116.
—Answer to the Prussian memorial.

And if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.* And to give a more certain remedy against invasions of neutral authority, a late act of congress† has given expressly the cognizance of such cases to the district courts. Van Bynkerhoeck the celebrated Dutch jurist whom I have occasion so often to cite, while he admits those principles in their full extent, yet supposes‡ that if an enemy be attacked on hostile ground or in the open sea, and flee into neutral territory, he may lawfully be pursued by the victor *dum fervet opus*; but he founds this opinion entirely on the authority and practice of the states-general, and it cannot be received as just, or admitted as usage, except where the neutral ground is used as a shelter for making preparations to renew the attack. §

It seems to be allowed by the Law of Nations (x) - praised to bring prizes into neutral ports and to sell them. || The neutral power may however at in 2 - Brown his pleasure refuse this privilege, provided the refusal be made, as the privilege must be granted, Civ - Adm - Law - 215 - to both parties or to neither; and it is more consistent with the state of neutrality, and the interest of 2 - 12 - peace and commerce, that it should be refused, as has formerly been done by Holland and France

* Van Bynk, l. 1. ch. 8.—Burlamaq. vol. 2. 211.—Vattel, b. 3. c. 7. § 132.—† Laws of the United States, vol. 3. 100.—‡ L. 1. ch. 8.

§ Vattel, b. 3. c. 7. § 133.—|| Van Bynk. l. 1. ch. 15.—Vattel, b. 3. c. 7. § 132.

when they were neutral powers.* But an innocent passage is lawful to all nations with whom a state is at peace, unless the neutral sovereign has determined, as he has a right to do, that the admission of armed forces is inconsistent with his safety ; † and in no case must this admission be on such terms as to afford favorable means to the party admitted of attacking his enemy ; nor can the neutral arm or succors in any degree be employed with respect to the war by either or both of the belligerent parties. ‡ The government of

* Van Bynk. Quæst. pub. Juris. l. 1. c. 15.—Valin's Commentaire sur l'Ordonnance de la marine du 1681. tome 2. 272. 277.—Valin indeed considers it as the established Law of Nations, that prizes cannot be admitted into a neutral port unless in cases of necessity, without a violation of neutrality. His observations are so decided as to merit particular attention. Comme la neutralité avec deux puissances en guerre ne permet pas de favoriser l'une au prejudice de l'autre ; pour concilier cet objet avec le droit d'asyle, les nations sont convenues tacitement, et l'usage en a fait le droit commun, que l'asyle seroit donné aux vaisseaux de guerre etrangers avec leurs prises ; favoir, etant entrés dans un port par tempête, tant que le mauvais temps ne permettroit pas de remettre en mer, et pour vingt-quatre heures seulement, s'ils l'avoient abordé pour toute autre cause.

Ainsi, hors le cas de la tempête, les vaisseaux étant en état de faire voile ; il y a obligation de les faire retirer et de remettre en mer après les vingt-quatre heures, autrement ce seroit violer la loi de la neutralité.

Mais il faut prendre garde que cela ne regarde que les vaisseaux pris introduits dans un port neutre, et nullement, les vaisseaux amis ou neutres qui s'y sont réfugiés sans prises, pour échapper aux poursuites des ennemis, ou pour quelque autre cause. Valin, tom. 2. 272. 273.

† Vattel, b. 3, c. 7. § 119.—‡ Vattel, b. 3. c. 7. § 104. 132. 133.

the United States was therefore well warranted in asserting the rules of neutrality which it particularly recognized during the present war in Europe. These rules declared that the original arming and equipping of vessels in our ports by any of the belligerent parties for military service was unlawful ; and that if the armed vessel of any belligerent nation, should depart from our jurisdiction, no armed vessel being within the same, and belonging to an adverse belligerent power should depart until twenty-four hours after the former, without being deemed to have violated the Law of Nations.

There still remains an interesting question to be considered relative to neutral rights, and which has not been examined at least till very lately, by any of the writers on public law. This is whether a neutral power can lawfully carry on a trade with one of the belligerent parties not permitted in time of the previous peace? To authorize a trade of this kind it is said, would be to protect the commerce of a belligerent party under the cover of a neutral flag. A particular privilege granted to a *single* vessel to trade to the ports of one of the powers at war under all the advantages of a native ship, may well enough justify the presumption that she is adopted and naturalized for illicit purposes, and therefore a fit object of capture.* But to extend this presumption to a general enlargement of the whole neutral commerce, is a point of very serious moment. Lord Hawksbury has however boldly carried it to that extent, in his *Discourse on the*

* I. Blacks, Rep. 314.

conduct of Great-Britain in respect to neutral nations. “ With what policy or justice asks this able writer, can a neutral be permitted under the disguise of her own free trade, to convey freedom to the commerce of one of the belligerent parties? What can neutral nations desire more than to remain amidst the ravages of war in the same happy circumstances, which the tranquillity of peace afforded them? But no right can hence arise, that they should take occasion from the war itself, to constitute a new species of traffic, which in peace they never enjoyed, and which the necessity of one party is obliged to grant to the detriment, perhaps destruction of the other. If this right was admitted, he continues, it would be the interest of all commercial states to promote dissensions among their neighbours; the quarrels of others would be a harvest for themselves, and from the contentions of others they would gather strength and power.”* This reasoning of Lord Hawksbury ingenious as it is, I apprehend leads to consequences too mischievous to be tolerated. It goes to interdict all commercial negotiations between neutrals and either of the belligerent parties in time of war. If the belligerent sovereigns, are as they must be admitted to be, equally competent in war and in peace, to exercise the powers of government, then it is lawful to enter into commercial arrangements with them, subject to the universally acknowledged restrictions which have already been mentioned as imposed on the neutral trade. A contrary doctrine strikes at the necessary rights of sovereignty, and the freedom of independent nations.

* Discourse, pa. 18.

The very government in whose vindication the author wrote has recently given a strong condemnation of his theory, by entering into a commercial treaty with the United States, and allowing them, though they are a neutral and she a belligerent power, to take a share in her colony-trade and thereby to *constitute a new species of traffic to which we had no right in the time of the previous peace.* And so far is this power of neutrals to avail themselves of the revolutions of public events, to extend the bounds of their commerce, from being unfavorable to the general interest of mankind, that on the contrary, it has a salutary tendency to promote it, by abridging the sphere and mitigating the asperities of hostile operations. Whoever reflects properly on the immense moral and political advantages, which have been gained in two centuries past, by the spirit of commerce over the spirit of military rapacity, must be inclined to wish well to the neutral code, and will resolutely set his face against every novel doctrine however specious, which introduces fresh succours to the arm of war.*

* The anxiety discovered by Lord Hawkbury, lest the commerce of the belligerent powers should be covered by neutral flags, had long before been felt and expressed in other nations. And yet none of their regulations as far as I have been able to discover or learn are founded on the principle he has assumed. Van Bynkershoeck and Valin, expressly declare that except in the instances of contraband articles, the subjects of neutral powers can carry on commerce freely with the parties at war. I consider his doctrine therefore as a *novel one.* The celebrated marine ordinances of France (the accuracy and justness of which are known and admired all over Europe) are calculated to ascertain clearly by certain

The laws of neutrality are worthy of unceasing cultivation. They afford the only steady asylum to commerce, mild laws, and the liberal returns of industry ; and by the prosperity and happiness which they diffuse among the nations they govern, a happiness the more conspicuous from the frequently existing contrast of waste and misery, within the territories of the hostile powers, they

tain rules, the genuineness of the neutral vessel and cargo, and the rectitude and candor of his conduct, and if these points are established the neutral goes free. M. Valin in his copious and very instructive commentary, introduces an analysis of those regulations on this point with these remarks. On a pensé un peu tard en France à se précautionner contre les moyens que trouvoient les ennemis decontinuer leur commerce, comme en pleine paix, à la faveur du pavillon et des passeports des puissances neutres dont ils abusoient, soit à leur insu, soit par collusion ou intelligence secrete. Le Royaume en a souvent essuyé de grandes pertes, et ce n'est gueres que depuis qu' on y a reconnu de quelle importance est le commerce dans un Etat, qu' on a songé sérieusement à régler les conditions sous lesquelles, les sujets des princes neutres, pourroient commercer avec nos ennemis, et à les assujettir à des formalités capables de garantir *la sincérité de leurs dispositions à observer la neutralité.*

Notre Ordonnance est, à vrai dire, la premiere Loi qui ait commencé d'y pourvoir, principalement dans les art. 6. 7. and 11 ; mais l' experience ayant fait voir que ces dispositions ne suffisoient pas pour se garantir des suites d' *une feinte neutralité*, intervint d' abord le Reglement du 17 Fevrier 1694 ; et cela ne suffisant pas encore, intervint enfin un autre Reglement en date du 13 Juillet 1704, qui depuis a toujours fait Loi sur cette matiere, sauf quelques legers changemens qui y ont été faits par le dernier Réglement du 21 Octobre 1744.

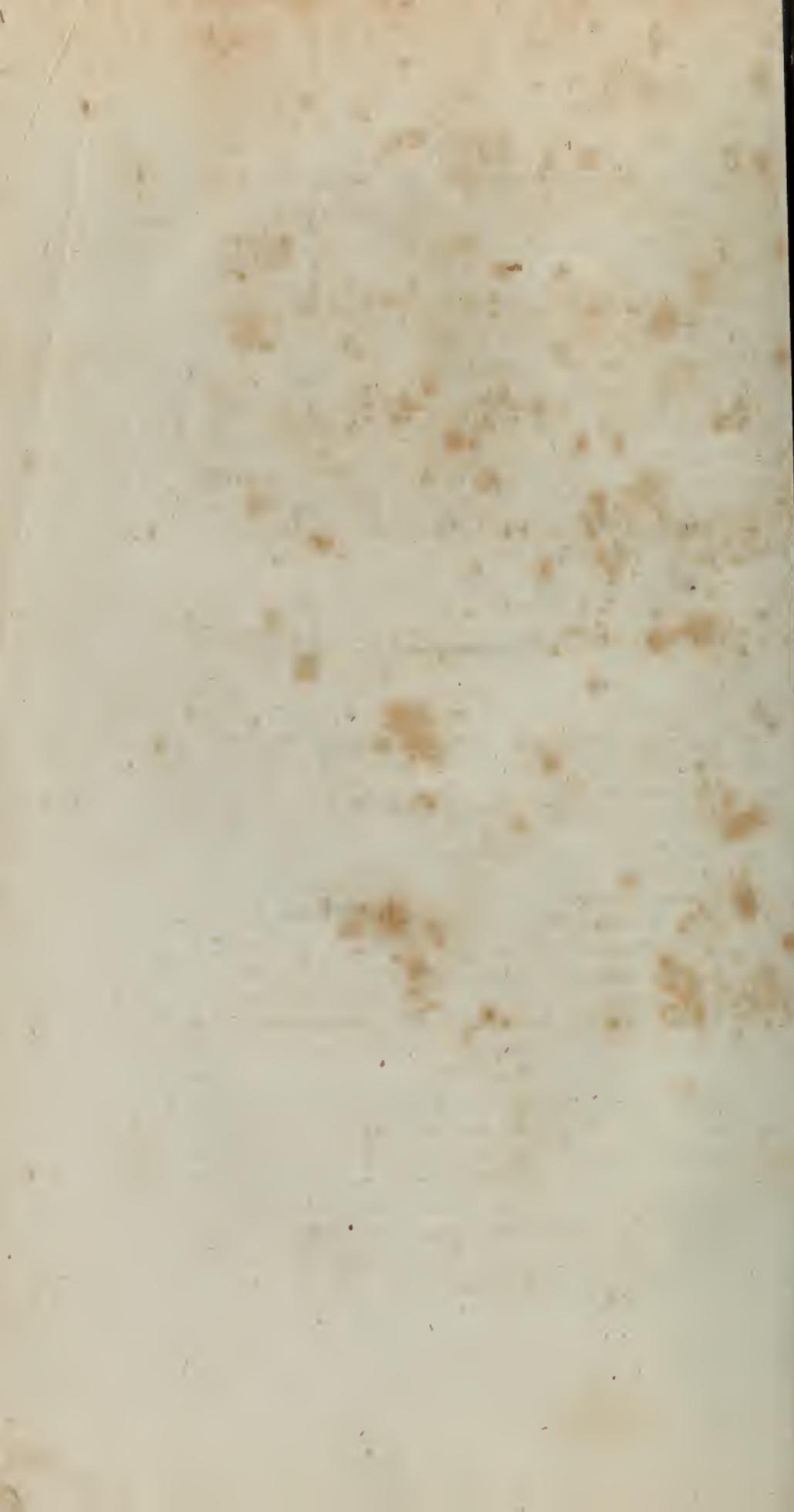
La partie qui concerne la preuve de la propriété des vaisseaux que l' on prétend neutres, premier objet essentiel. Liv. 3. tit. 9. Art. XI.

have a tendency to promote a general disgust of a state of war and a growing estimation of the blessings of peace.

I have thus attempted for the benefit of the student, a sketch of the principal matters with which the Law of Nations is conversant. It is a code so full of wisdom, that perhaps those persons who may from time to time be called to administer the happy government of this country, cannot better demonstrate that they love mankind, and revere justice, than by yielding a punctual obedience to its laws.

C R R A T A.

- Page 18, line 16—for skake, read *shake*.
19, line 5—distinct—*distant*.
21, line 3—Colonne—*Calonne*.
36, in the note—for Coldex, read *Codex*.
55, in the note—for Stratran, read *Strahan*.
64, in the note—for Vanel—*Vattel*.
67, line 14—for two—*too*.
71, line 6—for recommended—*recommend*.



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T H E E N D.



