TWO INTRODUCTORY LECTURES ON THE SCIENCE OF INTERNATIONAL LAW

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Two Introductory Lectures on the Science of International Law by Travers Twiss

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INTERNATIONAL LAW.

BY

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ADVERTISEMENT.

Upon the general theory of the Law of Nations, much has been written by authors of great name and ability. Upon practical questions much has been laid down by those distinguished civilians, who have adorned the British and American Courts of Admiralty, and whose masterly judgments, full of wisdom and learning, are the most perfect expositions of the best and purest principles of that law. It has been attempted, in the following lectures, to pass briefly in review both series of authorities, and to note the chief characteristics of the most eminent amongst them, with a view to make them known to the student, and not with any pretence to novelty of view or originality of treatment. On the contrary, the materials supplied by others have been freely used, where the doctrine appeared to be sound, or the criticism just. There is little, therefore, in the following pages calculated to satisfy the wants of the scholar or of the publicist; but they may be useful

to the student in guiding him to the best sources and in thereby enabling him to draw knowledge from the fountain head. Of all human sciences, the law is probably not the last to which the precept strictly applies, "melius est haurire fontes, quam consectari rivulos."

Doctors' Commons,
Dec. 26. 1855.

LECTURES

ON

INTERNATIONAL LAW.

LECTURE I.

International Law a Science of Modern Growth. — Law of Nations not identical with the Jus Gentium of the Romans. — Institutes of Gaius. — Institutes of the Emperor Justinian. — Cicero. — The Fetial Law. — Authority of the Holy See as Supreme Umpire between Temporal Sovereigns. — Reaction against the Papal Donation of the Indies. — Franciscus à Victoria and Dominicus Soto, the Pioneers of the New Doctrine. — Balthasar Ayala, the First Systematic Teacher. — Suarez of Granada; earliest Recognition of an Usage amongst Nations. — Albericus Gentilis the Precursor of Grotius. — Maritime Law. — Consolato del Mare. — Roles d'Oleron. — Laws of Wisby. — Code of the Hanse League. — Era of Grotius. — His Treatise on the Right of War and Peace. — Its wide-spread Influence. — Its subject more extensive than its Title. — Method of Treatment. — Contents of the Work. — Opposition to its Acceptance, both in England and in France. — Antagonism of Selden. — Unfavourable Criticisms of Rousseau, Paley, Jeremy Bentham, Dugald Stewart. — Favourable Judgments of Adam Smith, Sir James Mackintosh, Mr. Hallam, and Dr. Whewell.

The Science of International Law, like the science of Political Economy, is a fabric of comparatively modern structure. Much, which bears upon the subject, is probably to be discovered in the writings of the scholastic jurists of the fourteenth and fifteenth

centuries; but the true era from which we must date the foundation of the great science, which is conversant with questions of right that concern the fellowship of nations, is the latter portion of the fifteenth century, one of the most remarkable epochs in the annals of legal science. This period has been appropriately termed by the Jesuit Andrês "the Golden Age of Jurisprudence;" and it is distinguished not merely by the completion, under the masterly hand of Cujacius, of the important work, which Alciatus of Milan had commenced in the preceding generation, of emancipating the Roman law from the verbal subtleties of the scholastic philosophy and the conflicting glosses of the earlier commentators, but also by the first systematic enunciation of rules, to which the intercourse of independent nations should be amenable.

No writer had hitherto treated expressly of that branch of jurisprudence, which was formally expounded in the following century under the novel head of the Law of Nations and of Nature. For the Law of Nations, in the received sense of the term, was in a great measure unknown to antiquity, and is not to be confounded with the Jus Gentium of the Roman Law. The Jus Gentium of the Romans was not a body of rules regulating the mutual intercourse of nations, but was that portion of Natural Law to which all mankind does homage, the least as feeling its beneficence, the greatest as not exempt from its control, and which has accordingly been incorporated into the domestic code of every nation. The earliest formal definition of this branch of law is to be found in the Institutes of Gaius, which were restored to light by the researches of Niebuhr within the last half century from amidst the archives of the Chapter

Library in Verona; and that definition seems to have been approved, as it was adopted, by the compilers of the Institutes of the Emperor Justinian.

"Quod naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque Jus Gentium, quasi quo jure omnes gentes utuntur; et populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur." — *Inst.* l. I. tit. II. § 1.

This formal definition harmonises in substance with the view of Cicero, who contrasts the *Jus Gentium*, which is common to all mankind as rational beings, with the *leges populorum*, or those rules of municipal jurisprudence which are special to each state, and which correspond to the *Jus Civile* of the Institutes. "Neque vero hoc solum naturâ, *i.e.* jure gentium, sed etiam legibus populorum, quibus in singulis civitatibus respublicæ continentur, eodem modo constitutum est, ut non liceat sui commodi causâ nocere alicui," — (*Off.* l. III. c. 5.) We must not, however, suppose that the Romans had not at any time any definite notions of international law. The Collegium Fetialium was not a mere heralds' college. It was the duty of that body to act as ambassadors as well as heralds, to advise the state in negotiations of peace or alliance, and to regulate the general intercourse of Rome with foreign nations. Niebuhr expressly styles them judges of international law; and there can be no doubt that they committed their decisions and forms of proceeding to writing, and thus constituted a written body of Fetial Law. We find Cicero accordingly justifying the formal surrender of Regulus, on the part of the Roman Senate, to the Carthaginians, on the ground that the war with the Carthaginians was a war with a rightful and lawful

enemy, with regard to whom the whole Fetial Law was in force, and there were many duties and rights in common.

"Cum justo enim et legitimo hoste res gerebatur, adversus quem et totum jus fetiale, et multa sunt jura communia. Quod ni ita esset, nunquam claros viros senatus vinctos hostibus dedidisset."— *Off.* l. III. c. 29.

The institution, however, of the Fetiales naturally fell into decay with the rapid extension of the Roman dominion. Rules of international conduct based upon reciprocity, had been lost sight of by the Roman people long before the Republic had established its supremacy throughout the Italian peninsula, and the universal empire of the Cæsars left no place, as it furnished no occasion, for the application of any such rules.

When the Roman laws, therefore, such as they subsisted at the dismemberment of the Western Empire in the fifth century, were received in the several kingdoms of the Gothic, Lombard, and Carlovingian dynasties, they did not supply them with any explicit rules for the adjudication of questions of right between independent states or nations. Theological casuistry, however, was from time to time applied to the duties of the sovereigns; analogies of positive law were frequently invoked; and the Civilians, as being conversant with the most widely diffused system, took into their hands the adjudication of questions of public law. The doctors, for instance, of the famous school of Bologna had been called upon, from a very early period, to furnish arbitrators in the ever recurring disputes of the Italian Republics, and to supply jurists to direct the diplomacy of the Lombard cities in their contests with the German