

## CHAP. XII.

## OF TREATIES OF ALLIANCE, AND OTHER PUBLIC TREATIES. (124)

THE subject of treaties is undoubtedly one of the most important that the mutual relations and affairs of nations can present us with. Having but too much reason to be convinced of the little dependence that is to be placed on the natural obligations of bodies politic, and on the reciprocal duties imposed upon them by humanity,—the most prudent nations endeavour to procure by treaties those succours and advantages which the law of nature would insure to them, if it were not rendered ineffectual by the pernicious counsels of a false policy.

A treaty, in Latin *fœdus*, is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time.

The compacts which have temporary matters for their object are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all: treaties receive a successive execution whose duration equals that of the treaty.

Public treaties can only be made by the superior powers, by sovereigns, who contract in the name of the state. Thus, conventions, made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties.

The sovereign who possesses the full and absolute authority has, doubtless, a right to treat in the name of the state he represents; and his engagements are binding on the whole nation. But all rulers of states have not a power to make public treaties by their own authority alone: some are obliged to take the advice of a senate, or of the representatives of the nation. It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state. [ 193 ]

Notwithstanding our assertion above, that public treaties are made only by the superior powers, treaties of that nature may nevertheless be entered into by princes or communities, who have a right to contract them, either by the concession of the sovereign, or by the fundamental laws of the state, by particular reservations, or by custom. Thus, the princes and

(124) See in general, as to the law of nations respecting treaties, *post*, particular, 53, and 615 to 630; and see Book IV. Chap. II. &c., page 422 to each separate treaty, 2 Chitty's Com. 462, 1 Chitty's Commercial Law, 38 to 47; and, as to commercial treaties in particular, 53, and 615 to 630; and see each separate treaty, 2 Chitty's Com. 462, 1 Chitty's Commercial Law, p. 138.

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free cities of Germany, though dependent on the emperor and the empire, have the right of forming alliances with foreign powers. The constitutions of the empire give them, in this as in many other respects, the rights of sovereignty. Some cities of Switzerland, though subject to a prince, have made alliances with the cantons: the permission or toleration of the sovereign has given birth to such treaties, and long custom has established the right to contract them.

§ 155. Whether a state under protection may make treaties.

As a state that has put herself under the protection of another, has not on that account forfeited her character of sovereignty (Book I. § 192), she may make treaties and contract alliances, unless she has, in the treaty of protection, expressly renounced that right. But she continues for ever after bound by this treaty of protection, so that she cannot enter into any engagements contrary to it,—that is to say, engagements which violate the express conditions of the protection, or that are in their own nature repugnant to every treaty of protection. Thus, the protected state cannot promise assistance to the enemies of her protector, nor grant them a passage.

§ 156. Treaties concluded by proxies or plenipotentiaries.

Sovereigns treat with each other through the medium of agents or proxies who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we may apply all the rules of natural law which respect things done by commission. The rights of the proxy are determined by the instructions that are given him: he must not deviate from them; but every promise which he makes in the terms of his commission, and within the extent of his powers, is binding on his constituent.

At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded upon in their name by their ministers. The plenipotentiary commission is but a *procuracion cum libera*. If this commission were to have its full effect, they could not be too circumspect in giving it. But, as princes cannot otherwise than by force of arms be compelled to fulfil their engagements, it is customary to place no dependence on their treaties, till they have agreed to and ratified them. Thus, as every agreement made by the minister remains invalid till sanctioned by the prince's ratification, there is less danger in vesting him with unlimited powers. But, before a prince can honourably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minister has deviated from his instructions.

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§ 157. Validity of treaties.

A treaty is valid if there be no defect in the manner in which it has been concluded: and for this purpose nothing more can be required than a sufficient power in the contracting parties, and their mutual consent sufficiently declared.

§ 158. Injury does

An injury cannot, then, render a treaty invalid. He who enters into engagements ought carefully to weigh every thing

before he concludes them; he may do what he pleases with his own property, forego his rights, and renounce his advantages, as he thinks proper; the acceptor is not obliged to inquire into his motives, and to estimate their due weight. If we might recede from a treaty because we found ourselves injured by it, there would be no stability in the contracts of nations. Civil laws may set bounds to injury, and determine what degree of it shall be capable of invalidating a contract. But sovereigns are subject to no superior judge. How shall they be able to prove the injury to each other's satisfaction? Who shall determine the degree of it sufficient to invalidate a treaty? The peace and happiness of nations manifestly require that their treaties should not depend on so vague and dangerous a plea of invalidity.

A sovereign nevertheless is in conscience bound to pay a regard to equity, and to observe it as much as possible in all his treaties. And, if it happens that a treaty which he has concluded with upright intentions, and without perceiving any unfairness in it, should eventually prove disadvantageous to an ally, nothing can be more honourable, more praiseworthy, more conformable to the reciprocal duties of nations, than to relax the terms of such treaty as far as he can do it consistently with his duty to himself, and without exposing himself to danger, or incurring a considerable loss.

Though a simple injury, or some disadvantage in a treaty, be not sufficient to invalidate it, the case is not the same with those inconveniences that would lead to the ruin of the nation. Since, in the formation of every treaty, the contracting parties must be vested with sufficient powers for the purpose, a treaty pernicious to the state is null, and not at all obligatory, as no conductor of a nation has the power to enter into engagements to do such things as are capable of destroying the state, for whose safety the government is intrusted to him. The nation itself, being necessarily obliged to perform every thing required for its preservation and safety (Book I. § 16, &c.), cannot enter into engagements contrary to its indispensable obligations. In the year 1506, the states-general of the kingdom of France, assembled at Tours, engaged Louis XII. to break the treaty he had concluded with the emperor Maximilian and the archduke Philip, his son, because that treaty was pernicious to the kingdom. They also decided that neither the treaty, nor the oath that had accompanied it, could be binding on the king, who had no right to alienate the property of the crown.\* We have treated of this latter source of invalidity in the twenty-first chapter of Book I.

For the same reason—the want of sufficient powers—a treaty concluded for an unjust or dishonest purpose is absolutely null and void,—nobody having a right to engage to do

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not render  
them void.

§ 159. Duty  
of nations in  
this respect.

§ 160. Nul-  
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ties which  
are perni-  
cious to the  
state.

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§ 161. Nul-  
lity of trea-  
ties made  
for an unjust

\* See the French historians.

BOOK II. things contrary to the law of nature. Thus, an offensive  
 CHAP. XII. alliance, made for the purpose of plundering a nation from  
 or dishonest whom no injury has been received, may or rather ought to be  
 purpose. broken.

§ 162. Whether an alliance may be contracted with those who do not profess the true religion. It is asked, whether it be allowable to contract an alliance with a nation that does not profess the true religion, and whether treaties made with the enemies of the faith are valid. Grotius has treated this subject at large;\* and the discussion might have been necessary at a time when party-rage still obscured those principles which it had long caused to be forgotten; but we may venture to believe that it would be superfluous in the present age. The law of nature alone regulates the treaties of nations: the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of men, and not under the character of Christians, or of Mohammedans. Their common safety requires that they should be capable of treating with each other, and of treating with security. Any religion that should in this case clash with the law of nature, would, on the very face of it, wear the stamp of reprobation, and could not pretend to derive its origin from the great Author of nature, who is ever steady, ever consistent with himself. But, if the maxims of a religion tend to establish it by violence, and to oppress all those who will not embrace it, the law of nature forbids us to favour that religion, or to contract any unnecessary alliances with its inhuman followers, and the common safety of mankind invites them rather to enter into an alliance against such a people,—to repress such outrageous fanatics, who disturb the public repose and threaten all nations.

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§ 163. Obligation of observing treaties. It is a settled point in natural law, that he who has made a promise to any one has conferred upon him a real right to require the thing promised,—and, consequently, that the breach of a perfect promise is a violation of another person's right, and as evidently an act of injustice as it would be to rob a man of his property. The tranquillity, the happiness, the security of the human race, wholly depend on justice,—on the obligation of paying a regard to the rights of others. The respect which others pay to our rights of domain and property constitutes the security of our actual possessions; the faith of promises is our security for things that cannot be delivered or executed upon the spot. There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises. This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, therefore, and their con-

\* De Jure Belli et Pacis, lib. ii. cap. xv. § 8, et seq.

ductors, ought inviolably to observe their promises and their treaties. This great truth, though too often neglected in practice, is generally acknowledged by all nations:\* the reproach of perfidy is esteemed by sovereigns a most atrocious affront; yet he who does not observe a treaty is certainly perfidious, since he violates his faith. On the contrary, nothing adds so great a glory to a prince, and to the nation he governs, as the reputation of an inviolable fidelity in the performance of promises. By such honourable conduct, as much or even more than by her valour, the Swiss nation has rendered herself respectable throughout Europe, and is deservedly courted by the greatest monarchs who intrust their personal safety to a body-guard of her citizens. The parliament of England has more than once thanked the king for his fidelity and zeal in succouring the allies of his crown. This national magnanimity is the source of immortal glory; it presents a firm basis on which nations may build their confidence; and thus it becomes an unfailling source of power and splendour.

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As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him.

§ 164. The violation of a treaty is an act of injustice.

A sovereign already bound by a treaty cannot enter into others contrary to the first. The things respecting which he has entered into engagements are no longer at his disposal. If it happens that a posterior treaty be found, in any particular point, to clash with one of more ancient date, the new treaty is null and void with respect to that point, inasmuch as it tends to dispose of a thing that is no longer in the power of him who appears to dispose of it. (We are here to be understood as speaking of treaties made with different powers.) If the prior treaty is kept secret, it would be an act of consummate perfidy to conclude a contrary one, which may be rendered void whenever occasion serves. Nay, even to enter into engagements, which, from the eventual turn of affairs, may chance at a future day to militate against the secret treaty, and from that very circumstance to prove ineffectual and nugatory, is by no means justifiable, unless we have the ability to make ample compensation to our new ally: otherwise it would be practising a deception on him, to promise him a thing without informing him that cases may possibly occur which will not allow us to substantiate our promise. The ally thus deceived is undoubtedly at liberty to renounce the treaty: but, if he chooses rather to adhere to it, it will hold good with respect to all the articles that do not clash with the prior treaty.

§ 165. Treaties cannot be made contrary to those already existing

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\* Mohammed warmly recommended to his disciples the observance of treaties.—Ockley's History of the Saracens, vol. i.

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§ 166. How treaties may be concluded with several nations with the same view.

There is nothing to prevent a sovereign from entering into engagements of the same nature with two or more nations, if he be able to fulfil those several engagements to his different allies at the same time. For instance, a commercial treaty with one nation does not deprive us of the liberty of afterwards contracting similar engagements with other states, unless we have, in the former treaty, bound ourselves by a promise not to grant the same advantages to any other nation. We may in the same manner promise to assist two different allies with troops, if we are able to furnish them, or if there is no probability that both will have occasion for them at the same time.

§ 167. The more ancient ally entitled to a preference.

If nevertheless the contrary happens, the more ancient ally is entitled to a preference: for, the engagement was pure and absolute with respect to him; whereas we could not contract with the more recent ally, without a reservation of the rights of the former. Such reservation is founded in justice, and is tacitly understood, even if not expressly made.

§ 168. We owe no assistance in an unjust war.

The justice of the cause is another ground of preference between two allies. We ought even to refuse assistance to the one whose cause is unjust, whether he be at war with one of our allies, or with another state: to assist him on such occasion, would in the event be the same thing as if we had contracted an alliance for an unjust purpose; which we are not allowed to do (§ 161). No one can be validly engaged to support injustice.

§ 169. General division of treaties.

Grotius divides treaties into two general classes,—first, *those which turn merely on things to which the parties were already bound by the law of nature*,—secondly, *those by which they enter into further engagements*.\* By the former we acquire a perfect right to things to which we before had only an imperfect right, so that we may thenceforward demand as our due what before we could only request as an office of humanity. Such treaties became very necessary between the nations of antiquity, who, as we have already observed, did not think themselves bound to any duty towards people who were not in the number of their allies. They are useful even between the most polished nations, in order the better to secure the succours they may expect,—to determine the measure and degree of those succours, and to show on what they have to depend,—to regulate what cannot in general be determined by the law of nature,—and thus to obviate all difficulties, by providing against the various interpretations of that law. Finally, as no nation possesses inexhaustible means of assistance, it is prudent to secure to ourselves a peculiar right to that assistance which cannot be granted to all the world.

I. Those that relate to things already due by the law of nature.

To this first class belong all simple treaties of peace and friendship, when the engagements which we thereby contract

\* De Jure Belli et Pacis, lib. ii. cap. xv. § 5

make no addition to those duties that men owe to each other as brethren and as members of the human society: such are those treaties that permit commerce, passage, &c. BOOK II.  
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If the assistance and offices that are due by virtue of such a treaty should on any occasion prove incompatible with the duties a nation owes to herself, or with what the sovereign owes to his own nation, the case is tacitly and necessarily excepted in the treaty. For, neither the nation nor the sovereign could enter into an engagement to neglect the care of their own safety, or the safety of the state, in order to contribute to that of their ally. If the sovereign, in order to preserve his own nation, has occasion for the things he has promised in the treaty,—if, for instance, he has engaged to furnish corn, and in a time of dearth he has scarcely sufficient for the subsistence of his subjects, he ought without hesitation to give a preference to his own nation; for, it is only so far as he has it in his power to give assistance to a foreign nation, that he naturally owes such assistance; and it was upon that footing alone that he could promise it in a treaty. Now, it is not in his power to deprive his own nation of the means of subsistence in order to assist another nation at their expense. Necessity here forms an exception, and he does not violate the treaty, because he cannot fulfil it. § 170. Col-  
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duties we  
owe to our-  
selves.

The treaties by which we simply agree not to do any evil to an ally, to abstain, with respect to him, from all harm, offence, and injury, are not necessary, and produce no new right, since every individual already possesses a perfect natural right to be exempt from harm, injury, and real offence. Such treaties, however, become very useful, and accidentally necessary, among those barbarous nations who think they have a right to act as they please towards foreigners. They are not wholly useless with nations less savage, who, without so far divesting themselves of humanity, entertain a much less powerful sense of a natural obligation, than of one which they have themselves contracted by solemn engagements: and would to God that this manner of thinking were entirely confined to barbarians! We see too frequent effects of it among those who boast of a perfection much superior to the law of nature. But the imputation of perfidy is prejudicial to the rulers of nations, and thus becomes formidable even to those who are little solicitous to merit the appellation of virtuous men, and who feel no scruple in silencing the reproaches of conscience. § 171. Trea-  
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Treaties by which we contract engagements that were not imposed on us by the law of nature, are either *equal* or *unequal*. § 172. Trea-  
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cerning  
things that  
are not nat-  
urally due.

Equal treaties are those in which the contracting parties promise the same things, or things that are equivalent, or, finally, things that are equitably proportioned, so that the condition of the parties is equal. Such is, for example, a Equal  
Treaties.

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defensive alliance, in which the parties reciprocally stipulate for the same succours. Such is an offensive alliance, in which it is agreed that each of the allies shall furnish the same number of vessels, the same number of troops, of cavalry and infantry, or an equivalent in vessels, in troops, in artillery, or in money. Such is also a league in which the quota of each of the allies is regulated in proportion to the interest he takes or may have in the design of the league. Thus, the emperor and the king of England, in order to induce the states-general of the United Provinces to accede to the treaty of Vienna of the 16th of March, 1731, consented that the republic should only promise to her allies the assistance of four thousand foot and a thousand horse, though they engaged, in case of an attack upon the republic, to furnish her, each, with eight thousand foot and four thousand horse. We are also to place in the class of equal treaties those which stipulate that the allies shall consider themselves as embarked in a common cause, and shall act with all their strength. Notwithstanding a real inequality in their strength, they are nevertheless willing in this instance to consider it as equal.

Equal treaties may be subdivided into as many species as there are of different transactions between sovereigns. Thus, they treat of the conditions of commerce, of their mutual defence, of associations in war, of reciprocally granting each other a passage, or refusing it to the enemies of their ally; they engage not to build fortresses in certain places, &c. But it would be needless to enter into these particulars: generals are sufficient, and are easily applied to particular cases.

§ 173. Ob-  
ligation of  
preserving  
equality in  
treaties.

Nations being no less obliged than individuals to pay a regard to equity, they ought, as much as possible, to preserve equality in their treaties. When, therefore, the parties are able reciprocally to afford each other equal advantages, the law of nature requires that their treaties should be equal, unless there exist some particular reason for deviating from that equality,—such, for instance, as gratitude for a former benefit,—the hope of gaining the inviolable attachment of a nation,—some private motive, which renders one of the contracting parties particularly anxious to have the treaty concluded, &c. Nay, viewing the transaction in its proper point of light, the consideration of that particular reason restores to the treaty that equality which seems to be destroyed by the difference of the things promised.

I see those pretended great politicians smile, who employ all their subtlety in circumventing those with whom they treat, and in so managing the conditions of the treaty, that all the advantages shall accrue to their masters. Far from blushing at a conduct so contrary to equity, to rectitude and natural honesty, they glory in it, and think themselves entitled to the appellation of able negotiators. How long shall we continue to see men in public characters take a pride in practices that



would disgrace a private individual? The private man, if he is void of conscience, laughs also at the rules of morality and justice; but he laughs in secret: it would be dangerous and prejudicial to him to make a public mockery of them. Men in power more openly sacrifice honour and honesty to present advantage: but, fortunately for mankind, it often happens that such seeming advantage proves fatal to them; and even between sovereigns, candour and rectitude are found to be the safest policy. All the subtilities, all the tergiversations of a famous minister, on the occasion of a treaty in which Spain was deeply interested, turned at length to his own confusion, and to the detriment of his master; while England, by her good faith and generosity to her allies, gained immense credit, and rose to the highest pitch of influence and respectability.

When people speak of equal treaties, they have commonly in their minds a double idea of equality, viz. equality in the engagements, and equality in the dignity of the contracting parties. It becomes therefore necessary to remove all ambiguity; and for that purpose, we may make a distinction between *equal treaties* and *equal alliances*. *Equal treaties* are those in which there is an equality in the promises made, as we have above explained (§ 172); and *equal alliances*, those in which equal treats with equal, making no difference in the dignity of the contracting parties, or, at least, admitting no too glaring superiority, but merely a pre-eminence of honour and rank. Thus kings treat with the emperor on a footing of equality, though they do not hesitate to allow him precedency; thus great republics treat with kings on the same footing, notwithstanding the pre-eminence which the former now-a-days yield to the latter. Thus all true sovereigns ought to treat with the most powerful monarch, since they are as really sovereigns, and as independent as himself. (See § 37 of this Book.)

*Unequal treaties* are those in which the allies do not reciprocally promise to each other the same things, or things equivalent; and an *alliance is unequal* when it makes a difference in the dignity of the contracting parties. It is true, that most commonly an unequal treaty will be at the same time an unequal alliance; as great potentates are seldom accustomed to give or to promise more than is given or promised to them, unless such concessions be fully compensated in the article of honour and glory; and, on the other hand, a weak state does not submit to burdensome conditions without being obliged also to acknowledge the superiority of her ally.

Those unequal treaties that are at the same time unequal alliances, are divided into two classes,—the first consisting of those where *the inequality prevails on the side of the more considerable power*,—the second comprehending treaties where *the inequality is on the side of the inferior power*.

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Treaties of the former class, without attributing to the more powerful of the contracting parties any right over the weaker, simply allow him a superiority of honours and respect. We have treated of this in Book I. § 5. Frequently a great monarch, wishing to engage a weaker state in his interest, offers her advantageous conditions,—promises her gratuitous succours, or greater than he stipulates for himself: but at the same time he claims a superiority of dignity, and requires respect from his ally. It is this last particular which renders *the alliance unequal*: and to this circumstance we must attentively advert; for, with alliances of this nature we are not to confound those in which the parties treat on a footing of equality, though the more powerful of the allies, for particular reasons, gives more than he receives, promises his assistance gratis, without requiring gratuitous assistance in his turn, or promises more considerable succours, or even the assistance of all his forces:—here the alliance is equal, but the treaty is unequal, unless indeed we may be allowed to say, that, as the party who makes the greater concessions has a greater interest in concluding the treaty, this consideration restores the equality. Thus, at a time when France found herself embarrassed in a momentous war with the house of Austria, and the cardinal de Richelieu wished to humble that formidable power, he, like an able minister, concluded a treaty with Gustavus Adolphus, in which all the advantage appeared to be on the side of Sweden. From a bare consideration of the stipulations of that treaty, it would have been pronounced an unequal one; but the advantages which France derived from it, amply compensated for that inequality. The alliance of France with the Swiss, if we regard the stipulations alone, is an unequal treaty; but the valour of the Swiss troops has long since counterbalanced that inequality; and the difference in the interests and wants of the parties serves still further to preserve the equilibrium. France, often involved in bloody wars, has received essential services from the Swiss: the Helvetic body, void of ambition, and untainted with the spirit of conquest, may live in peace with the whole world; they have nothing to fear, since they have feelingly convinced the ambitious, that the love of liberty gives the nation sufficient strength to defend her frontiers. This alliance may at certain times have appeared unequal:—our forefathers\* paid little attention to ceremony:—but, in reality, and especially since the absolute independence of the Swiss is acknowledged by the empire itself, the alliance is certainly equal, although the Helvetic body do not hesitate to yield to the king of France all that pre-eminence which the established usage of modern Europe attributes to crowned heads, and especially to great monarchs.

\* The author was a native of Switzerland.

Treaties in which the inequality prevails on the side of the inferior power—that is to say, those which impose on the weaker party more extensive obligations or greater burdens, or bind him down to oppressive or disagreeable conditions,—these unequal treaties, I say, are always at the same time unequal alliances; for, the weaker party never submits to burdensome conditions, without being obliged also to acknowledge the superiority of his ally. These conditions are commonly imposed by the conqueror, or dictated by necessity, which obliges a weak state to seek the protection or assistance of another more powerful; and by this very step, the weaker state acknowledges her own inferiority. Besides, this forced inequality in a treaty of alliance is a disparagement to her, and lowers her dignity, at the same time that it exalts that of her more powerful ally. Sometimes also, the weaker state not being in a condition to promise the same succours as the more powerful one, it becomes necessary that she should compensate for her inability in this point, by engagements which degrade her below her ally, and often even subject her, in various respects, to his will. Of this kind are all those treaties in which the weaker party alone engages not to make war without the consent of her more powerful ally,—to have the same friends and the same enemies with him,—to support and respect his dignity,—to have no fortresses in certain places,—not to trade or raise soldiers in certain free countries,—to deliver up her vessels of war, and not to build others, as was the case of the Carthaginians when treating with their Roman conquerors,—to keep up only a certain number of troops, &c.

These *unequal alliances* are subdivided into two kinds; they either impair the sovereignty, or they do not. We have slightly touched on this in Book I. Ch. I. and XVI.

The sovereignty subsists entire and unimpaired when none of its constituent rights are transferred to the superior ally, or rendered, as to the exertion of them, dependent on his will. But the sovereignty is impaired when any of its rights are ceded to an ally, or even if the use of them be merely rendered dependent on the will of that ally. For example, the treaty does not impair the sovereignty, if the weaker state only promises not to attack a certain nation without the consent of her ally. By such an engagement she neither divests herself of her right, nor subjects the exertion of it to another's will; she only consents to a restriction in favour of her ally: and thus she incurs no greater diminution of liberty than is incurred by promises of every kind. Such reservations are every day stipulated in alliances that are perfectly equal. But, if either of the contracting parties engages not to make war against any one whatsoever without the consent or permission of an ally who on his side does not make the same promise, the former contracts an unequal alli-

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ance, with diminution of sovereignty; for he deprives himself of one of the most important branches of the sovereign power, or renders the exertion of it dependent on another's will. The Carthaginians having, in the treaty that terminated the second Punic war, promised not to make war on any state without the consent of the Roman people, were thenceforward, and for that reason, considered as dependent on the Romans.

§ 176. How an alliance with diminution of sovereignty may annul preceding treaties.

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When a nation is forced to submit to the will of a superior power, she may lawfully renounce her former treaties, if the party with whom she is obliged to enter into an alliance requires it of her. As she then loses a part of her sovereignty, her ancient treaties fall to the ground together with the power that had concluded them. This is a necessity that cannot be imputed to her as a crime: and since she would have a right to place herself in a state of absolute subjection, and to renounce her own sovereign, if she found such measures necessary for her preservation,—by a much stronger reason, she has a right, under the same necessity, to abandon her allies. But a generous people will exhaust every resource before they will submit to terms so severe and so humiliating.

§ 177. We ought to avoid as much as possible making unequal alliances.

In general, as every nation ought to be jealous of her glory, careful of maintaining her dignity, and preserving her independence, nothing short of the last extremity, or motives the most weighty and substantial, ought ever to induce a people to contract an unequal alliance. This observation is particularly meant to apply to treaties where the inequality prevails on the side of the weaker ally, and still more particularly to those unequal alliances that degrade the sovereignty. Men of courage and spirit will accept such treaties from no other hands but those of imperious necessity.

§ 178. Mutual duties of nations with respect to unequal alliances.

Notwithstanding every argument which selfish policy may suggest to the contrary, we must either pronounce sovereigns to be absolutely emancipated from all subjection to the law of nature, or agree that it is not lawful for them, without just reasons, to compel weaker states to sacrifice their dignity, much less their liberty, by unequal alliances. Nations owe to each other the same assistance, the same respect, the same friendship, as individuals living in a state of nature. Far from seeking to humble a weaker neighbour, and to despoil her of her most valuable advantages, they will respect and maintain her dignity and her liberty, if they are inspired by virtue more than by pride—if they are actuated by principles of honour more than by the meaner views of sordid interest—nay, if they have but sufficient discernment to distinguish their real interests. Nothing more firmly secures the power of a great monarch than his attention and respect to all other sovereigns. The more cautious he is to avoid offending his weaker brethren, the greater esteem he testifies for them, the more will they revere him in turn; they feel

an affection for a power whose superiority over them is displayed only by the conferring of favours: they cling to such a monarch as their prop and support; and he becomes the arbiter of nations. Had his demeanour been stamped with arrogance, he would have been the object of their jealousy and fear, and might perhaps have one day sunk under their united efforts.

But, as the weaker party ought, in his necessity, to accept with gratitude the assistance of the more powerful, and not to refuse him such honours and respect as are flattering to the person who receives them, without degrading him by whom they are rendered; so, on the other hand, nothing is more conformable to the law of nature than a generous grant of assistance from the more powerful state, unaccompanied by any demand of a return, or, at least, of an equivalent.

And in this instance also, there exists an inseparable connection between interest and duty. Sound policy holds out a caution to a powerful nation not to suffer the lesser states in her neighbourhood to be oppressed. If she abandon them to the ambition of a conqueror, he will soon become formidable to herself. Accordingly, sovereigns, who are in general sufficiently attentive to their own interests, seldom fail to reduce this maxim to practice. Hence those alliances, sometimes against the house of Austria, sometimes against its rival, according as the power of the one or the other preponderates. Hence that balance of power, the object of perpetual negotiations and wars.

When a weak and poor nation has occasion for assistance of another kind—when she is afflicted by famine—we have seen (§ 5), that those nations who have provisions ought to supply her at a fair price. It were noble and generous to furnish them at an under price, or to make her a present of them, if she be incapable of paying their value. To oblige her to purchase them by an unequal alliance, and especially at the expense of her liberty—to treat her as Joseph formerly treated the Egyptians—would be a cruelty almost as dreadful as suffering her to perish with famine.

But there are cases where the inequality of treaties and alliances, dictated by some particular reasons, is not contrary to equity, nor, consequently, to the law of nature. Such, in general, are all those cases in which the duties that a nation owes to herself, or those which she owes to other nations, prescribe to her a departure from the line of equality. If, for instance, a weak state attempts, without necessity, to erect a fortress, which she is incapable of defending, in a place where it might become very dangerous to her neighbour if ever it should fall into the hands of a powerful enemy, that neighbour may oppose the construction of the fortress; and, if he does not find it convenient to pay the lesser state a compensation for complying with his desire, he may force her com-

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alliances where the inequality is on the side of the more powerful party.

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§ 180. How inequality of treaties and alliances may be conformable to the law of nature.

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pliance, by threatening to block up the roads and avenues of communication, to prohibit all intercourse between the two nations, to build fortresses, or to keep an army on the frontier, to consider that little state in a suspicious light, &c. He thus indeed imposes an unequal condition; but his conduct is authorized by the care of his own safety. In the same manner he may oppose the forming of a highway, that would open to an enemy an entrance into his state. War might furnish us with a multitude of other examples. But rights of this nature are frequently abused; and it requires no less moderation than prudence to avoid turning them into oppression.

Sometimes those duties to which other nations have a claim, recommend and authorize inequality in a contrary sense, without affording any ground of imputation against a sovereign, of having neglected the duty which he owes to himself or to his people. Thus, gratitude—the desire of showing his deep sense of a favour received—may induce a generous sovereign to enter into an alliance with joy, and to give in the treaty more than he receives.

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§ 181. Inequality imposed by way of punishment.

It is also consistent with justice to impose the conditions of an unequal treaty, or even an unequal alliance, by way of penalty, in order to punish an unjust aggressor, and render him incapable of easily injuring us for the time to come. Such was the treaty to which the elder Scipio Africanus forced the Carthaginians to submit, after he had defeated Hannibal. The conqueror often dictates such terms: and his conduct in this instance is no violation of the laws of justice or equity, provided he do not transgress the bounds of moderation, after he has been crowned with success in a just and necessary war.

§ 182. Other kinds of which we have spoken elsewhere.

The different treaties of protection—those by which a state renders itself tributary or feudatory to another—form so many different kinds of unequal alliances. But we shall not repeat here what we have said respecting them in Book I. Chap. I. and XVI.

§ 183. Personal and real treaties.

By another general division of treaties or alliances, they are distinguished into *personal* and *real*: the former are those that relate to the persons of the contracting parties, and are confined and in a manner attached to them. *Real alliances* relate only to the matters in negotiation between the contracting parties, and are wholly independent of their persons.

A *personal alliance* expires with him who contracted it.

A *real alliance* attaches to the body of the state, and subsists as long as the state, unless the period of its duration has been limited.

It is of considerable importance not to confound these two sorts of alliances. Accordingly, sovereigns are at present accustomed to express themselves in their treaties in such a manner as to leave no uncertainty in this respect: and this is doubtless the best and safest method. In default of this

precaution, the very subject of the treaty, or the expressions in which it is couched, may furnish a clue to discover whether it be real or personal. On this head we shall lay down some general rules.

In the first place, we are not to conclude that a treaty is a personal one from the bare circumstance of its naming the contracting sovereigns: for, the name of the reigning sovereign is often inserted with the sole view of showing with whom the treaty has been concluded, without meaning thereby to intimate that it has been made with himself personally. This is an observation of the civilians *Pedius* and *Ulpian*,\* repeated by all writers who have treated of these subjects.

Every alliance made by a republic is in its own nature real, for it relates only to the body of the state. When a free people, a popular state, or an aristocratical republic, concludes a treaty, it is the state herself that contracts; and her engagements do not depend on the lives of those who were only the instruments in forming them: the members of the people, or of the governing body, change and succeed each other; but the state still continues the same.

Since, therefore, such a treaty directly relates to the body of the state, it subsists, though the form of the republic should happen to be changed—even though it should be transformed into a monarchy. For, the state and the nation are still the same, notwithstanding every change that may take place in the form of the government; and the treaty concluded with the nation remains in force as long as the nation exists. But it is manifest that all treaties relating to the form of government are exceptions to this rule. Thus two popular states, that have treated expressly, or that evidently appear to have treated, with the view of maintaining themselves in concert in their state of liberty and popular government, cease to be allies from the very moment that one of them has submitted to be governed by a single person.

Every public treaty, concluded by a king or by any other monarch, is a treaty of the state; it is obligatory on the whole state, on the entire nation which the king represents, and whose power and rights he exercises. It seems then at first view, that every public treaty ought to be presumed real, as concerning the state itself. There can be no doubt with respect to the obligation to observe the treaty: the only question that arises, is respecting its duration. Now, there is often room to doubt whether the contracting parties have intended to extend their reciprocal engagements beyond the term of their own lives, and to bind their successors. Conjunctions change; a burden that is at present light, may in other circumstances become insupportable, or at least oppressive: the manner of thinking among sovereigns is no less

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§ 184.

Naming the contracting parties in the treaty does not render it personal.

§ 185. An alliance made by a republic is real.

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§ 186.

Treaties concluded by kings or other monarchs.

\* Digest, lib. ii. tit. xiv. de Pactis, leg. vii. § 8.

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variable; and there are certain things of which it is proper that each prince should be at liberty to dispose according to his own system. There are others that are freely granted to one king, and would not be allowed to his successor. It therefore becomes necessary to consider the terms of the treaty, or the matter which forms the subject of it, in order to discover the intentions of the contracting powers.

§ 187. Perpetual treaties, and those for a certain time.

Perpetual treaties, and those made for a determinate period, are real ones, since their duration cannot depend on the lives of the contracting parties.

§ 188. Treaties made for the king and his successors.

In the same manner, when a king declares in the treaty that it is made "for himself and his successors," it is manifest that this is a real treaty. It attaches to the state, and is intended to last as long as the kingdom itself.

§ 189. Treaties made for the good of the kingdom.

When a treaty expressly declares that it is made for the good of the kingdom, it thus furnishes an evident proof that the contracting powers did not mean that its duration should depend on that of their own lives, but on that of the kingdom itself. Such treaty is therefore a real one.

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Independently even of this express declaration, when a treaty is made for the purpose of procuring to the state a certain advantage which is in its own nature permanent and unfailling, there is no reason to suppose that the prince by whom the treaty has been concluded, intended to limit it to the duration of his own life. Such a treaty ought therefore to be considered as a real one, unless there exist very powerful evidence to prove that the party with whom it was made granted the advantage in question only out of regard to the prince then reigning, and as a personal favour: in which case the treaty terminates with the life of the prince, as the motive for the concession expires with him. But such a reservation is not to be presumed on slight grounds: for, it would seem, that, if the contracting parties had had it in contemplation, they should have expressed it in the treaty.

§ 190. How presumption ought to be founded in doubtful cases.

In case of doubt, where there exists no circumstance by which we can clearly prove either the personality or the reality of a treaty, it ought to be presumed a real treaty if it chiefly consists of favourable articles,—if of odious ones, a personal treaty. By favourable articles we mean those which tend to the mutual advantage of the contracting powers, and which equally favour both parties; by odious articles, we understand those which operate one of the parties only, or which impose a much heavier burden upon the one than upon the other. We shall treat this subject more at large in the chapter on the "Interpretation of Treaties." Nothing is more conformable to reason and equity than this rule. Whenever absolute certainty is unattainable in the affairs of men, we must have recourse to presumption. Now, if the contracting powers have not explained themselves, it is natural, when the question relates to things favourable, and equally



advantageous to the two allies, to presume that it was their intention to make a real treaty, as being the more advantageous to their respective kingdoms: and if we are mistaken in this presumption, we do no injury to either party. But, if there be any thing odious in the engagements,—if one of the contracting states finds itself overburdened by them,—how can it be presumed that the prince who entered into such engagements intended to lay that burden upon his kingdom in perpetuity? Every sovereign is presumed to desire the safety and advantage of the state with which he is intrusted: wherefore it cannot be supposed that he has consented to load it for ever with a burdensome obligation. If necessity rendered such a measure unavoidable, it was incumbent on his ally to have the matter explicitly ascertained at the time; and it is probable that he would not have neglected this precaution, well knowing that mankind in general, and sovereigns in particular, seldom submit to heavy and disagreeable burdens, unless bound to do so by formal obligations. If it happens then that the presumption is a mistake, and makes him lose something of his right, it is a consequence of his own negligence. To this we may add, that, if either the one or the other must sacrifice a part of his right, it will be a less grievous violation of the laws of equity that the latter should forego an expected advantage, than that the former should suffer a positive loss and detriment. This is the famous distinction *de lucro captando*, and *de damno vitando*.

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We do not hesitate to include equal treaties of commerce in the number of those that are favourable, since they are in general advantageous, and perfectly conformable to the law of nature. As to alliances made on account of war, Grotius says with reason, that “defensive alliances are more of a favourable nature,—offensive alliances have something in them that approaches nearer to what is burdensome or odious.”\*

We could not dispense with the preceding brief summary of those discussions, lest we should in this part of our treatise leave a disgusting chasm. They are, however, but seldom resorted to in modern practice, as sovereigns at present generally take the prudent precaution of explicitly ascertaining the duration of their treaties. They treat for themselves and their successors,—for themselves and their kingdoms,—for perpetuity,—for a certain number of years, &c.—or they treat only for the time of their own reign,—for an affair peculiar to themselves,—for their families, &c.

Since public treaties, even those of a personal nature, concluded by a king, or by any other sovereign who is invested with sufficient power, are treaties of state, and obligatory on the whole nation (§ 186), real treaties, which were intended

§ 191. The obligations and rights resulting

\* De Jure Belli et Pacis, lib. ii. cap. xvi. § 16.

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from a real  
treaty pass  
to the suc-  
cessors.

to subsist independently of the person who has concluded them, are undoubtedly binding on his successors; and the obligation which such treaties impose on the state passes successively to all her rulers as soon as they assume the public authority. The case is the same with respect to the rights acquired by those treaties: they are acquired for the state, and successively pass to her conductors.

It is at present a pretty general custom for the successor to confirm or renew even real alliances concluded by his predecessors: and prudence requires that this precaution should not be neglected, since men pay greater respect to an obligation which they have themselves contracted, than to one which devolves on them from another quarter, or to which they have only tacitly subjected themselves. The reason is, that, in the former case, they consider their word to be engaged, and, in the latter, their conscience alone.

§ 192. Treaties accomplished once for all and perfected.

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The treaties that have no relation to the performance of reiterated acts, but merely relate to transient and single acts which are concluded at once,—those treaties (unless indeed it be more proper to call them by another name\*)—those conventions, those compacts, which are accomplished once for all, and not by successive acts,—are no sooner executed than they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect: nor have we them in view when we inquire whether a treaty be real or personal. Puffendorf† gives us the following rules to direct us in this inquiry—"1. That the successors are bound to observe the treaties of peace concluded by their predecessors. 2. That a successor should observe all the lawful conventions by which his predecessor has transferred any right to a third party." This is evidently wandering from the point in question: it is only saying that what is done with validity by a prince, cannot be annulled by his successors.—And who doubts it? A treaty of peace is in its own nature made with a view to its perpetual duration: and, as soon as it is once duly concluded and ratified, the affair is at an end; the treaty must be accomplished on both sides, and observed according to its tenor. If it is executed upon the spot, there ends the business at once. But, if the treaty contains engagements for the performance of successive and reiterated acts, it will still be necessary to examine, according to the rules we have laid down, whether it be in this respect real or personal,—whether the contracting parties intended to bind their successors to the performance of those acts, or only promised them for the time of their own reign. In the same manner, as soon as a right is transferred by a lawful convention, it no longer belongs to the state that

\* See Chap. XII. § 153, of this book.

† Law of Nature and Nations, book 8, c. 9, § 8.

has ceded it; the affair is concluded and terminated. But, if the successor discovers any flaw in the deed of transfer, and proves it, he is not to be accused of maintaining that the convention is not obligatory on him, and refusing to fulfil it; —he only shows that such convention has not taken place: for a defective and invalid deed is a nullity, and to be considered as having never existed.

The third rule given by Puffendorf is no less useless with respect to this question. It is, "that if, after the other ally has already executed something to which he was bound by virtue of the treaty, the king happens to die before he has accomplished in his turn what he had engaged to perform, his successor is indispensably obliged to perform it. For, what the other ally has executed under the condition of receiving an equivalent, having turned to the advantage of the state, or at least having been done with that view, it is clear, that, if he does not receive the return for which he had stipulated, he then acquires the same right as a man who has paid what he did not owe; and, therefore, the successor is obliged to allow him a complete indemnification for what he has done or given, or to make good, on his own part, what his predecessor had engaged to perform." All this, I say, is foreign to our question. If the alliance is real, it still subsists, notwithstanding the death of one of the contracting parties; if it is personal, it expires with them, or either of them (§ 183). But, when a personal alliance comes to be dissolved in this manner, it is quite a different question to ascertain what one of the allied states is bound to perform, in case the other has already executed something in pursuance of the treaty: and this question is to be determined on very different principles. It is necessary to distinguish the nature of what has been done pursuant to the treaty. If it has been any of those determinate and substantial acts which it is usual with contracting parties mutually to promise to each other in exchange, or by way of equivalent, there can be no doubt that he who has received, ought to give what he has promised in return, if he would adhere to the agreement, and is obliged to adhere to it: if he is not bound, and is unwilling to adhere to it, he ought to restore what he has received, to replace things in their former state, or to indemnify the ally from whom he has received the advantage in question. To act otherwise, would be keeping possession of another's property. In this case, the ally is in the situation, not of a man who has paid what he did not owe, but of one who has paid beforehand for a thing that has not been delivered to him. But, if the personal treaty related to any of those uncertain and contingent acts which are to be performed as occasions offer,—of those promises which are not obligatory if an opportunity of fulfilling them does not occur,—it is only on occasion likewise that the performance of similar acts is due

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§ 193. Treaties already accomplished on the one part.

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in return: and, when the term of the alliance is expired, neither of the parties remains bound by any obligation. In a defensive alliance, for instance, two kings have reciprocally promised each other a gratuitous assistance during the term of their lives: one of them is attacked: he is succoured by his ally, and dies before he has an opportunity to succour him in his turn: the alliance is at an end, and no obligation thence devolves on the successor of the deceased, except indeed that he certainly owes a debt of gratitude to the sovereign who has given a salutary assistance to his state. And we must not pronounce such an alliance an injurious one to the ally who has given assistance without receiving any. His treaty was one of those speculating contracts in which the advantages or disadvantages wholly depend on chance: he might have gained by it, though it has been his fate to lose.

We might here propose another question. The personal alliance expiring at the death of one of the allies, if the survivor, under an idea that it is to subsist with the successor, fulfils the treaty on his part in favour of the latter, defends his country, saves some of his towns, or furnishes provisions for his army,—what ought the sovereign to do, who is thus succoured? He ought, doubtless, either to suffer the alliance to subsist, as the ally of his predecessor has conceived that it was to subsist (and this will be a tacit renewal and extension of the treaty)—or to pay for the real service he has received, according to a just estimate of its importance, if he does not choose to continue that alliance. It would be in such a case as this that we might say with Puffendorf, that he  
[ 211 ] who has rendered such a service has acquired the right of a man who has paid what he did not owe.

§ 194. The personal alliance expires if one of the contracting powers ceases to reign.

§ 195. Treaties in their own nature personal.

The duration of a personal alliance being restricted to the persons of the contracting sovereigns,—if, from any cause whatsoever, one of them ceases to reign, the alliance expires: for they have contracted in quality of sovereigns; and he who ceases to reign no longer exists as a sovereign, though he still lives as a man.

Kings do not always treat solely and directly for their kingdoms; sometimes, by virtue of the power they have in their hands, they make treaties relative to their own persons, or their families; and this they may lawfully do, as the welfare of the state is interested in the safety and advantage of the sovereign, properly understood. These treaties are personal in their own nature, and expire, of course, on the death of the king or the extinction of his family. Such is an alliance made for the defence of a king and his family.

§ 196. Alliance concluded for the defence of the king and the

It is asked, whether such an alliance subsists with the king and the royal family, when, by some revolution, they are deprived of the crown. We have remarked above (§ 194), that a personal alliance expires with the reign of him who contracted it: but that is to be understood of an alliance formed

with the state, and restricted, in its duration, to the reign of the contracting king. But the alliance of which we are now to treat, is of another nature. Although obligatory on the state, since she is bound by all the public acts of her sovereign, it is made directly in favour of the king and his family: it would, therefore, be absurd that it should be dissolved at the moment when they stand in need of it, and by the very event which it was intended to guard against. Besides, the king does not forfeit the character of royalty merely by the loss of his kingdom. If he is unjustly despoiled of it by an usurper, or by rebels, he still preserves his rights, among which are to be reckoned his alliances.

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royal  
family.

But who shall judge whether a king has been dethroned lawfully or by violence? An independent nation acknowledges no judge. If the body of the nation declare that the king has forfeited his right, by the abuse he has made of it, and depose him, they may justly do it when their grievances are well founded; and no other power has a right to censure their conduct. The personal ally of this king ought not, therefore, to assist him against the nation who have made use of their right in deposing him: if he attempts it, he injures that nation. England declared war against Louis XIV., in the year 1688, for supporting the interests of James II., who had been formally deposed by the nation. The same country declared war against him a second time, at the beginning of the present century, because that prince acknowledged the son of the deposed monarch, under the title of James III. In doubtful cases, and when the body of the nation has not pronounced, or has not pronounced freely, a sovereign ought naturally to support and defend an ally; and it is then that the voluntary law of nations subsists between different states. The party who have expelled the king maintain that they have right on their side: the unfortunate prince and his allies flatter themselves with having the same advantage; and, as they have no common judge upon earth, there remains no other mode of deciding the contest than an appeal to arms: they, therefore, engage in a formal war. [ 212 ]

Finally, when the foreign prince has faithfully fulfilled his engagements towards an unfortunate monarch, when he has done, in his defence, or to procure his restoration, every thing which, by the terms of the alliance, he was bound to do,—if his efforts have proved ineffectual, it cannot be expected, by the dethroned prince, that he shall support an endless war in his favour,—that he shall for ever continue at enmity with the nation or the sovereign who has deprived him of the throne. He must at length think of peace, abandon his unfortunate ally, and consider him as having himself abandoned his right through necessity. Thus, Louis XIV. was obliged to abandon James II. and to acknowledge King William, though he had at first treated him as an usurper.

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§ 197. Obligation of a real alliance when the allied king is deposed.

The same question presents itself in real alliances, and, in general, in all alliances made with a state, and not in particular with a king, for the defence of his person. An ally ought, doubtless, to be defended against every invasion, against every foreign violence, and even against his rebellious subjects; in the same manner a republic ought to be defended against the enterprises of one who attempts to destroy the public liberty. But the other party in the alliance ought to recollect that he is the ally, and not the judge, of the state or the nation. If the nation has deposed her king in form,—if the people of a republic have expelled their magistrates, and set themselves at liberty, or, either expressly or tacitly, acknowledged the authority of an usurper,—to oppose these domestic regulations, or to dispute their justice or validity, would be interfering in the government of the nation, and doing her an injury (see §§ 54, &c. of this Book.) The ally remains the ally of the state, notwithstanding the change that has happened in it. However, if this change renders the alliance useless, dangerous, or disagreeable to him, he is at liberty to renounce it: for, he may upon good grounds assert that he would not have entered into an alliance with that nation, had she been under her present form of government.

To this case we may also apply what we have said above respecting a personal ally. However just the cause of that king may be, who is expelled from the throne either by his subjects or by a foreign usurper, his allies are not obliged to support an eternal war in his favour. After having made ineffectual efforts to reinstate him, they must at length restore to their people the blessings of peace; they must come to an accommodation with the usurper, and for that purpose treat with him as with a lawful sovereign. Louis XIV., finding himself exhausted by a bloody and unsuccessful war, made [ 213 ] an offer, at Gertruydenberg, to abandon his grandson, whom he had placed on the throne of Spain: and afterwards, when the aspect of affairs was changed, Charles of Austria, the rival of Philip, saw himself, in his turn, abandoned by his allies. They grew weary of exhausting their states in order to put him in possession of a crown to which they thought him justly entitled, but which they no longer saw any probability of being able to procure for him.