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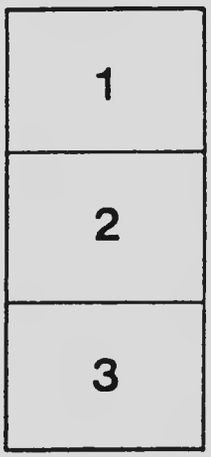

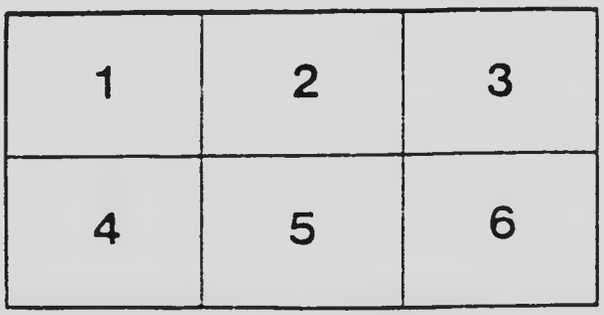

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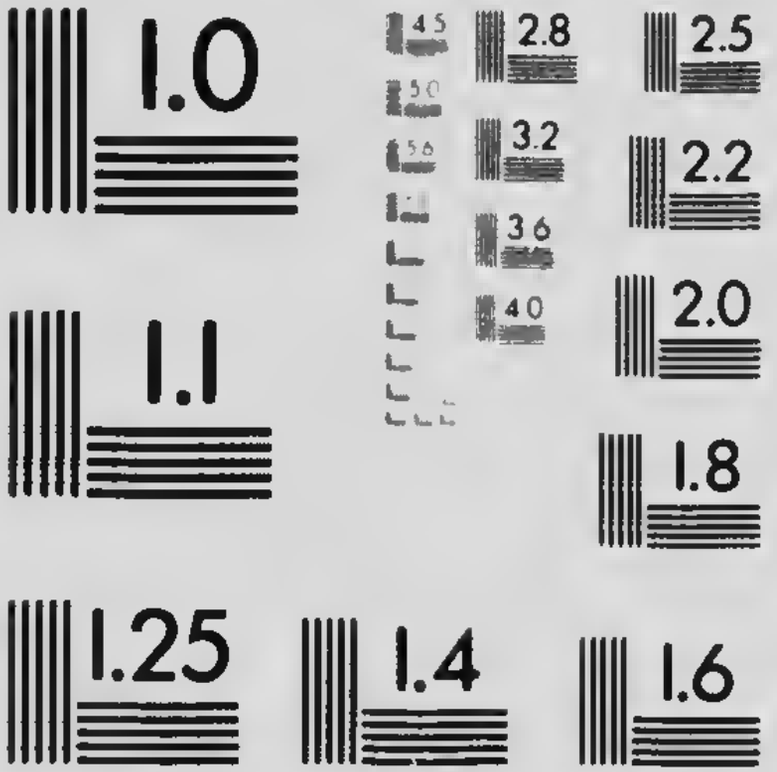

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THE LAW OF CONTRABAND OF WAR

THE LAW OF CONTRABAND OF WAR

BY

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PREFACE

In writing the following book my aim has been, after defining my subject, distinguishing it from allied topics and indicating the sources of the law of contraband, to trace the origin and development of the fundamental principles of that law and impartially to set forth the rules of which it consists as exemplified from time to time in the practice of the chief naval powers. I have endeavoured to avoid all discussion of what the law ought to be. No attempt has been made, for example, to discuss such questions as whether the non-prohibition of the export of arms from a neutral country is consistent with the restrictions imposed upon the building and equipping of warships for belligerents within neutral territory, or whether it would not be more consistent with the principle of non-intervention for the neutral government to abstain in both cases from all interference with the merely commercial activities of its subjects.

Whichever way the law was settled, it would be almost certain, in the special circumstances of a particular case, to benefit one side more than the other. But the sole duty of a neutral state is impartially to observe the established rules and not to attempt in any way to equalize the inequality which the accident of the case works out. The actually existing rules which govern the relations of belligerents and neutrals are in effect the result of a compromise between conflicting interests, and can only be determined by deduction, in the light of the circumstances of the times and the special conditions of the war, from the usages, through a period of

some three hundred years, of the leading maritime powers. These usages have been created by the action of belligerent rather than of neutral states, and with a view to extending and not restricting the advantages that accrue to a belligerent from the possession of a predominant command of the sea.

Amid all the uncertainty and indefiniteness that exists on many points of the law of neutrality, it cannot possibly be contended that a neutral government is under any obligation, apart from a special convention, to prevent its subjects from trading in contraband of war ; and such a fundamental change in the prevailing law as would be required to establish this obligation, even if desired and agreed upon by a majority of states, could not be effected, so as to make the obligation generally binding, without the consent of Great Britain and every other important maritime power. The mercantile interests of non-belligerent countries would suffer still more severely than they do at present if warlike material could not be supplied even to the belligerent who was strong enough to ensure its safe passage by sea. Such interests would gain by the abolition of the doctrine of contraband ; but the maintenance of a strict law of contraband is essential for a belligerent state that depends largely upon naval power for its safety. The present war has shown the inadequacy of the provisions of the Declaration of London to secure this safety.

In order clearly to distinguish shipment of contraband from the use of neutral territory as a base for belligerent operations and to determine the limits under the established law of the non-responsibility of a neutral state for the supply of articles of warlike use by its subjects to the belligerents, I have dealt somewhat more fully than the title of the book might warrant with the subject of illegal shipbuilding.

The following pages were in print before Sir Samuel Evans delivered his judgement in the case of the *Kim and others* (32 T. L. R. 10), and before the publication of the United States Note of November 5, 1915, the Proclamations of August 20, 1915, specifying various forms of cotton to be treated as absolute contraband, and of October 14, 1915, containing the revised lists of contraband at present in force, and the Declaration of London Order in Council, 1915, discontinuing the adoption of Article 57 of the Declaration and providing that in lieu thereof British prize courts shall apply the rules and principles which they formerly observed.

Reference should be made to this Order in Council in connexion with what is said on p. 17 as to the adoption of the Declaration of London by Great Britain and her Allies; while the general statement on p. 6 that the neutral or enemy character of a vessel is determined by the flag she is entitled to fly now needs qualification. As regards vessels sailing under the enemy flag, the British rule is that the flag is conclusive (the *Vrow Elizabeth* (1803), 5 C. Rob. 4; 1 E. P. C. 409; the *Industrie* (1854), Spinks, 54; 2 E. P. C. 297); but where a ship is flying a neutral flag, it is permissible to go behind the flag and inquire into the nationality of the owners (see Hol. N. P. L. § 51; and the *dictum* of Dr. Lushington in the *Industrie*, 2 E. P. C. p. 300).

A cursory reference to the two Contraband Proclamations mentioned above will be found on p. 182; they have also been included, with the earlier Proclamations, in Appendix C.

The decision in the *Kim* case, and the objections to the British naval policy raised in the latest American Note, should be referred to in connexion with the subject-matter of Chapter XIV. The *Kim* case was concerned with four neutral vessels which had been captured on

voyages from New York to Copenhagen with large cargoes of lard, hog and meat products, oil stocks, wheat and other food-stuffs; two of them had cargoes of rubber and one of them had a cargo of hides. One cargo of rubber was seized as absolute contraband; the remaining cargoes were seized on the ground that they were conditional contraband alleged to be confiscable in the circumstances. All questions relating to the capture and confiscability of the ships were left over to be argued and dealt with later. The claimants admitted that the goods seized partook of the character of absolute or conditional contraband under the Proclamations respectively in force at the time the vessels sailed, and also that they expected the great bulk of the goods ultimately to reach Germany. All that the Court had to decide, therefore, was, in the first place, whether the goods had been shipped to Copenhagen in pursuance of a bona fide contract of sale and with the intention of being imported on their arrival into the common stock of the neutral country, or with the intention on the part of the shippers of an ultimate hostile destination; and, secondly, whether, in the case of the articles that partook of the nature of conditional contraband, there was evidence of the special form of hostile destination required for goods of that class (see *infra*, pp. 170–1).

In the course of his judgement the President observed that 'prize courts are not governed or limited by the strict rules of evidence which bind and sometimes unduly fetter our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents' (32 T. L. R. 23). Referring to the cases of the *Rosalie and Betty* (1800, 2 C. Rob. 343; 1 E. P. C. 246) and the *Stephen Hart* (*infra*, pp. 151, 152), he held that prize courts have always deemed it right to take cogni-

zance of well-known facts which have come to light in other cases, or as matters of public reputation.

In the United States Note objection is taken to the fact that British prize courts are no longer precluded from receiving extrinsic evidence for which no suggestion has been laid in the preparatory evidence (cf. *infra*, p. 217), and to the practice of seizing neutral vessels at sea upon suspicion and bringing them into port for the purpose, by search or otherwise, of obtaining evidence of the carriage of contraband (cf. *infra*, p. 201). But, as Sir Samuel Evans pointed out in the case before us, 'international law, in order to be adequate as well as just, must have regard to the circumstances of the times, including the circumstances arising out of the particular situation of the war or the condition of the parties engaged in it' (32 T. L. R. 27; cf. *infra*, pp. 118–19; and Editorial Comment in 9 A. J. (1915), 212: 'international law, to be adequate, must take note of facts'). In applying the rules of international law it is necessary to take into account the economic and other conditions prevailing at the time. Old rules may be adapted to altered circumstances, provided such adaptations are necessary to the effective enforcement of the belligerent right and are consistent with the general principles upon which the right is based and with the universally recognized rules of international law which are founded upon considerations of justice and humanity (cf. Mr. Bryan's letter, referred to *infra*, pp. 186–7).

This is a very different claim from that put forward by Germany in support of the enforcement of her war-zone proclamation by submarines through indiscriminate destruction instead of by regulated capture. Submarines, it is argued, may destroy at sight because they cannot always give warning without exposing themselves to the danger of destruction; that is to say, they are to

be free to repudiate the old rules of international law, founded upon considerations of elementary justice and humanity, governing the right of capture, because their observance would render the employment of such craft impracticable (cf. Garner in 9 A. J. (1915), 621–5; and Editorial Comment, ibid., 679).

The foundation of the law of contraband is 'the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use' (32 T. L. R. 27). The conditions of modern commerce and transport which facilitate the infraction of this right by neutrals at the same time justify the belligerent in increasing the stringency of the measures taken to prevent such infractions. In order to give effect to the principles of contraband, the adoption of the rules of evidence followed on the Continent and by the American prize courts during the civil war (see *infra*, p. 217) has been found to be indispensable; an extended search of the captured vessel in port is similarly essential (see *infra*, p. 201). In seizing vessels on suspicion the belligerent runs the risk of having to compensate the neutral should he fail to discover evidence of illegitimate trading or of other circumstances justifying the seizure. If the delay and expense in bringing vessels into port for search and investigation has a deterrent effect upon trade ventures generally, owing to the risk of innocent vessels and cargoes being detained on mere suspicion, this is a hardship with which neutrals must put up (cf. Moore, Dig. vii. 699, quoted *infra*, p. 201). As long as war exists between the great powers, neutral interests must continue to be subordinated to the exigencies of the belligerents.

In the *Kim* case it was held that at the beginning of the present war the doctrine of continuous voyage had become part of the law of nations 'in accordance with the principles of recognized legal decisions, and with

the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare' (32 T. L. R. 28). The President showed that there was no logical reason for the attempted exclusion of that doctrine in the case of conditional contraband by the Declaration of London. 'If it is right', he said, 'that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination for the enemy government or its armed forces?' (ibid. 27–8; cf. Scott in 8 A. J. (1914), 315–16).

One cargo of lard was released on the ground that the claimant had proved that it was on its way to Denmark as its real and bona fide destination to a purchaser who intended to put it through a manufacturing process there. Other goods were released on the ground that they had been shipped to the claimants as bona fide neutral purchasers. As to the remaining cargoes, the Court held that it might infer that they were intended for Germany for the following reasons: (1) Because of the quantity of the goods consigned to Copenhagen compared with the average annual quantity of similar goods imported into Denmark from all sources during the three years preceding the war. (2) Because of the convenient situation of Copenhagen for transporting goods to Germany. (3) Because of the circumstances, which had previously (see *infra*, pp. 153–4) been regarded as important in determining the question of the real or ostensible destination at the neutral port, that the goods were consigned 'to order or assigns' without naming any independent consignee. (4) Because of the failure of the claimants to produce evidence to rebut

the inferences made on the three previous grounds. In the case of the *Arabia*, which came before the Russian prize courts during the Russo-Japanese war, the claimants only recovered their goods by tendering ample proof of their innocent destination (cf. *infra*, p. 217). In the absence of evidence for the shippers it is sufficient for the captor to prove a 'highly probable' destination for the enemy. The Court also held, in connexion with the description of a cargo of rubber as 'gum', that, apart from fraud or false papers, 'any concealment or misdescription, or device calculated and intended by neutrals to deceive and hamper belligerents in their undoubted right of search for contraband' would 'weigh heavily against those adopting such courses when any presumptions or inferences have to be considered' (32 T. L. R. 25). But a claimant was not affected who proved that he had taken no part in the attempt to mislead, and that the transaction was a bona fide purchase by him for his trade in the neutral country.

With regard to the proof of the special form of hostile destination required for the goods which partook of the nature of conditional contraband, the Court assumed that the Order in Council of August 20, 1914, had ceased to have any effect upon the promulgation of the subsequent Order of October 29, and that therefore, owing to the date of sailing, the cargoes on the *Kim* were the only ones to which an Order in Council applied, and that the cases relating to the cargoes on the other vessels must be decided in accordance with the general principles of international law. As to the binding character of the Orders in Council, Sir Samuel Evans referred to the views he had expressed in the case of the *Zamora* (1915, 31 T. L. R. 513; B. & C. P. C. 309). In that case he did not find it necessary to decide whether he was bound to obey an Order in Council which might run contrary to

the acknowledged law of nations, but he said that if the question should arise he was prepared to follow the doctrine laid down by the late Professor Westlake and to assume the standpoint of Lord Stowell in the *Fox* (cf. *infra*, pp. 215–16) and of Judge Story in *Maisonnaire* v. *Keating* (1815, 2 Gallison, 325). The Court accordingly condemned the cargoes to which it considered the Order in Council of October 29 applied, because of the presumption of the requisite hostile destination raised by that Order.

With regard to the cargoes to which no Order in Council was deemed to apply, it was held that it was incumbent upon the captors in the first instance to prove facts from which a reasonable inference of a destination to the armed forces or a Government department of the enemy could be drawn. But, so far as it was necessary to establish that such a destination was intended on the part of the shippers, it could be shown by inferences from the surrounding circumstances relating to the shipment of and dealing with the goods (cf. Dana's opinion, *infra*, p. 123). In accordance with this principle the Court condemned the cargoes of conditional contraband on the following grounds: (1) Because some of the goods, such as canned beef, smoked bacon, &c., were specially adapted for military use, while others were adapted for immediate warlike purposes in the sense that they could be employed for the production of explosives. (2) Because it was inferred that they were destined for some of the nearest German ports, like Hamburg, Lubeck, and Stettin, where some of the forces were quartered or which were otherwise connected with the operations of war. (3) Because the state of things in Germany in relation to the military forces and the civil population and the methods adopted by the Government in order to procure supplies for the

forces. In this connexion the President quoted the opinion of the editors of the *American Journal of International Law* referred to on p. 98, *infra*.

In the still more recent case of the *Sorfareren* (*The Times*, November 9, 1915), Sir Samuel Evans had to consider the effect of Article 43 of the Declaration of London (*infra*, pp. 230, 269–70). He said that the Article was only intended to give protection to *neutrals* whose goods were being carried at sea when their owners were unaware of the declaration of contraband, and he decided that contraband belonging to the *enemy* (cf. *infra*, pp. 6–8) remained liable to condemnation without compensation.

The latest American Note again raises the point, referred to on p. 4, *infra*, that neutrals should not be affected by reprisals. But an act of reprisal, if otherwise justifiable against the enemy, must not necessarily be deemed indefensible merely because it involves unusual limitations upon the international trade of neutrals and deprives them of rights and privileges which they would otherwise have enjoyed. Until the society of nations has created a central authority capable of establishing courts and enforcing obedience to their decisions, no member can claim complete exemption from the consequences of the infraction, by another member, of the law governing their relations in that society. Each member must bear a certain amount of responsibility for securing the due observance of the rules of international law; and if unwilling to take direct action to punish the breach of those rules, must acquiesce in any untoward effects that may result from reasonable and necessary acts of self-help on the part of the member directly injured. This is far different from a claim to infringe established neutral rights in order merely to ensure the success of a belligerent's naval or military operations.

It is hoped that the classified list of authorities at the commencement of the book will be of use to those who are interested in the law of naval warfare and desirous, like the writer, of investigating the intricate subject of contraband still further, particularly with a view to the position to be assigned to it in international law after the conclusion of the present war. In Appendix A has been added for convenience of reference the parts of the Declaration of London and of the General Report which relate to the topics dealt with in the body of the book. In the remaining Appendices will be found, in addition to the various Contraband Proclamations, the Orders in Council adopting the provisions of the Declaration, the important Circular of the Department of State defining the attitude of the United States towards trade in contraband by American citizens, and the Order in Council of March 11, 1915, issued by way of reprisal for the German war-zone proclamation.

It will be obvious that I have availed myself freely of the learned and elaborate works of past and present international jurists; and my sincere thanks are specially due to Dr. A. Pearce Higgins, Lecturer on Public International Law at the London School of Economics and Political Science, for many valuable suggestions and for the kindly assistance and encouragement he has so readily given me while studying the subject of this book as a post-graduate student of King's College. I have also to express my indebtedness to the staff, readers, and printers of the Clarendon Press for the great care and expedition with which they have assisted in the production of the book.

H. R. P.

November, 1915.

ADDENDA ET CORRIGENDA.

PAGE

vii. The *Kim* is also reported, P. [1915] 215; B. & C. P. C. 405.

7, n. 2. The *Clan Grant* is reported, 31 T. L. R. 321; B. & C. P. C. 272.

8, n. 3. *For* 9 A. S. (1915) *read* 9 A. J. (1915).

44, l. 12. *For* Amalasnintha's *read* Amalasuintha's.

59, n. 4. The *Somla* is reported, B. & C. P. C. 281.

80, n. 4. *For* infra, p. 296, App. D *read* infra, p. 300, App. D.

82, l. 9. *For* Marine Fire & Marine Insurance Co. *read* Maine Fire & Marine Insurance Co.

118, n. 2. *Insert* 1 *before* C. Rob. 89.

156, l. 8 *For* civil law *read* civil war.

166, n. 4. Add reference to App. A. p. 257.

182, l. 9. *For* reproductions of *read* reproductions on.

184, n. 1. *For* an *read* and.

190, n. 3. *For* infra, App. E. p. 298 *read* infra, App. E. p. 301.

216, n. 1. The *Zamora* is also reported, B. & C. P. C. 309.

233, n. 7. *For* Rym. VIII. i. 184 *read* Rym. VIII. ii. 156.

247, nn. 3 & 4. The references printed separately as n. 3 should form one note with the reference in n. 4.

249, n. 6. The *Katwyk* is also reported, B. & C. P. C. 282.

251, n. 2. Add reference to p. 233, n. 7.

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CHAPTER I

BELLIGERENT INTERFERENCE WITH NEUTRAL TRADE

Neutral trade affected by state of war.

. might very well be contended as an abstract principle that ...e subjects of those powers which take no part in a war ought not to be affected or injured in any way by the state of hostilities existing between the belligerents. But it is impossible for the nations at war to exercise the power and force required for the purpose of overthrowing each other without inflicting injury and loss upon the trade of other nations which claim, and rightly claim, to remain strangers to the contest.

1. Indirectly.

In the first place, there are certain inevitable consequences of the state of war through which neutral commerce is bound to suffer indirectly. Owing to the complexity of modern commercial relations and the cosmopolitan character of finance and trade, the mere existence of a war of any magnitude necessarily involves heavy losses to the subjects of neutral states through the consequent diminution of purchasing power in the belligerent countries and general shrinkage and dislocation of trade.

2. Through the duty to refrain from participation in hostilities.

Secondly, neutral individuals are liable to suffer damage through the restrictions to which their trade is subject as a result of the special obligations incumbent upon them owing to the duty to abstain from all real participation in hostilities and from all acts favourable to the success of either belligerent against the other which, with a view to localizing the war and hastening

its end, is imposed upon their state by the modern law of neutrality. In pursuance of this duty a neutral power must prevent its territory from being used as the starting-point of hostile expeditions or as a base of hostile operations.[1] Thus, in 1870, vessels were prohibited from sailing from English ports with supplies of coal directly consigned to the French fleet in the North Sea;[2] and neutrals are similarly bound to refrain from building, fitting out, arming, or supplying with other necessaries of war, within neutral territory, vessels intended for the naval operations of a belligerent.[3] The obligations from which these particular restrictions upon neutral trade result are, as we shall see hereafter, of comparatively recent growth. The commercial acts to which they relate are prohibited because such acts are considered, in modern international opinion, to be incompatible with an attitude of strict neutrality. A failure by the neutral government to use due diligence to secure their performance would constitute a breach of national neutrality for which the state as a whole would be liable to make reparation to the injured belligerent, as Great Britain had to do in respect of the *Alabama* claims[4] after the American civil war.

3. Through the right of a belligerent to restrain certain forms of commercial intercourse with the enemy.

i. Blockade.

Thirdly, neutral merchants are liable to suffer damage through the restrictions imposed upon their trade by the exercise of the right to deny certain forms of commercial intercourse with the enemy which belligerents, in possession of the necessary sea-power, have acquired, by centuries of customary usage, in the interest of self-preservation and in order the more quickly to vanquish the foe.[5] A belligerent in a position to station off his enemy's coast or ports a naval force sufficiently strong

[1] Lawr. Prin. 633, sq.; Cob. Cases, ii. 283.
[2] Hall, I. L. 656; Westlake, I. L. ii. 300.
[3] See 13 H. C. 1907, Arts. 8, 18–20. [4] See Cob. Cases, ii. 320–48.
[5] Opp. I. L. ii. 496; Perels, 254 (§ 45).

to cause evident danger in ingress or egress is entitled to interdict all neutral traffic by sea with the locality thus blockaded. Similarly, a belligerent, with the requisite naval power at his disposal, is entitled to prevent neutral vessels from transporting to his enemy such articles or commodities as may be of use to the latter for carrying on the war, from carrying persons or dispatches for the enemy, and from engaging in any form of trade from which they were excluded by the enemy in time of peace. Prior to the middle of the nineteenth century neutral commerce was also susceptible to injury through the exercise of the belligerent right to capture any enemy goods that a neutral vessel might be carrying.[1]

ii. Contraband.

iii. Unneutral service.

iv. Rule of the war of 1756.

v. Capture of enemy goods.

The corresponding obligation to refrain from these different kinds of prohibited trade, imposed by international law upon the subjects of neutral powers, is not, as in the case of illegal shipbuilding and illegal expeditions, derived from the general principle of neutrality which requires a loyal abstinence from real participation in a war on the part of all those who do not avowedly participate in it,[2] or from any intrinsic unlawfulness in the acts themselves. It is simply the result of a rule of positive international law, established by the practice of maritime nations upon the principle of self-preservation, in the interest of a belligerent with sufficient command of the sea to prevent these particular forms of neutral interference with his naval operations. Unless the belligerent possesses the necessary power, no offence is committed; for to him is left the responsibility of punishing any attempt to infringe the restrictions of this class imposed upon neutral trade by the law of nations. In this case a failure on the part of the individual merchant

Nature of correlative duties of neutral traders.

[1] Under Art. 2 of the Declaration of Paris, 1856, the neutral flag now covers such goods with the exception of contraband of war.

[2] Westlake, I. L. ii. 192.

to perform his duty does not in any way compromise the neutrality of the state to which he belongs.[1]

4. Owing to the conditional nature of international law.

Fourthly, neutral commerce is liable to suffer still further damage through the extraordinary economic pressure which a belligerent is entitled to put upon his enemy when the latter violates the conditional obligation of international law that it shall be reciprocally observed. It has been contended[2] that neutrals ought not to be affected by reprisals, and that the sovereignty of a nation over its own ships and citizens under its own flag on the high seas can only be diminished by the exercise of the regularly recognized rights of interference with neutral trade referred to under the third head. But owing to the conditional nature of the rules of positive international law and the otherwise sanctionless state of the law of war, the same rule of public policy which, in the case of the less extensive forms of prohibited commerce, requires the subordination of the interests of neutral traders to the safety of a power at war because of the manifest necessity of the latter under the principle of self-preservation, requires and justifies the additional inconvenience and loss occasioned to neutrals by the exercise of the belligerent right of reprisals. Just as every member of a state has to bear his share of the expense of securing the due observance of the rules of municipal law, so no member of the community of nations can claim to be immune from all injury in connexion with the repression of the violation, by another member, of the rules of international law.[3]

[1] Opp. I. L. ii. 429, 434; Bonfils, 946; Twiss, War, 247–8 (§ 127).

[2] United States Note of April 2, 1915 (*The Times*, April 6, 1915).

[3] When England and Holland concurred, in 1689, in a joint declaration prohibiting all intercourse by neutrals with the ports of France, although not actually blockaded, Pufendorf urged in justification of their action that Holland was then struggling for her existence as an independent nation against the aggressive policy of Louis XIV,

Necessity for these restraints upon neutral trade.

The fact that, in cases coming under the third and fourth heads, the neutral persons affected are to a large extent really innocent sufferers, and that all neutral traders are exposed to injury through the detention of their ships in exercise of the concurrent and indispensable right of visit and search, cannot be allowed to impair the efficacy of a belligerent's arms. This is particularly the case in such a war as that of 1914–15, in which the gradual wearing down of Germany by the exercise of sea-power is absolutely essential for the self-preservation of Great Britain and her Allies. They are engaged in a life-and-death struggle for everything they hold dear, and are therefore naturally entitled, while respecting and safeguarding neutral interests as much as possible, to use to the uttermost all legitimate means for the coercion of the enemy.

and that Great Britain was then fighting for the civil and religious liberty of Europe as well as her own (Reddie, i. Prel. Obs. x). On the subject of the effect of reprisals upon neutrals see also Sir William Scott's judgement in the *Fox* (1811), Edw. 311, at pp. 320–1; 2 E. P. C. 61, at p. 68; and cf. Baldwin in 9 A. J. (1915), 299–300.

CHAPTER II

DEFINITION OF CONTRABAND AND DISTINCTION FROM ALLIED TOPICS

Definition of contraband.

At the present day one of the chief restrictions upon neutral commerce, to which we have referred under the third head in the preceding chapter, results from the operation of the rules relating to contraband of war. 'Contraband of war' is the designation of property, by whomsoever owned on board a neutral vessel, or owned by a neutral on board an enemy vessel,[1] found by a belligerent on the high seas or within his own or his enemy's territorial waters, on its way to assist his enemy in the conduct of hostilities against him. The neutral or enemy character of a vessel is determined by the flag she is entitled to fly;[2] a neutral vessel would herself be contraband if suitable for any warlike use and destined for sale in a hostile port or for delivery to the enemy. The neutral or enemy character of goods is determined by the neutral or enemy character of their owner,[3] which, on the European continent, is deemed to depend upon his political nationality.[4] In accordance with this principle, Article 16 of Hague Convention V of 1907, respecting the rights and duties of neutral powers and persons in war on land, defines a neutral person as the subject or citizen (*national*) of a neutral state;[5] but Great Britain made reservations in regard to this article

Criteria of neutral or enemy character.

[1] Declaration of Paris, Art. 3 (Pearce Higgins, 2; the Declaration of Paris will also be found in the Manual of Emergency Legislation, 446).

[2] Declaration of London, Art. 57.

[3] Ibid. Art. 58. [4] Westlake, I. L. ii. 163; Cob. Cases, ii. 28.

[5] Pearce Higgins, 285.

on signing the Convention, which she has not ratified.[1] English law—and also that of the United States of America—regards commercial domicile as the criterion of the cargo-owner's enemy or neutral character; if an enemy subject resides in a neutral country he is, for commercial purposes, not regarded as an enemy; while, conversely, a neutral, or even a British, subject who voluntarily resides in an enemy country is regarded as subject to the disqualification of alien enemies.[2] At the London Conference of 1908–9 the powers were equally divided on the question whether the nationality or the domicile of the owner of the goods should be the test of his character, and no agreement could be arrived at.[3]

Contraband distinguished from

1. Capture of enemy goods.

Enemy goods, of whatever kind, found on board an enemy ship are liable to capture simply because they are enemy property, and their nature and destination are immaterial.[4] Formerly it was unnecessary, as a general rule, to consider the nature or destination of enemy property on board a neutral vessel, although where the

[1] P. P. Misc. No. 5 (1908); Pearce Higgins, 293–4.

[2] Westlake, I. L. ii. 164; Col. Papers, 607–12; Cob. Cases, ii. 24; Dicey, Confl. 740; Hals. Laws, vi. 195; xxiii. 278–9; Borchard in 9 A. J. (1915), 120–1. By clause 3 of the Trading with the Enemy Proclamation of September 9, 1914, the expression 'enemy' is declared to mean 'any person or body of persons of whatever nationality resident or carrying on business in the enemy country', and 'persons of enemy nationality who are neither resident nor carrying on business in the enemy country' are expressly excluded (M. E. L. 379). And see *Porter* v. *Freundenberg*, *Kreglinger* v. *Samuel* (*S.*) and *Rosenfeld*, *Re Morten's Patents* [1915] 1 K. B. 857. But the converse of the rule that if a person carries on business in an enemy country he has his commercial domicile there, does not extend to the case of a merchant residing in a hostile country and having his house of trade in a neutral country, because it is held that an enemy domicile imp[illegible] a general enemy character which will affect all the property of such a person embarked in trade (the *Antonia Johanna* (1816), 1 Wheat. 159; the *Clan Grant* (1915)). The Anglo-American rule has been adopted by the Allies in the war of 1914–15 (Bentwich in 9 A. J. (1915), 29).

[3] P. P. Misc. No. 4 (1909), 61, 100; Pearce Higgins, 604; Bent. Decl. 112.

[4] Twiss, War, 141 (§ 73); Hall, I. L. 437; Opp. I. L. ii. 221; Bonfils, 846.

goods would, if neutral, have been contraband, the neutral carrier was deprived of the freight to which he was ordinarily entitled in respect of captured enemy goods.[1] Now, as we have already noticed,[2] owing to the provisions of Article 2 of the Declaration of Paris, 1856, the neutral flag covers such property with the exception of contraband of war.

2. Trading with the enemy.

A belligerent is, of course, entitled to seize any warlike supplies destined to his enemy that belong to one of his own subjects; but in that case he does not act in pursuance of any rule of international law. It is the practice for states at war to forbid their own subjects to hold any kind of commercial intercourse with the enemy, and by English law the property of a British subject who engages in such a trade without the permission of the Crown is confiscable as prize to the captor.[3] Action in disregard of this prohibition, whatever the nature of the articles supplied to the enemy, would constitute a breach, not of the law of contraband, but merely of the municipal or domestic law of the trader's own country. But if the goods were carried in a neutral vessel, the provisions of the law of contraband would apply to the latter; for, as appears from our definition, whenever the carrier

[1] The *Commercen* (1816), 1 Wheat. 382; Scott, 765; cf. Hist. Add. Letts. 28.

[2] Supra, p. 3, n. 1. As to the precise effect of this provision, cf. Ath. Jones, 275–6; Baty, S. A. 3. The United States have never formally accepted the Declaration of Paris, because it does not go far enough and exempt from belligerent capture on the high seas all private property which is not of the nature of contraband of war; but they gave effect to its principle during the civil war and also in the war with Spain in 1898, and the rule of Art. 2 was embodied in Art. 19 of the Naval War Code of 1900 (infra, pp. 14–15). Except as a necessary act of reprisal, no power is now likely to depart in practice from the provisions of the Declaration (cf. Hall, I. L. 693–4; Westlake, I. L. ii. 145; Hol. Letts. 72–4; Pearce Higgins, 3–4. A list of the powers that have acceded to the Declaration will be found in Bent. Decl. 170).

[3] Hall, I. L. 383–5, and authorities cited in n. 3 on p. 384; Heffter, D. I. 270–2 (§ 123); the *Hoop* (1799), 1 C. Rob. 196; 1 E. P. C. 104; the *Jonge Pieter* (1801), 4 C. Rob. 79; 1 E. P. C. 353; the *Panariellos* (1915), 31 T. L. R. 326; B. & C. P. C. 195; Bentwich in 9 A. S. (1915), 352–71.

is neutral, it is immaterial, so far as he is concerned, to whom the noxious articles actually belong.

3. Unneutral service.

The term 'contraband of war' applies properly to merchandise only,[1] and carriage of contraband must be carefully distinguished from the carriage of persons and dispatches for the enemy. Such expressions as 'quasi-contraband',[2] 'analogues (or analogous) of contraband',[3] and *contrebande par accident*,[4] have been employed by various writers to denote traffic of the latter kind, and in the early stages of the law of nations it was not dealt with separately. But the analogy between traffic of this kind and carriage of contraband lies not so much in the nature of the acts themselves as in the nature of the measures applied to repress them. When a neutral vessel is chartered by a belligerent government or its agents for the purpose of carrying men or dispatches, such carriage takes place in the direct service of the belligerent. Acts of the kind in question are therefore more properly called 'unneutral service',[5] and treated as a distinct branch of the law of neutrality.

4. The furnishing

In his proposed International Code[6] Field defines

[1] Cf. the *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Co.* [1908] 1 K. B. 910 and 2 K. B. 504; and Dupuis in 3 R. G. D. I. (1896), 651.

[2] Pratt, liv.

[3] Hall, I. L. 674; Westlake, I. L. ii. 302–3; Opp. I. L. ii. 516 and n. 2. In the affair of the *Trent* the American case was based on the assumption that the captured Commissioners were contraband of war (Hist. Letts. 187).

[4] Heffter, D. I. 395–7 (§ 161 a); Bischof, Seerecht, 63–4 (§ 44); Hirsch, 42 (§ 12).

[5] As in chapter III of the Declaration of London. Cf. Hall, I. L. 674–5; Opp. I. L. ii. 515–16; Cob. Cases, ii. 385; Bonfils, 1016; Manceaux, 4–5; and § 34 of the modifications of the *Règlement des Prises* voted by the Institute of International Law at Copenhagen in 1897 (16 Ann. 45, 311). Besides the cases of unneutral service which are similar in their results to carriage of contraband, Article 46 of the Declaration enumerates four kinds of unneutral service which vest the neutral vessels engaged in them with enemy character. There are also other forms of unneutral service, such as signalling and showing channels, which almost as much amount to a participation in the war as enlistment in the ranks of the enemy's armed forces.

[6] § 859; and cf. Art. 44 of the draft code of neutrality drawn

of war supplies by the neutral state itself.

contraband of war as including, not only the 'private property of any person whomsoever', but also the 'public property of a neutral nation', of the requisite nature destined for the enemy's use. But a neutral power that, either in its corporate capacity or through the action of its officials or public servants, supplied either of the belligerents with any kind of war material would commit a breach of national neutrality for which the state as a whole would be liable to make full reparation to the power it had injured,[1] which, in a sufficiently grave case, might even be entitled to declare war against the offending neutral.[2] The furnishing of such materials by private persons, on the other hand, as we have noticed in the first chapter,[3] in no way compromises the neutrality of the state to which they belong. It is with these cases where the belligerent deals directly with the neutral trader and there is no question of any breach of state neutrality that the law of contraband is concerned.

up by the Institute of International Law in 1906 (21 Ann. 113, 158–9).

[1] See 13 H. C. 1907, Art. 6; and cf. Dav. Elem. 396, 450. Of course the goods, if captured, would undoubtedly be confiscated (Lawr. War, 145).

[2] Westlake, I. L. ii. 202–3.

[3] Supra, p. 4; and cf. 5 H. C. 1907, Art. 7; 13 H. C. 1907, Art. 7; and Pearce Higgins, 464–5.

CHAPTER III

SOURCES OF THE LAW OF CONTRABAND

Derivation of term contraband.

THE word 'contraband' is derived through the Italian *contrabbando* from the Low Latin *contrabannum*, and means literally 'in defiance of an injunction' or 'contrary to a decree or proclamation'. The most ancient document in which the word appears to have been found is an Italian charter of 1445, where it is employed in its Latin form to denote a trade in salt prohibited by the sovereign authority of a state to its own subjects in time of peace;[1] and it is still applied in this sense to merchandise, the importation or exportation of which is forbidden by the laws of a particular kingdom. Subsequently the term was also used to denote the goods which, as we shall presently see, belligerents became accustomed to forbid, by declarations formally communicated to neutral powers at the outset of war, to be carried to their enemies by sea; and in order to distinguish this traffic from ordinary contraband trade, the prohibited neutral commerce with a belligerent came to be called 'contraband of war'. The treaty of Southampton of 1625 between England and Holland[2] affords the first official mention of the word with this meaning in relation to the laws of war.

Sources. International practice.

Like all other rules of international law, the rules relating to contraband of war are to be deduced from the practice and opinion of nations as evidenced in unilateral

[1] Calvo, D. I. v. 1 2; Nys, D. I. iii. 626; Desp. D. I. 1255–6; Kleen, Neut. i. 350, n.; Brochet, 13, n. 2; Twiss, War, 233–4 (§ 121); Westlake, I. L. ii. 278, n. 1; Opp. I. L. ii. 480; Smith & Sib. 181.

[2] Art. 20 (Dum. V. ii. 480).

acts (such as general ordinances and notifications), in the provisions of treaties to which they have been parties, in the decisions of their prize and other courts, and in the arguments adduced by their statesmen in dispatches and other public utterances.[1] With regard to treaties, however, caution must be exercised in appealing to their provisions as evidence of a general usage, especially with reference to the contraband or non-contraband character of a particular article. No doubt a continuous course of similar conventions will go a long way to establish a general rule for the guidance of all countries; but, more often, treaties are but evidence of what particular states consider advantageous rules, having regard to their own peculiar interests; special stipulations are introduced because without them the common law would make a different disposition.[2] As Pitt once well expressed it, 'the very circumstance of making an exception by treaty proves what the general law of nations would be if no such treaty were made to modify or alter it.'[3] The maritime law of nations, as evidenced in their practice and the decisions of their prize courts, has sometimes stood in direct opposition to that law as recognized by contemporaneous treaties;[4] while the provisions of the treaties are various and contradictory, even in the case of conventions entered into at different periods between the same nations. Except for ascertaining by what engagements a state is actually bound, the majority of the treaties in which articles of contraband are enumerated present but little interest.[5]

Treaties.

Text writers.

Although there is a natural tendency for the opinions of international jurists to be affected by the practices and special necessities of the countries to which they

[1] Walk. Hist. i. 29–9; Bonfils, 22–9, 998; Reddie, i. 38, 65–6.
[2] Cf. Hist. Letts. 80, n.; Hall, Rights, 7–12; Reddie, i. 4–5, 6–12.
[3] Pitt's Speeches, iii. 227–8. [4] Cf. Wheat. Hist. 204.
[5] Westlake, I. L. ii. 286–7; Hall, I. L. 638–41; Boeck. 593–4.

belong, their writings are valuable as evidence of the prevailing doctrine, and have not been without influence in the formation of the law itself.[1] With such writings may be classed the discussions and resolutions of voluntary international associations like the Institute of International Law. This is an association of publicists of all nations, founded at Ghent in 1873, one of the principal objects of which is to promote the codification of the law of nations by means of international conventions.[2] From 1874 to 1877 the subject of contraband was considered by the Institute in its discussions upon the treatment of private property at sea.[3] In 1878 the question of the establishment of an international prize court was raised by the late Professor Westlake, and this led to the discussion of the law of maritime warfare and to the adoption of a Naval Prize Code at Turin in 1882, at Munich in 1883, and at Heidelberg in 1887.[4] The subject of contraband was also touched upon in 1883–5 in connexion with the consideration of railways in time of war.[5] Then, at the session of the Institute at Geneva in 1892, it was decided to consider the law of contraband by itself. This course was proposed by Kleen, who, in the following year, published a draft Code, under the title *De la contrebande de guerre et des transports interdits aux neutres d'après les principes contemporains*, accompanied by a commentary in which he set forth his views in an extensive study of the subject. After a very

Institute of International Law.

Discussions of contraband.

[1] Wheat. Hist. 491; Walk. Hist. i. 21–2; Kent, I. L. 43; Cob. Cases, i. 7–8; Westlake, Chaps. 84; Col. Paps. 84; I. L. ii. 200; Reddie, i. 95–6; Kleen, Neut. i. 17–18; cf. the judgement of Cockburn, C. J. in the *Franconia* case (*R* *Keyn* (1876), L. R. 2 Ex. Div. 63; Scott, 154); and the *West* *Central Gold Mining Co.* v. *Rex* [1905] 2 K. B. at p. 402. The first writer to have treated of contraband of war appears to have been Martinus Navarrus (Martin de Azpilcueta) in his book Relectio capitis, Ita quorundam, de Judaeis, published at Coimbra in Portugal in 1550 (Hrabar in 13 R. D. I. 2nd ser. (1911), 183–94; Nys, D. I. iii. 634–5).

[2] Beckenkamp, 2.

[3] Id. 6–21.

[4] Id. 21–31.

[5] Id. 31–2.

protracted discussion and the preparation of several fresh drafts, a set of rules to govern international practice with regard to contraband of war was adopted at Venice in 1896.[1] The Institute also dealt with the subject of contraband ten years later, at the session at Ghent, when it discussed a draft code of the law of neutrality prepared by Kleen.[2]

National Codes of Prize Law.

Many maritime powers, as, for example, Italy, Holland, Spain and Portugal, have official codes of prize law, but no such code has ever been published by Great Britain.

British practice.

The attitude of the last-named country with regard to contraband of war is defined by reference to the general principles of international law, as interpreted by the decisions of British prize courts, and the provisions of the various proclamations and Orders in Council issued on the occasion of a particular war. It is true that in

Manual of Naval Prize Law.

1866 a Manual of Naval Prize Law, prepared by Sir Godfrey Lushington, was issued by the British naval authorities for the officers of the Royal Navy, and that in 1888 Dr. Holland prepared a second edition, which was expressly stated to be 'issued by authority of the Lords Commissioners of the Admiralty'. But in the dispute with Germany over the *Bundesrath* cases during the Boer war it appeared that the Manual was no longer recognized as an official publication, and it has since been withdrawn.[3] On June 27, 1900, the United States published a body of rules for the guidance of the American navy entitled 'The Laws and Usages of War at Sea'. But this code also, which was drafted by Captain Charles

United States Naval War Code.

[1] Beckenkamp, 33–71. The discussions and resolutions are in the Annuaire, vols. xiii, xiv, and xv, and the *Réglementation internationale de la contrebande de guerre* adopted in 1896 will also be found in Opp. I. L. ii. 511, n.

[2] 21 Ann. 111–13, 130, 157–9.

[3] P. P. Africa, No. 1 (1900), 18-19. In his preface Dr. Holland expressly says (p. v) that he made no attempt 'to forecast the view which British prize courts may take of the effect upon the right of capture of the changes which have been introduced into the conduct of modern warfare'.

H. Stockton, was subsequently withdrawn on February 4, 1904.[1] The German law of prize is based on the law of May 3, 1884, which confers the general ordinance power in respect of this subject. In conformity with this law there was enacted the Prize Ordinance of September 30, 1909, consisting of 131 articles, together with some supplementary provisions of June 22, 1914. The rules of international law, as such, are not binding on the German prize courts. Where treaties are involved, resort must, of course, be had to their provisions; but in cases not covered by the express provisions of law, the general principles underlying the ordinances are to be applied.[2]

German Prize Law.

The law of naval warfare was outside the programme of the First Hague Conference of 1899, and the British delegates were expressly instructed to take no part in discussions of that subject. The representative of Luxemburg, however, endeavoured to bring the law of neutrality into the deliberations of the Conference; and, at the suggestion of the President, M. de Martens, the wish (*vœu*) was recorded that the question of the rights and duties of neutrals might be inserted in the programme of a conference in the near future.[3] The subject of the laws and customs of naval warfare was accordingly included in the programme of the Second Hague Conference of 1907. The second sub-committee of the third committee considered the rights and duties of neutrals at sea, and, as a result of their labours, the question of the responsibility of a neutral state for the trade of its subjects in contraband of war was determined, in accordance with the prevailing practice, by Article 7 of Convention XIII.[4]

The Hague Conferences of 1899 and 1907.

[1] Opp. I. L. i. 38; Hol. Letts. 30–2.
[2] Heymann, Das Prisenrecht des deutschen Reichs, in 19 Deutsche Juristen-Zeitung, 1048 et sq.; Reichsgesetzblatt, August 3, 1914.
[3] Pearce Higgins, 42; Beckenkamp, 75–6.
[4] Pearce Higgins, 448; Beckenkamp, 80–3; supra, pp. 3–4, 10.

The fourth committee was entrusted with the consideration of contraband of war, and, after the discussion of a proposal made by Great Britain for the complete abolition of the doctrine of contraband, which was not in fact approved,[1] the subject was referred to a special sub-committee. But the chief result of the deliberations was to disclose how completely opinions differed on almost every point; and, as there appeared to be no prospect of a unanimous vote, the fourth committee reported in favour of the submission of the whole question to a fresh examination by the interested states.[2] A list of certain contraband articles was, however, provisionally agreed upon; and this list was subsequently adopted by the Naval Conference of 1908–9, and incorporated in the Declaration of London.[3]

The London Conference of 1908–9.

Ten of the most important maritime powers were invited by Great Britain to this conference in London in order to draw up, if possible, a definite code of rules for the guidance of the international prize court which it was proposed to establish by Convention XII of 1907.[4] The settlement of the law of contraband was one of the foremost objects of the conference, and, as the result of much discussion and compromise, an agreement on the subject was arrived at between the delegates and embodied in Chapter II of the Declaration of London. But although the Declaration has been signed by all the powers represented at the conference, it has not been ratified, and the Prize Court Convention is in the same position.[5] At the outset of the war of 1914–15 the German and Austro-

The Declaration of London.

[1] Infra, pp. 102–4.

[2] P. P. Misc. No. 4 (1908), 194–6; La Deux. Confér. i. 256–60; Pearce Higgins, 4, 87–9, 523–4; Westlake, I. L. ii. 287–90; Beckenkamp, 76–80.

[3] Infra, p. 167.

[4] Pearce Higgins, 431–44; Westlake, I. L. ii. 317–24; Beckenkamp, 85–8; Hol. Letts. 181–2.

[5] On December 7, 1911, the House of Commons passed a Naval Prize Bill which contained the requisite provisions to enable Great

Hungarian Governments announced their intention to observe the rules of the Declaration without addition or amendment, but they have since added to the list of contraband articles and in other ways departed from the terms of the Declaration.[1] Great Britain and her Allies have also adopted the provisions of the Declaration as their rule of action, subject to such modifications and additions, consistent with the law as previously established, as are rendered necessary by the special circumstances of the war.[2] Although by a preliminary provision the signatory powers declared themselves agreed that the rules of the Declaration correspond in substance with the generally recognized principles of international law, it was admitted that those rules really 'represent what may be called the *media sententia*', and 'are not always in absolute agreement with the views peculiar to each country'.[3] In view of the amount of compromise and concession which was required to arrive at this *media*

Adoption in war of 1914–15.

Britain to ratify the Convention and Declaration (Bent. Decl. 171–5), but on December 12 it was rejected by the Lords, mainly on the ground of certain points which, as the powers could not agree on them, the Declaration left still for decision by the international prize court, in case it should be established, in accordance with its sense of justice and equity (Westlake, I. L. ii. 255–6; Hol. Letts. 193–5; 9 A. J. (1915), 200–1). It is incompatible with the constitution of the United States that a decision of the Supreme Court should be formally annulled by an appeal, and in order to overcome this difficulty an additional protocol was signed at the Hague on September 19, 1910 (5 A. J. (1911), Sup. 95; cf. 6 id. (1912), 799; Pearce Higgins, 443–4; Lawr. Prin. 492). For opinions as to the probable influence of the Declaration upon international practice apart from ratification cf. Westlake, I. L. ii. 256; Col. Paps. 645–7; Cob. Cases, ii. 285, 387; and as to the attitude towards it of other states than Great Britain cf. 9 A. J. (1915), 201.

[1] See infra, pp. 182–3, 185–6.

[2] See the Orders in Council of August 20 and October 29, 1914 (Appendix B, infra, pp. 282–5). The alterations chiefly concern the law of contraband. The German Government addressed a memorandum to neutral powers in which she complained of the attitude of Great Britain and France towards the Declaration of London as nullifying its chief points and also violating existing international law (*The Times*, October 26, 1914).

[3] P. P. Misc. No. 4 (1909), 34.

sententia, Article 65 of the Declaration stipulates that its provisions must be treated as a whole and cannot be separated; but this does not prevent a state which has not ratified the Declaration from declaring that it will act in accordance with some of the rules of that convention and depart from others which are inconsistent with its own previously established views of the law.[1]

The Renault Report.

The Declaration is accompanied by a General Report of the Drafting Committee, prepared by M. Renault, which not only discloses the considerations by which the Conference was guided in drawing the Declaration up, but also amplifies or qualifies many of its articles and suggests that many details not specified in them are to be implied. In accordance, as it seems,[2] with the continental practice, the Report was adopted by the Conference as a guide to the meaning of the Declaration; but it has been seriously questioned whether it would be binding on the signatory powers unless expressly adopted by them on ratification.[3] The Order in Council of August 20, 1914,[4] by which the modified rules of the Declaration were first adopted, directed all British prize courts to consider the Report as an authoritative statement of the meaning and intention of the Declaration and to construe and interpret its provisions by the light of the commentary therein. But this direction was dropped in the subsequent Order in Council of October 29, 1914,[5] which repealed and replaced the earlier one. In English law a draftsman

[1] Cf. Bent. in 9 A. J. (1915), 37; and Editorial Comment, ibid. 201–2.

[2] But see Lord Alverstone's remarks in the debate in the House of Lords on March 13, 1911 (7 Hansard (1911), 464–5).

[3] P. P. Misc. No. 4 (1909), 94, and No. 4 (1910), 21–2; Pearce Higgins, 567, n. 1; Bent. Decl. 8; Bate, Decl. 11–12; Hol. P. C. 6–8; Letts, 186–90; Cohen in 27 L. Q. R. (1911), 12. Westlake, however, considered that the Report had been duly incorporated in the Declaration (Col. Paps. 651–4, 667–71).

[4] Clause 0 (App. B, infra, p. 283).

[5] Declaration of London, Order in Council No. 2, 1914 (App. B, infra, p. 284).

is not allowed to define the intention of his own document in the way attempted by the Naval Conference; this can only be done by the document itself;[1] and it is therefore to be regretted that the Report was not originally expressly incorporated into the Declaration.[2]

[1] Beal, Legal Interpretation, 287–90.

[2] The Declaration of London will be found, with the Report, in Pearce Higgins, 538–613, and also in M. E. L. 447–514; and see Appendix A, infra, pp. 256–81.

CHAPTER IV

CONTRABAND IN THE WARS OF THE GREEKS AND ROMANS AND THE PROVISIONS OF THE CIVIL AND CANON LAW

I. Instances of the Application of the Principle of Contraband in the Wars of the Greeks and Romans

Antiquity of the law of contraband.

At the present day the rules regarding contraband of war, being concerned with the relations between belligerent states and neutral individuals, are universally treated as a branch of the law of neutrality. But, as we have already observed,[1] the fully-developed principles of the modern law of neutrality, the foundation of which is a duty on the part of non-belligerent states and their subjects to observe the strictest impartiality towards the contending parties and to refrain from taking part in, or from interfering with, any operation of war that is legitimate as between the belligerents,[2] are of comparatively recent growth; whereas the origin of the law of contraband is to be found in times long anterior to the recognition of this general duty of impartiality and abstention on the part of a neutral state. Attempts by belligerents to prevent the transport of arms and other necessaries of war to their enemies by the subjects of non-belligerent states—the essential idea of contraband of war—is as old as war between civilized communities.

Classical instances

In 295 B.C. we meet with a case more akin to blockade than contraband. Demetrius Poliorcetes, King of Macedonia, who was besieging Athens, captured a merchant

[1] Supra, p. 2.

[2] Westlake, I. L. ii. 192; Kleen, Neut. i. 208.

ship bound for that city with a cargo of wheat, and put to death both the owner and the pilot. Other traders were so alarmed at this that, as Plutarch informs us, they were deterred from attempting to carry further supplies to the Athenians, with the result that a famine ensued and the city was speedily compelled to surrender.[1] Later on, at the close of the first Punic war, a clearer case of the practice of contraband occurred. A formidable insurrection broke out among the mercenary troops of Carthage, and in 239 B.C. five hundred persons sailing from Italy with provisions for the mutineers were captured by the Carthaginians and thrown into prison. This aroused great resentment at Rome. Ambassadors were sent to Carthage and eventually possessed of the men were released by diplomatic means. But the Romans were so angered with the result that they proceeded to prohibit the export of provisions to the mutineers, while Carthage expressly allowed their merchants to export to Carthage whatever from time to time was required.[2]

Their legal character and value.

Although, however, in some matters—as, for example, in reference to the inviolability of heralds and the observance of truces[3]—a system of rules and customs analogous to the modern law of nations existed, equity, and although the idea of a community remaining friendly with both sides in a controversy which it had no concern seems to have been more or less clearly understood, it must not be supposed that the particular incidents referred to in the preceding paragraph arose from the recognition of any general rules or principles

[1] Plutarch, Demet. chap. 23; Phillipson, Greece and Rome, ii. 383.
[2] Polybius, bk. i, chap. 83; Hosack, 9; Phillipson, op. cit. ii. 383.
[3] Walk. Hist. i. 50–4; Westlake, Chaps. 18–19; Col. Paps. 18–19; Hershey, in 5 A. J. (1911), 901. When Queen Tueta sent men to assassinate a Roman ambassador on his return home, the Romans, Polybius says (bk. ii, chap. 8), were highly incensed at the queen's violation of the law of nations (*διοργισθέντες ἐπὶ τῇ παρανομίᾳ τῆς γυναικὸς εὐθέως*).

with which the interested parties felt their conduct ought to conform.[1] 'The policy of belligerents with regard to non-combatant states was in general shaped in accordance with considerations of state utility. In actual warfare there was no hesitation to adopt such practices against third states as were thought to be advantageous to the one side and disastrous to the other; and such third states, if weaker than their aggressor, were often obliged to submit to extreme measures, and rarely had any subsequent remedy.'[2] Every form of trade with the enemy might be prohibited to non-belligerents; while, on the other hand, third parties might be required to render assistance to a powerful belligerent by allowing his forces to pass through their country and supplying him with provisions and the like.[3]

In such a condition of things it was impossible for there to be, apart from convention, any generally recognized duty on the part of a neutral community and its citizens to abstain from assisting either of the belligerents in the conduct of hostilities. Thus, one of the terms of the league of amity and confederacy which Judas Maccabeus successfully concluded with the Romans in 161 B.C. expressly stipulated that neither of the contracting parties should aid the enemies of the other during war with arms, ships, money, or provisions.[4]

2. Provisions of the Civil and Canon Law

Provisions of the Civil Law.

When Rome subsequently became a world-empire, and all the civilized people of the West were subject to one imperial ruler, international law, and with it all idea of a state of neutrality, was bound, as Dr. Walker truly

[1] Cf. Phillipson, op. cit. ii. 186–7, 382–3; Walk. Hist. i. 55–6; Taylor, I. L. 617–19.

[2] Phillipson, op. cit. ii. 382; cf. Desp. D. I. 1195; Kleen, Neut. i. 2–3.

[3] Opp. I. L. ii. 347–8.

[4] 1 Macc. viii; Hosack, 9, n. 3.

remarks,[1] to find its vanishing point. But, from the earliest times, Greek and Roman municipal law punished with death or exile and confiscation of property the furnishing of arms and other appliances of war to the enemy;[2] and very stringent prohibitions of the sale of arms and other necessaries to the barbarians are to be found in the Digest and Code of Justinian.[3] Thus, in Dig. 48, 4 (Ad Legem Iuliam Maiestatis), 4, pr. we read:

Eadem lege tenetur . . . cuiusve opera dolo malo hostes populi Romani commeatu, armis, telis, equis, pecunia, aliave qua re adiuti erunt.[4]

Similarly, the ordinances of the Emperors Valentinian, Gratian, Honorius, Marcian, and Theodosius, recorded in Cod. 4, 41 (Quae res exportari non debeant), provide:

1. Ad barbaricum transferendi vini et olei et liquaminis nullam quisquam habeat facultatem, nec gustus quidem causa aut usus commerciorum. 2. Nemo alienigenis barbaris cuiuscunque gentis, ad hanc urbem sacratissimam sub legationis specie vel sub quocunque alio colore venientibus, aut in diversis aliis civitatibus vel locis loricas, scuta, et arcus, sagittas, et spathas, et gladios, vel alterius cuiuscunque generis arma audeat venumdare, nulla prorsus iisdem tela, nihil penitus ferri vel facti iam vel adhuc infecti, ab aliquo distrahatur. Perniciosum namque Romano imperio et proditioni proximum est, barbaros, quos indigere convenit, telis eos, ut validiores reddantur, instruere. Si quis autem aliquod armorum genus quarumcunque nationum barbaris alienigenis contra pietatis nostrae interdicta ubicunque vendiderit, bona eius universa proscribi protinus ac fisco adici, ipsum quoque capitalem poenam subire decernimus.[5]

[1] History, i. 58–9. [2] Phillipson, op. cit. ii. 313.
[3] Cf. Nys, Orig. 224; G. M. 35 and n.; Cauchy, D. M. i. 158–9; Pard. U. et C. i. 131 and nn.; Walk. Science, 506; Heffter, D. I. 383 (§ 158).
[4] And cf. Dig. 39, 4 (De Publicanis et Vectigalibus et Commissis), 11.
[5] And cf. Cod. 9, 47 (De Poenis), 25.

Their legal character and influence on modern international law.

These enactments do not, of course, afford direct authority for the international unlawfulness of trade in contraband of war; for they were merely provisions of the national criminal law. The acts which they forbade constituted, not breaches of an obligation owed by a neutral state or its subjects to a belligerent, but treasonable practices on the part of individuals towards their own government.[1] Modern international law, however, arose at a time when Roman law was regarded as the common law applicable to the relations between the various monarchical rulers of the world, with whom their states were identified; and the conception of the Ius Gentium as a law of all mankind secured the easy incorporation into the law of nations of decision after decision of Roman municipal origin.[2] The early writers on international law were all learned civilians, and there can be no doubt that the prohibitions contained in the civil law against furnishing the barbarians with necessaries of war strongly confirmed in their minds, and in those of the statesmen of the time, the sense of the unlawfulness of trade in contraband of war.[3]

Mediaeval trade with the Saracens.

In the tenth century the Venetians had an important trade with the Saracens, whom they supplied with arms and ship timber. The warlike emperors of the Basilian dynasty, who were valorously fighting against the invading Mussulmans in Asia Minor, in Syria, and in Crete, vigorously objected; in 971 the Emperor John

[1] Cf. Nys, Orig. 225–6; G. M. 35–6; Kleen in 25 R. D. I, 10; Neut. i. 248–9; Phillipson, op. cit. ii. 313–14.

[2] Cf. Nys, G. M. 47–8; D. I. iii. 632–5; Kent (by Abdy), 32–3; Walk. Hist. i. 59; Opp. I. L. i. 52–3; Westlake, I. L. i. 15; Polleck, 22–4; Hershey in 5 A. J. (1911) 921, 926; and Lord Stowell in the *Maria* (1799), 1 C. Rob. at p. 363; 1 E. P. C. at p. 159.

[3] Cf. the citations from the Digest with reference to contraband in Gentilis's De iure belli, bk. ii, chap. 22 (p. 257). The arguments in the Hispanicae Advocationis are founded in the main upon citations from Roman civilians and their commentators (see Walk. Hist. 274); while Grotius's *magnum opus* abounds in quotations from classical writers.

Zimisces sent ambassadors to the Doge and threatened to set fire to the ships engaged in such trade, wherever they might be met. The Doge thereupon forbade, under pain of a heavy fine, or, in case of insolvency, under pain of death, the sale or delivery to the Saracens of arms or timber suitable for constructing or arming vessels.[1]

At one time Egypt was of considerable importance in the mediaeval world; for at the market of Alexandria was accumulated the greater part of the products of the East, which European merchants came to buy, bringing in exchange the products of the West, especially arms and material of war.[2] But Egypt soon became one of the first Mussulman powers, while one of the main advantages that the Christian nations possessed over the Saracens was the coat of mail and other defensive armour.[3] During the Crusades Venetians, Genoese, and Pisans vied with each other in assisting the enemies of the Cross by supplying them with ship timber, pitch and tar, and metals and arms. The policy pursued by the Roman emperors in relation to traffic with the barbarians was accordingly copied by the Church regarding trade by Christians with the infidels. Severe penalties were decreed against such traffic by the third Lateran Council in 1179, by the fourth Lateran Council in 1215, and by the first General Council of Lyons of 1245.[4] Henceforth whoever dared to sell to the Saracens iron or arms, wood for naval construction or ships, or to enter the service of the infidels as a captain or pilot, was to be excommunicated and deprived of his goods and personal liberty. He was to become the slave of his captor.

Prohibitions of the canon law.

The Provincial Councils adopted similar provisions, and the popes addressed exhortations and threats to the

[1] Nys, Orig. 224–5.
[2] Nys, D. I. iii. 627.
[3] Hal. M. A. iii. 316, n. b.
[4] Nys, Orig. 284–5; G. M. 35–6; D. I. iii. 627–8; Desp. D. I. 1196 and n.; Twiss, War, 243, n. 21; Heffter, D. I. 383 (§ 158).

various commercial cities. Innocent III appealed to the Venetians; Gregory X wrote to the citizens of Genoa, Montpellier, and Narbonne. The authorities of the towns could not do less than repeat the papal warnings and decree penalties against those who were guilty of such an abuse of the liberty of commerce. The consuls of Genoa (1151) and Pietro Ziani, Doge of Venice (1226), issued special ordinances on this subject for their citizens; the King of Aragon did the same for the inhabitants of his territory and the citizens of Barcelona. In 1252 St. Louis and in 1312 Philip the Fair prohibited the export of arms, iron, and horses from France for the enemies of the faith. The popes even demanded the insertion of their bulls among the official acts of the cities. Thus, in 1304, Benedict XI addressed himself to the Doge, council, and citizens of Venice; he forbade, under severe penalties, the transport of horses, arms, iron, wood, or provisions to Alexandria or any other part of Egypt, and required the bull to be placed and transcribed among the decrees of the city.[1]

Not confined to articles of warlike use.

But the traffic did not decrease. The Venetian merchants disregarded the ecclesiastical prohibitions; the Pisans undertook, in their treaties with the Egyptian sovereigns, to supply the latter with naval stores and arms. The popes then attempted to forbid trade of every kind with the infidels. But these decrees were equally violated, as were also the prohibitions, under pain of excommunication, of all commercial dealings with Venice, which were issued by Clement V in 1309 and Sixtus IV in 1483 to compel the Venetians to restore their conquests in Ferrara. In theory, however, the distinction was maintained between lawful and unlawful traffic—between goods, such as iron, arms, timber, and ships,

[1] Cf. Nys, Orig. 184–5, 225; D. I. iii. 628; Manceaux, 9; Hautefeuille, Hist. 121–2.

which were at all times forbidden to be conveyed to the Saracens, and other more innocent goods, which could be consigned to them in time of truce.[1]

Legal character of the papal prohibitions.

At the commencement of the Middle Ages it is impossible to discover any idea of the modern unity of nations as distinct from a world empire. The imperial idea was resuscitated in the West by Charlemagne, Otho, and their successors; while the Church also continued the notion of a world unity, but, like later Rome, refused to recognize the independence and absolute autonomy of the component states of her empire. The papal decrees, which were addressed to the faithful as members of the Catholic Church, were, like the corresponding provisions of the civil law, distinctly municipal and domestic in character. They prohibited trade with belligerents who were regarded as the enemies of every Christian nation, including those which remained strangers to the war. Even as neutrals the subjects of such a nation, it was thought, should consider an enemy of the Church as an enemy of their own country. They were looked upon as bound to the Christian belligerents by the common banner of the Cross; and trade in contraband by which a subject, even neutral and foreign, of that banner helped an adversary of the Holy cause was treated, notwithstanding the difference of nationality, as an act of high treason.[2]

Their influence on modern international law.

But as the allies of the Cross, while regarding themselves as brothers in arms, were not actually fellow-countrymen, the prohibitions of the Church afforded a precedent for regarding traffic in contraband goods as something more than a simple breach of national criminal law. And although the stipulations of the Canon Law may only have bound the subjects of those states which

[1] Cf. Nys. Orig. 285–6; D. I. iii. 628–9, 633.
[2] Cf. Walk. Hist. i. 83–4; Ward, Hist. i. 343–4; Hershey in 5 A. J. (1911), 922–3; Desp. D. I. 15–16.

acknowledged the papal supremacy, they had obviously, like those of the civil law, considerable influence in generating and strengthening the notion of the illegality of trade in contraband of war. But the ultimate source of their obligation was municipal rather than international in character,[1] and certainly did not arise from the conception of a duty on the part of a neutral state and its subjects, as such, to refrain from all participation in hostilities and from giving any succour to either of the belligerents. It was as members of the Christian confederation which recognized the Pope as its supreme head, and not as members of a society of mutually independent states, that Christian princes sanctioned the papal prohibitions by their own municipal ordinances.[2]

[1] Cf. Nys, D. I. iii. 629; Manceaux, 9; Brochet, 14.

[2] Cf. Twiss, War, 238, n. 11, and 243; Gent. H. A. bk. i, chap. 20. Gentilis discusses the case of an English ship which had been captured by Sardinian and Maltese cruisers while sailing to Constantinople, under a licence from Queen Elizabeth, with a general cargo and some gunpowder, and which was in judgement before a Spanish court of admiralty for carrying munitions of war to an infidel nation contrary to the prohibition of the canon law. The King of England, he says, is supreme in the ecclesiastical affairs of his kingdom, and therefore his express permission to transport articles of contraband to the Turks will absolve his subjects from liability to the penalties of the canon and civil law. 'Etiam licita ad Turcos ferri per placita Reginae Elizabethae. Has patrias leges norunt Angli, quas sequuntur: alias et canonicas illas non norunt, quae exulant etiam ex Anglia' (p. 79).

CHAPTER V

ORIGIN AND DEVELOPMENT OF THE PRINCIPLES OF THE MODERN LAW OF CONTE[illegible]ND

As soon as war against the infidels gave [illegible] to war between the Christian states themselves, a more truly international conception of contraband became possible. But at first there was no idea whatever of a duty on the part of rulers and their subjects who were not directly concerned in a war to abstain from assisting the belligerents and from interfering in any way in their warlike operations. On the contrary, there continued to exist throughout the Middle Ages such an absence from the common law of nations of any recognized rule denying to a state the right to commit, or to permit its subjects to commit, acts of open hostility against other states with which it was nominally at peace, that neither usage nor moral opinion was outraged if a neutral power allowed a belligerent or his ally to enlist levies within its territories or even if it should itself lend him money or ships or supply him with munitions of war.[1] In default of special treaty obligations the utmost extension of neutral care for which the mediaeval belligerent might look was the equal treatment of both sides.[2] Thus the

Absence of idea of modern obligations of neutrality in Middle Ages.

[1] Kleen, Cont. 71–2; Neut. i. 9–10; Manceaux, 3; Kent, 34, 324–5; Manning, 227–9; Hall, I. L. 571; Lawr. Prin. 590–1; Walk. Hist. i. 135–6, 197; Nys, Orig. 201–2; and cf. Louis XI's treaties with the Swiss Cantons of 1474 and 1475 (Dum. III. i. 465, 520).

[2] Walk. Science, 377–8. In the letters of neutrality of 1596 from Henry IV of France to Charles of Lorraine it was stipulated: 'Et quand nôtre dit Beaufrere ou ses officiers et sujets le feront pour l'un, seront aussi tenus de le faire pour l'autre, afin qu'égalité soit gardée' (Dum. V. i. 527).

Borgias, hesitating as to which side to take in the Franco-Spanish struggle, gave leave to both parties to enlist levies in Rome. Machiavelli openly condemned neutrality on the ground that it was more profitable to declare for the one or the other.[1]

Belligerent interference with neutral trade.

In self-defence a belligerent was bound to take such steps as lay in his power to prevent the deliberate assistance of his enemy; and in this respect, as Dr. Walker observes,[2] 'sovereigns declined to distinguish between military and merely mercantile succour of their foes; the foreign trader who carried on his accustomed commerce with a belligerent was apt to be roughly handled by the enemy.' As early as the thirteenth century it became the usage for powerful belligerents, following the papal example, to issue a proclamation at the commencement of a war forbidding all ships to carry provisions or supplies of any kind to the enemy under penalty of confiscation.[3] Such a proclamation was issued by Henry III in 1223; while Edward I tried to induce the Flemings to cease their commercial dealings with Scotland,[4] and in 1295 compelled the masters of neutral vessels lying in English ports to give security not to trade with France. In 1315 Edward II expressly forbade foreign merchants to transport wheat or any other kind of provisions to the Scotch under pain of imprisonment; and Edward III issued a similar declaration in 1337. In 1460 and 1487 the kings of Denmark demanded that

[1] The Prince, chap. xxi; Walk. Hist. i. 135.

[2] History, i. 136.

[3] Nys, Orig. 226; D. I. iii. 629; Jenk. Disc. 13–14; Westlake, I. L. ii. 199–200; Dav. Elem. 451, n.

[4] Cf. the letter from Robert, Count of Flanders, in 1305, asking Edward to allow his subjects to trade with the Scots as well as with others (Rym. I. iv. 39). The trade with Scotland was too lucrative to be resigned at the King of England's bidding, and Hallam (M. A. iii. 321) characterizes this as an early instance of that conflicting selfishness of belligerents and neutrals which was destined to aggravate the animosities and misfortunes of later times.

the Hanse towns should cease from all commerce with Sweden, with which the Danish monarchs were then at war.

Merchants granted conditional charters of privileges.

Charters of privileges were granted to the Hanseatic and other foreign merchants only on the express condition that they should not trade with the enemies of England.[1] Similarly, Edward III's confirmatory charters allowed foreign merchants to carry their goods, whether purchased within the kingdom or without, 'quo voluerint . . . praeterquam ad terras manifestorum et notoriorum hostium regni praedicti'.[2] In 1357 Spanish merchants were granted special liberty to trade with France under certain conditions.[3]

Attitude of neutral traders.

Neutrals did not always comply with the demand that they should break off their trade with a country at war. In 1458 Lubeck refused to obey such a demand from Dantzig, though in 1551 she herself made one on the Hollanders. The Hanse confederation complained in 1492 of the hardships and alleged injuries they had sustained in consequence of the war carried on by the King of Denmark and his ally the King of Scotland with Sweden, and of the interdiction of commerce with the latter country. But when the members of the Hanseatic league themselves went to war they were notorious for the severity of their prohibitions of neutral commerce with their enemies.[4] At the outset belligerent interference with neutral trade was an act of force, uncontrolled by any generally recognized principles of international law. What traffic with his adversary a belligerent could stop he did stop. The regulations of neutral trade

[1] 'Ne merces in terras manifestorum et notoriorum hostium Regni Angliae devcherent' (Camd. Ann. 1589, pp. 553–4); cf. Nys, Orig. 226; Walk. Hist. i. 136.

[2] Rym. II. iii. 15–16, 76–7; cf. Jenk. Disc. 18.

[3] Rym. III. i. 144.

[4] Grot. note to bk. iii, chap. 1, § 5; Reddie, i. 60; Calvo, D. I. v. 2; Cauchy, D. M. i. 358; Kleen in 25 R. D. I. (1893) 11, 14.

issued by a state at war were, as Jenkinson observes,[1] 'sometimes attended to and sometimes not, either as the interest of the party neutral inclined him to submit to the restraint, or as the power of the party belligerent enabled him to enforce the execution of it'.

Absence of law of naval warfare.

Prior to the twelfth century there was no body of generally recognized rules, or even of more or less consistent practice, that in any way approached to a law of maritime warfare; at this period naval warfare consisted of little else than piracy.[2] Such rules as were established by the Rhodian law and the treaties of Venice with the other Italian states during the latter part of the twelfth and the beginning of the thirteenth centuries were merely private, or regulated maritime commerce and the law of prize only in time of peace.[3] Of this nature are the rules contained in the second part[4] of the Black Book of the Admiralty with reference to the conduct to be observed by the masters of English vessels towards foreigners, which rules are avowedly based upon the Custom of the Sea and the general Maritime Law. The *Consolato del Mare* does not deal with the question of contraband.

Maritime Codes.

Treaty stipulations.

In order to restrain the wide liberty of action exercised by neutral powers, a great many treaties were concluded containing stipulations that neither of the parties should assist the enemies of the other, either publicly with auxiliary forces or subsidies, or privately by indirect means. Such stipulations usually extended to the acts of the subjects of the parties as private individuals. Sometimes the friends of a sovereign expressly renounced

[1] Discourse, 14; cf. Reddie, i. 61–4.

[2] Cf. Ward, Hist. ii. 340; Reddie, i. 66–7.

[3] Kleen, Neut. i. 5; ii. 93–4, 97–8; Kent, 2; Lawr. Prin. 589–90; Dav. Elem. 8–10, 451; Reddie, i. 26–7, 44–5, 58–9.

[4] This part probably consists of ordinances issued by the king in council in 1338 or 1340 (Twiss, Black Book, I. introd. xxxi, xliv).

by convention all commerce with his enemies.[1] A treaty of 1303[2] between England and France provided that the enemies of the one should not have from the lands or dominions of the other comfort, succour, or aid, whether of armed men or victuals or of other things whatever they might be. By a treaty of 1370[3] the Count of Flanders promised England to take certain measures for preventing his subjects from carrying enemy's goods and from supplying the enemy with arms, artillery, and victuals. In case of transgression the Count was to have their goods and the punishment of their bodies, but the enemy's goods and the arms, &c., being carried to the enemy were to belong to the King of England and were to be delivered to his agent. In 1505 Henry VII and the Elector of Saxony covenanted that neither of the contracting parties 'alieni alteri patrias, dominia, . . . alterius invadenti, . . . consilium, auxilium, favorem, subsidium, naves, pecunias, gentes armorum, victualia, aut aliam assistentiam quamcunque publice vel occulte dabit aut praestabit, nec a subditis suis dari aut praestari consentiat, sed palam et expresse prohibebit et impediet'.[4]

Tendency to restrict belligerent interference with neutral trade to articles of warlike use.

As time went on there was a tendency for these treaty stipulations to limit the right which a belligerent was acquiring by continuous usage to interfere with the trade of neutral subjects with his enemy's ports to the prohibition of such articles as were deemed to be of assistance to the enemy for the conduct of the war;

[1] Cf. Westlake, I. L. ii. 198–9; Nys, Orig. 226; D. I. iii. 629–30; Desp. D. I. 1259; Kleen, Neut. ii. 100.

[2] Rym. I. iv. 24. Shortly after 1303, during war between England and Flanders, some French ships with cargoes for the latter country were captured by the English. The French king claimed that this was piracy, but the English king answered that the captures were good prize, because they were aiding his enemies in breach of the treaty.

[3] Rym. III. ii. 172; cf. the treaties between England and the Duke of Burgundy in 1406 and 1446 (Dum. II. ii. 302; Rym. IV. i. 109; V. i. 164).

[4] Dum. IV. i. 75; and cf. the other treaties referred to in Hall, I. L. 572, n.

and there was a similar tendency to moderate in practice the original claim by belligerents to prohibit all neutral commerce with their enemies by means of formal notifications or warnings. By the sixteenth century the distinction between lawful and unlawful traffic with a belligerent is clearly recognized. The treaty of 1522 between Francis I and the Archduchess Margaret provided that the inhabitants of the districts affected 'pourront hanter, converser, trafiquer et marchander de choses licites et non prohibées'.[1] In like manner the similar treaty of 1595 between Henry IV of France and Philip II of Spain stipulated that it should be 'loisible . . . de trafiquer de toutes choses permises';[2] while, in the following year, the same French king declared in his letters of neutrality to Charles of Lorraine, 'voulons de plus que les marchands . . . de nôtredit Beaufrere, terres, lieux et seigneuries susdites, puissent . . . trafiquer avec leurs biens et marchandises par tous nos païs . . . et par celles dudit parti contraire et par tout ailleurs, librement et seûrement . . . à la charge qu'ils ne porteront marchandises prohibées par la guerre'.[3]

Practice of sixteenth century.

By ordinances of 1543 and 1584 France declared that her friends might carry on commerce during war and land where they pleased, provided the goods were not munitions of war; but if articles of the latter kind were carried it was to be lawful for the French to take them on payment of a fair price.[4] In 1543 there was a discussion between Sir Ralph Sadler, the envoy of Henry VIII, and the Government of Scotland respecting the detention of some Scotch vessels by the English Government which contended that as the vessels were carrying victuals to France, it was a breach of treaty, for the Scotch were

[1] Art. 2; and cf. Art. 4 (Dum. IV. i. 380).
[2] Dum. V. i. 518. [3] Ibid. 527.
[4] Lebeau, Code des Prises, i. 19-20, 29; Twiss, War, 242-3 (§ 124).

bound not to minister any kind of aid to the enemies of England. To this the Scotch Government made answer that there was no other cargo on board the vessels than fish, which was a common article of traffic between the two countries in time of peace. The English envoy replied that 'fish could not but be deemed to be victuals, and being laden in the said ships to be transported to France, which was in open hostility with England, was a certain kind of aid ministered to the enemies of England, and therefore a lawful and just cause to stay the said ships'.[1] Two years later England seized Hanse vessels taking supplies to French ports.[2] In a case of 1551 a proclamation was pleaded, which was issued during the war between England and Scotland towards the end of the reign of Henry VIII, that 'any shipp or other vessell laden with victualls or artillery or any other thing conveying owte of France to Scotland to the intente to ayde or succour the same realme of Scotland' should, if captured, be sold, 'gyffyng the merchauntes thereof the hole sommes that so shalde arise or growe of the same goodes so taken'.[3]

English policy during war with Spain.

During the last twenty years of the sixteenth century England became involved in a great conflict for empire with Spain; and the latter country, in spite of her great money resources, was very insufficiently provided with the munitions of naval warfare, excellent opportunities were afforded for the application of the essential principles of contraband. In 1585 Philip, being greatly in need of shipping materials, which were supplied chiefly by the Hanse, Dutch, and other merchants of northern Europe, issued a proclamation that all ships bringing such goods to Spain or Portugal should be treated as friends. Many ships, Hollanders as well as Easterlings, took

[1] Twiss, War, 246 (§ 120).
[2] Cheyney in 20 E. H. R. (1905), 664.
[3] Marsden in 67 Nautical Mag. (1898), 389.

advantage of this proclamation and continued to bring timber, hemp, tar, and other shipping materials to Spain during the years when Philip was preparing his Armada against England. And not only the cargoes but the ships themselves were, according to the custom of the day, used by Philip against his enemies. At first Elizabeth seems to have taken no definite step to hinder this trade between the Hanse towns, who were friendly to her, and the Dutch, who were her allies, and her Spanish enemy; but she did not fail to point out the inconsistency of the United Provinces in allowing their subjects to carry on a trade in war materials with Spain, whilst all commerce with the Spanish Netherlands was prohibited. In 1587, however, some ships at Falmouth were detained and searched, and it was declared by Order in Council that they should not be allowed to sail if laden with 'Spanish preparations, munitions, or victuals'.[1] On several occasions after this Elizabeth justified the seizure of the ships and merchandise of neutrals on their way to an enemy's country on the ground that it was allowable by the laws of war to capture such ships and their cargoes.

In 1588 Elizabeth called upon the King of France to prevent the exportation of corn from his country to Spanish ports, announcing her intention, in case her request was not complied with, to instruct the commanders of her ships lying upon the Spanish coast to 'impeach' all Spain-bound vessels laden with grain or any other kind of victual 'of what nation soever they be'. To this request the queen received an answer with which she was 'very greatly contented'.[2] In the same year Maurice Timberman, alderman of the Steelyard, was summoned before the Privy Council and directed to inform the Hanse cities that they were required 'to

Dispute with the Hanse cities.

[1] Marsden in 67 Nautical Magazine (1898), 394; and in 24 E. H. R. (1909), 692.

[2] Walk. Hist. i. 199.

forbeare to send into Spain or Portugal any kind of provision fitt for the maintenance of the king of Spayne for his warres against this realm, upon paine of confiscation of the same goodes and the shippes upon which they should be laden, in case they should be taken with any such warlyke provision by any of her majestie's shippes or of her subjects '.[1] The Hanseatic merchants, however, failed to comply with the Council's demand; and in 1589 Drake captured sixty of their vessels at the mouth of the Tagus freighted with wheat and naval stores, which it was alleged were intended to furnish a second Armada. But by the special grace and favour of the Queen only such things as were 'manifestly of the proper nature of victualls and of munitions' were confiscated.[2]

To the subsequent complaints of the Hanse towns, 'etiam minis intermixtas', as Camden, the contemporary annalist, tells us,[3] Elizabeth replied that she had warned them not to supply her enemies with provisions; that it was lawful to intercept the carriers; and that she could not do otherwise unless she desired willingly to bring destruction upon herself and her people. On their contending that her action constituted a breach of their ancient privileges, she pointed out that in Edward I's charters to the Hanseatic League it was expressly stipulated that such articles should not be furnished to the enemies of England: she observed further that it was notorious that their vessels had often been captured while carrying provisions in the heat of war to the French, not by the English alone, but by the Emperor Charles V,

[1] Cheyney in 20 E. H. R. (1905), 662.

[2] Ibid. 663. A list of the things considered to be 'manifestly of the proper nature of victualls and munitions' was appended to the declaration of the Privy Council by which the confiscation of the corn and war material was decreed (cf. infra, p. 106). The ships and the residue of the cargoes were restored (Marsden in 24 E. H. R. (1909), 692; cf. infra, p. 232).

[3] Ann. 1589 (p. 553).

by the kings of Sweden, Poland, and Denmark, and by the Prince of Orange in his recent contest with Spain. 'The right of neutrality must be used in such a way', she said, 'that none in our alliance are injured. It is not rightfully used when by helping one ally we are injuring another who is equally in our alliance.' [1]

Burleigh's proclamation.

In connexion with this dispute Burleigh drew up a proclamation 'for the satisfaction of such as are capable of reason and void of malyce', in which he states the English claim in the following terms: 'Her Majesty thynketh and knoweth it by the rules of the law as well of nature as of men, and specially by the law civil, that whenever any doth directly help her enemy with succours of eny victell, armor, or any kynd of munition to enhable his shippes to maintain themselves, she may lawfully interrupt the same: and this agreeth with the law of God, the law of nature, the law of nations, and hath been in all tymes practised and in all countries betwyxt prynce and prynce, and country and country.' [2] A contemporary French jurist, who sat for a long time in the first Court of Judicature in France, characterized Elizabeth's conduct as merely impolitic and not illegal.[3]

Early in 1596, when an English fleet had been prepared for an attack upon the ships and coasts of Spain and Portugal, a proclamation was issued by the Council in which it was declared that, England being in amity with all nations except Spain, her Majesty's navy had orders to refrain from injury to the persons and property of all men, except, in the first place, subjects of the King of Spain; in the second, such other persons as should give to that king 'manifest aid with men, shippes, artillery, victuals, and other warlike provisions for

[1] Chevney in 20 E. H. R. 1905, 664. [2] Ibid. 664.

[3] In tam alieno tempore tetam prudentiam existimabant imperiti dexterrimi factum esse a Regina et ab Anglis (Thuanus, bk. 96, cf. Lenk. Dr. 19).

invasion of her majesty'. If the latter class of persons failed to remove their ships and prohibited goods from all Spanish and Portuguese ports, the commanders of the Queen's navy would feel themselves at liberty to treat them as manifest aiders of the King of Spain, and consequently open enemies of England. They would, therefore, have no just cause of complaint or claim for restitution of such goods and ships as should be seized.[1]

Neutral protests.

Frequent seizures followed, which soon brought a response in the form of a series of protests from neutral governments. Early in the summer of 1597 an ambassador came from Hamburg, and he was almost immediately followed by Paul Dzialin, the ambassador of the newly elected Sigismund, King of Poland, in whose dominions lay Dantzig and Elbing, two of the Hanse towns which felt the hardship of English interference with neutral trade. Three days after his arrival in London, on July 23, 1597, this handsome, learned, and eloquent Polish gentleman had a dramatic interview with Elizabeth, who immediately replied in an impromptu Latin address, in which she reminded him that he ought to know that when war has broken out between kings it is allowed to one party to intercept the aid or succours sent to the other, and to provide that no injury thence arise to himself; this is in conformity to the law of nature and of nations, and was so enforced by the kings of Poland and Sweden in their wars with the Muscovite. The same arguments were repeated a few days afterwards by four of the privy councillors.[2]

Maintenance of English policy.

A somewhat more conciliatory policy was adopted towards the Danish embassy, which arrived a few weeks later; and when Spain and France made peace in 1598 and the latter power obtained a share of Spanish

[1] Cheyney in 20 E. H. R. (1905), 665 6.
[2] Hal. 866 8; Camd. Ann. 1597 (pp. 693 4).

commerce, Elizabeth had to submit to many infractions of what she considered her rights, for she could not adopt the same tone to Henry IV as to Sigismund and the Hanse towns, and had to confine herself to remonstrances.[1] But such concessions as were made only involved a slight narrowing of the list of contraband articles, without introducing any change of principle. No suggestion was made of surrendering the Queen's claim to the right of confiscation of contraband, which continued to be an established part of the policy of her government till the end of her reign.[2] The principle, so consistently maintained by Elizabeth, that during the progress of a war goods of warlike use carried by merchants of a nation not engaged in the war to aid one party may justly be confiscated by the other, disappeared in the resolution (*placaat*) issued by the Dutch States-General in 1599, whereby they forbade all merchants to carry to the Spaniards provisions *or any other goods whatsoever*, under penalty of being treated as enemies.[3] This was simply an attempt to revive the ancient practice of interdicting all neutral trade with the enemy.

Dutch action in 1599.

Authority of belligerent proclamations.

At this period, as Westlake observes [1] unilateral acts, such as the manifestos or notifications defining the restrictions imposed by a belligerent on neutral trade with the enemy, 'appear to have carried greater weight even in determining the law than we should now be disposed to concede to similar ones. They had been considered by statesmen before they were issued, and

[1] Cheyney in 20 E. H. R. (1905), 668-9; Monson's Naval Tracts, i. 275.

[2] Cf. Cheyney in 20 E. H. R. (1905), 669-70.

[3] Twiss, War, 247 (§ 126), quoting Grot. Hist. de Rebus Belg. bk. viii. None of the powers of Europe seems to have protested against this proclamation; Henry IV of France announced that he gave up the interests of his subjects who should within six months transgress it, and the English Government held it to be 'an effect of great necessity which had no law' (cf. Jenk. Disc. 23).

[1] I. L. ii. 200; cf. Twiss, War, 216-7 (§ 126).

there were few or no independent writers. Hence they attracted to themselves something of that respect which, during the two centuries following Grotius, was attributed to the eminent international jurists whose line he so magnificently inaugurated, and who, whatever their learning or their sincerity, were after all the nationals of some country or other. To this it must be added that even when a unilateral prohibition was in contradiction with the pronouncement of some other state . . . the sovereign who uttered it stood in the ideas of the time so immeasurably above the private person on whom he enforced it that the latter, although of another nation, seemed in infringing it to be guilty of an audacity almost wicked.'

Customary law of contraband established by end of sixteenth century.

By the end of the sixteenth century, as a result of the continued acquiescence of neutral sovereigns, belligerents had acquired a customary right, if they considered it to be necessary to secure a successful issue to the war in which they were engaged, to interdict neutrals from furnishing their enemies with the articles required by the latter for the maintenance of hostilities and to capture on the high seas the vessels of the subjects of neutral powers carrying such articles to the enemy.[1] When a neutral sovereign considered that his subjects had suffered through a belligerent exceeding the limits of the right of interference with neutral trade with which he was considered to be invested, he granted letters of reprisal to those subjects whereby they might make good their loss by seizing the property of the subjects of the offending belligerent.[2] But from the very beginning of the struggle carried on, on the one hand, by neutral individuals striving to trade unhindered in war, and, on

[1] Twiss, War, 243, 245, 247–8 (§§ 125–7); Azuni, vol. ii, chap. 2, art. 2, § 6 (pp. 64–5); Lampredi, chap. i, § 4 (pp. 40–1).

[2] As was done in the case of the English vessel condemned for carrying a cargo of tobacco to a Dutch port during the war between the States-General and Spain (Twiss, War, 248–9 (§ 127)).

the other, by belligerents striving to weaken their opponents by depriving them of the benefits of maritime commerce, it was understood that the freedom of neutral trade should not extend to impede the right of a belligerent with the requisite naval power to prevent the transport of such things to his enemy as the latter might use to prosecute the war against him.

Based upon compromise between conflicting interests.

The gist of the matter, as Albericus Gentilis, who was appointed to the Regius Professorship at Oxford in 1587 and in 1605 was appointed Advocate to the Spanish embassy to represent the interest of Philip III and his subjects before the English Court of Admiralty,[1] clearly recognized, was the conflict between the interest of the neutral merchant in carrying on his trade in arms, provisions, and stores of all kinds, in time of war as well as in time of peace, or even in deriving special gain from the existence of hostilities between other countries, and that of the belligerent government in impairing its enemy's powers of offence and resistance and in preventing the obstruction of its own military operations. The former wished to avoid the loss of the profits of his commerce; the latter objected to the doing of that which imperilled its country's safety. The rights of traders are to be respected, but still more is the safety of the state. 'Ius commerciorum aequum est: at hoc aequius mendae salutis. Est illud gentium ius: hoc naturae est. Est illud privatorum: est hoc regnorum. Cedat igitur regno mercatura, homo naturae, pecunia vitae.'[2] Any form of neutral trade that would interfere with the measures taken by a belligerent to prevent the strengthening of his adversary for the prosecution of hostilities against him must be prohibited, not because there is

This recognized by Gentilis.

[1] Hol. Stud. II 12; Walk. Hist. i. 274 and n.

[2] De iure belli, bk. i. chap. 21 (p. 97). This work was published during Gentilis's tenure of the Regius Professorship.

necessarily anything intrinsically unlawful in the acts of the neutral trader, but simply because of the manifest necessity of a country at war under the principle of self-preservation. Private commercial interests can only be respected during war so long as their enjoyment does not conflict with the safety of states.

Notion of unlawfulness of trade punishable.

The prevailing practice was thus supported by publicists on the ground of expediency. But at the same time there was a tendency, not only in literature, but also in the language of statesmen,[1] to regard contraband trade as something more than a mere commercial adventure undertaken at the risk of the neutral merchant. Belligerents contended that neutral individuals favoured their enemies by supplying them with objects of warlike use and that such acts were incompatible with an attitude of strict neutrality. There existed a very real feeling, fostered by the provisions of the civil and canon law and confirmed by the stipulations of treaties,[2] that the person who traded in contraband of war was acting unlawfully in violation of the rules of the law of nations by which belligerent interference with neutral trade was regulated, and that the belligerent sovereign in seizing the prohibited goods or otherwise inflicting injury on the neutral trader was punishing him for a wrong committed.

Gentilis

'Non fuisse licitum', says Gentilis in the *Hispanicae Advocationis*,[3] 'Hanseaticis ferre ad Hispanos commeatum et quod in bello usui esse solet quum Anglis Hispani hostes

[1] Cf. supra, p. 38.

[2] Cf. supra, pp. 24, 28, and infra, p. 48. Although the conception of the unlawfulness of contraband trade may have been strengthened by treaty provisions, the latter were merely auxiliary to the general right of a state at war to put a stop to such a trade by the customary law of nations, and were often entered into with the object of regulating this acknowledged right and restraining its exercise within just limits (cf. Twiss, War, 235, 249, and infra, p. 49).

[3] Bk. i. chap. 20 (p. 73). This work was first published in 1613, about five years after its author's death (Hol. Stud. 12, 35).

erant.' In the *De iure belli*[1] the same writer, after declaring that the goods of those who are not enemies (*non hostium*) cannot anywhere legitimately be captured, observes that it nevertheless behoves a foreigner to see to it that he wittingly does nothing to assist the enemy, lest he make himself an enemy, as does any other who brings aid to the enemy. Gentilis refers to the Lateran decrees excommunicating those who supplied the Saracens with goods apt for war against Christians,[2] and to Elizabeth's reply to the complaint of the Hanse cities of the despoiling of their ships by the English fleet,[3] and he also cites Queen Amalasuintha's remark to Justinian that he is a member of the enemy's army who supplies it with the necessaries of war.

Grotius. Hugo Grotius approaches the subject from much the same standpoint, and, like his predecessor, notices the conflict between the *belli rigor* and the *commerciorum libertas*.[4] He considers the question primarily in reference to what is lawful against individual traders who are not enemies, or will not allow themselves to be so called, but who provide the enemy with supplies of various kinds; a point, he says, which had been sharply contested both anciently and recently, one party defending the rigorous rights of war, the other the freedom of commerce.[5] The Dutch jurist explains that he is obliged to refer this question to natural law because he had not been able to find in history anything on the subject as determined by instituted law, while he carefully notes that from treaty stipulations nothing can be inferred which is binding upon all.[6] The practice had not yet become sufficiently definite and uniform to enable him to determine therefrom the exact extent to which a belligerent

[1] Bk. ii, chap. 22 (pp. 256-7).
[2] Cf. supra, p. 25.
[3] Cf. supra, p. 37.
[4] Cf. Hol. N. D. 14-15.
[5] De iure belli et pacis, bk. iii, chap. 1, § 5, 1 (first published in 1625).
[6] Ibid. § 5, 5; cf. supra, p. 12.

was entitled to interfere with neutral trade. In what he says about such interference he mixes the subjects of contraband, blockade, and capture of enemy property on neutral vessels together, and, like Gentilis, he does not mention the word 'contraband' itself at all.[1]

In the case of articles useful in war only (*quae in bello tantum usum habent*), such as arms and ammunition, Grotius adopts the same opinion as Gentilis, that they are of the party of the enemy who supply him with what is necessary in war;[2] these things a belligerent can always confiscate as a punishment to the neutral trader for his interposition in the war. In the case, however, of articles useful both in war and in peace (*usus ancipitis*), such as money, provisions, ships, and naval stores, he considers that their seizure can only be justified as a general rule on the doctrine of necessity; and he imposes upon the capturing belligerent the obligation of restitution or compensation. But if the neutral merchant is aware of the belligerent's necessity and knows that the supplies sent will impede the exaction of his rights, as when a town is besieged or a port blockaded, or if he is aware of the justness of the belligerent's cause, then, even in the case of articles of double use, a degree of criminality is incurred for which he is liable to suffer punishment at the hands of the injured belligerent.[3]

Responsibility of neutral state.

Gentilis first mentions the subject of contraband when dealing with the acts committed by the subjects of one state as private individuals which are injurious to another state or its subjects and for which the former state is responsible.[4] He observes that it was regarded as

[1] This, however, may possibly be due to their studied classical style (cf. Westlake, I. L. ii. 190, 281).

[2] De iure belli et pacis, bk. iii, chap. 1, § 5, 2; and similarly in the short and meagre chapter on the duties of neutrals (De his qui in bello medii sunt), bk. iii, chap. 17.

[3] Id. bk. iii, chap. 1, § 5, 3; cf. Wheat. Hist. 128; Westlake, I. L. ii. 281 2.

[4] De iure belli, bk. i, chap. 21 (pp. 94–5).

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inequitable that a single man should be able to involve a whole state or a kingdom in war. The injurious act of a private individual is not *per se* a cause of offence against his state. He then refers to the complaint of the King of France of the sale and transport of provisions and gunpowder to his enemies by the Venetians, and contrasts with this the directly aggressive piratical acts of the Illyrians, who from time immemorial had oppressed and pillaged vessels sailing from Italy. Queen Tenta's first measure on ascending the throne in 231 B.C. was to grant letters of marque to privateers authorizing them to plunder all whom they fell in with;[1] and Gentilis concludes that the Romans were justified in disputing her assertion that it was not the custom of the rulers of Illyria to hinder private persons from taking booty at sea, and in requiring her to take steps to prevent her subjects from molesting Roman merchants.

A little further on in the same chapter he proceeds to consider in greater detail the question of neutral trade with a belligerent.[2] A state itself offends, he remarks, which being at once bound and able to restrain the offences of its subjects knowingly neglects so to do. A state is in default, not only when it expressly refuses to give satisfaction to the injured, but also when it for a long time, but without common deliberation, allows injury to be done. A state is rightly held responsible in respect of the oft-repeated offences of its citizens. They were guilty of repeated offences who, to the great peril and loss of the kingdom of England and its allies, supplied the Spaniards with provisions, including articles of regular warlike use. They strove to continue their traffic when requested to discontinue it, resisting the demand made upon them on the ground that it was 'contra ius gentium' and a violation of their freedom of

[1] Polybius, bk. II. chap. 4. [2] pp. 96 7.

trade. But Gentilis hesitates definitely to characterize the traders' acts as delicts for which their government was responsible.

Not discussed by Grotius.

Grotius does not discuss the question of the responsibility of a neutral state for the trade of its subjects in contraband of war, and it is impossible to discover in his writings any real appreciation of the modern distinction in the obligations of neutrality with regard to the acts of a state as such and those of its subjects as private individuals. At the time of the Crusades, as we have seen,[1] the princes in most of the Christian states and cities expressly sanctioned by their own ordinances the prohibitions contained in the papal bulls. But although such action showed a sense of obligation and of the responsibility of a state for the acts of its subjects, the princes only acted in this way as members of the Christian confederation which recognized the Pope as its supreme head. When we pass from war against the infidels to war between the Christian states themselves, we still occasionally find a belligerent complaining to a neutral sovereign of the noxious trade of the latter's subjects with the enemy. Thus, in 1316, Edward II made a formal complaint to the city of Genoa that the Genoese were furnishing the Scots with ships and arms;[2] while twenty years later Edward III requested the King of Norway to forbid his subjects to supply ships to the enemies of England.[3] When the Privy Council drew up a new list of 'prohibited' and 'licit' articles at the request of the Danish embassy in 1597, it was agreed that the English naval commanders should be given orders not to interfere with Danes carrying the latter goods, provided the Danish king would order his subjects not to carry any of the former goods to Spain during the war.[4]

Enforcement of papal prohibitions.

Belligerent complaints to neutral sovereigns.

[1] Supra, p. 26.
[2] Rym. II. i. 98.
[3] Id. II. iii. 153.
[4] Cheyney in 20 E. H. R. (1905), 668–9.

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Similarly, in the arrangement made between Elizabeth and Henry IV in May, 1599, after the conclusion of peace between France and Spain in the preceding year by the treaty of Vervins, the English queen agreed to exempt French subjects from search on Henry's undertaking that they should not carry enemy's goods, nor carry to the Spaniards arms, munitions, or other instruments or materials of war, either by land or sea. But as the traffic still continued Elizabeth withdrew the privilege she had granted, and an attempt made by Henry to secure exemption from search by treaty was unsuccessful.[1]

Treaty stipulations.

In the treaties whereby, as we have seen,[2] states undertook to refrain from assisting each other's foes by supplying them with necessaries of war, it was generally provided that they should prevent their subjects from doing acts of a similar kind. Thus, in 1370, the Count of Flanders promised to take certain measures to prevent his subjects from furnishing the enemies of England with arms, artillery, and victuals;[3] and the treaty of neutrality of 1522 between Francis I and Margaret[4] and Henry IV's letters of neutrality of 1596,[5] which expressly excepted prohibited articles from the conceded freedom of trade, contained stringent provisions for the punishment by their own sovereign of individuals acting in contravention thereof. In a treaty concluded in 1604 between Philip III of Spain, the Archduke Albert and his wife Isabella, and James I of England,[6] and referred to by Gentilis in the *Hispanicae Advocationis*,[7] it was stipulated: 'And as the

[1] Westlake, I. L. ii. 278–9; Marsden in 24 E. H. R. (1909), 695.
[2] Supra, pp. 32–3.
[3] Rym. III. ii. 172.
[4] Dum. IV. i. 378.
[5] Id. V. i. 527.
[6] Id. V. ii. 32. Cf. the other treaties cited, supra, p. 33, and also the treaties of May, 1613, between the Dutch and Lubeck, Art. 7 (Dum. V. ii. 232), of April, 1614, between Sweden and Holland, Art. 5 (ibid. 247), and of December, 1615, between Holland and the Hanse towns, Art. 7 (ibid. 276), in which, in one form or another, the responsibility of the neutral government was expressly stipulated for.
[7] Bk. i, chap. 20 (p. 73).

said kings solemnly promise never to give any warlike assistance to the enemies of the other, it is further provided that their subjects or inhabitants, of whatever nation or quality they be, shall not, either on pretence of trade or commerce, or under any other colour, assist the enemies of the said princes, or of either of them, in any manner, nor furnish them with money, provisions, arms, engines, guns, or instruments fit for war, nor afford any other warlike furniture; and all contraveners shall be liable to the severest punishment as covenant breakers and seditious persons.'

Such engagements, however, were, to a great extent, the outcome of the mutual jealousies of belligerents and of their efforts to deprive each other of any advantage they might have derived from the freedom of action exercised by neutrals, and were merely auxiliary to the right of a belligerent under the customary law of nations to put a stop by his own acts to the noxious commerce of neutrals with his enemy.[1] With reference to neutral duties generally, Grotius taught benevolent neutrality in favour of the most worthy as the better part; and, failing that, equality of treatment in the sense of permitting or furnishing to both belligerents the same things as are permitted or furnished to either. 'The duty of those who keep aloof from a war', he says, 'is to do nothing by which the one whose cause is bad may be strengthened, or the movements of him who is engaged in a just war may be impeded, but in a doubtful case to treat the two parties equally in allowing passage, in furnishing supplies to their armies, and in abstaining from the relief of besieged places.'[2] The whole subject was still confused even in theory, and the times were too disorderly for practice to follow closely such theory as

Impossible to hold neutral state responsible apart from treaty.

[1] Cf. Twiss, War, 235, 249.
[2] De iure belli et pacis, bk. iii, chap. xvii, § 3, 1.

was possible. The relations of states themselves were in a state of chaos from which order was only very slowly evolved; and therefore, in the absence of a specific convention, it was impossible to hold a neutral sovereign responsible for the acts of his subjects in supplying the enemy with necessaries of war. To the complaints of the French king[1] the Venetians replied that their state was a free one where no one was ever forbidden to trade, and they refused to accept responsibility for the commercial acts of individuals. Individual merchants did not hesitate to disobey the prohibitions issued by the magistrates of the various Hanse cities in pursuance of the agreements they sometimes entered into to abstain from the conveyance of warlike stores to countries engaged in war.[2]

Establishment of direct relation between belligerent state and neutral merchant.

Prior to the middle of the sixteenth century international maritime trade lay almost entirely in the hands of communes or private corporations. Trade adventurers looked after themselves, and it was rare for the home government to consider itself compromised even by high-handed acts of piracy committed by its subjects on the other side of the world.[3] Belligerents accordingly dealt directly with neutral commerce themselves, and summarily punished the infraction of the rules they had laid down for the protection of their own interests, without an appeal to the neutral sovereigns to whom the wrong-doers belonged. Such neutral sovereigns found it more politic to submit to the punishment of their subjects by the belligerent by whom their persons and properties were seized, than to accept responsibility for all acts of those subjects committed beyond the limits of their territorial jurisdiction. Moreover, a precedent for the direct punishment of the offending neutral trader by the

[1] Cf. supra, p. 46.

[2] Reddie, i. 63–4.

[3] Cf. Wakeman, Ascendancy of France, 202; Dup. D. M. Ang. 408–9; Opp. I. L. i. 55–6; Reddie, i. 41, 74.

injured belligerent existed in the provisions of the canon law which awarded to the captor the property and liberty of any one taken in the act of violating the papal in[illegible]ctions.[1]

Non-responsibility of neutral state established.

It is now established that the carriage of necessaries of war to the ships or dominions of a belligerent is so far unlawful that the other party to the contest is entitled, if he has the necessary maritime power, to impose penalties upon any neutral merchants he may find on the high seas engaging in such noxious traffic. But, in the absence of a definite international agreement to the contrary, a neutral sovereign is in no way responsible for such traffic on the part of his subjects. The express engagements entered into from time to time on the part of neutral states not to permit their subjects to supply the enemy with articles of warlike use never resulted in the establishment of a general obligation for a neutral sovereign to forbid the transport of contraband to his subjects, and were discontinued, as a general rule, after the middle of the seventeenth century.

Charles I's proclamation of Dec. 31, 1625.

On December 31, 1625, an English proclamation was issued which, in accordance with the provisions of the treaty of alliance signed between England and Holland at Southampton in the preceding September,[2] purported 'to declare that all ships carrying corn or other victuals, or any munition of war, to or for the King of Spain or any of his subjects, shall and ought to be esteemed as lawful prize'. In this proclamation it was recited that it was 'neither agreeable with the rules of policy or law of nations to permit the said king or his subjects to be

[1] Supra, p. 25.

[2] Dum. V. ii. 478. As we have already noticed (supra, p. 11), it was in this treaty that the word 'contraband' was first officially employed to denote a prohibited neutral trade with a belligerent. The clause of the treaty (Art. 20) and the proclamation will be found in Twiss, War, 234–8 (§§ 121–3); and cf. Marsden in 25 E. H. R. (1909), 251–3, and Westlake, I. L. ii. 279–80.

furnished or supplied with corn, victuals, arms, provisions for his shipping, navy or army, *if the same can be prevented*'. The proclamation further justified itself upon the quality of Charles I as 'a monarch and prince sovereign', 'former declarations and acts of state made in this behalf in the time of Queen Elizabeth of famous memory', and the practice of 'other states and princes upon the like occasions avowed and maintained by public writings and apologies'. The usage of princes was thus relied upon in evidence of the right of a belligerent to impose penalties on neutral merchants for giving aid to the enemy by carrying to him munitions or other provisions of war. But as is clearly shown by the provision of the treaty of Southampton that Charles should *endeavour* to get foreign princes to prohibit to their subjects the obnoxious trade with Spain during the war, there was no such usage for the responsibility of a neutral sovereign for the contraband trade of his subjects. If a belligerent was not himself strong enough to prevent the transport of the forbidden articles to his enemy, he had no further remedy and, without an express agreement to that effect, could not look to neutral sovereigns to interfere in any way with the commerce of their subjects.

Sale of war supplies on neutral territory lawful.

From the recognition of this principle it followed that the prevention of trade in contraband goods was simply an operation of maritime warfare to be exercised on the high seas or within the territorial waters of the respective belligerents, and that neutral traders were free to sell such goods within their own country to either of the warring powers or their agents; for no neutral state would have admitted the right of a belligerent to repress such trade by action within the neutral territory. On the other hand, it was hardly yet generally considered unlawful for a belligerent to commit actual hostilities in

neutral harbours and territorial waters,[1] and therefore it could not have been suggested that it was not permissible for him to be supplied with provisions and munitions of war on neutral territory. When a belligerent complained to a neutral sovereign of the traffic of the latter's subjects in contraband of war, he did not trouble to make any distinction between sale and transport. But when he came to exercise his own powers of self-help, he could only seize goods actually in course of transit to his enemy; and it would be only very exceptionally that his strong arm could prevent the supply of goods over the land frontier between his enemy's and a neutral country. Consequently it was sea traffic rather than land traffic that was regularly interfered with in practice, and the act of merely selling contraband articles was entirely excluded from the law of contraband of war, which aims solely at prohibiting the carriage of such articles to the enemy by sea.[2] Practice.

The decrees or proclamations, as distinct from treaty stipulations, issued by belligerents forbade simply the transport of the forbidden articles to the enemy's ports, and did not extend to the sale of such articles on neutral territory.[3] The papal bulls, however, and also the provisions of the civil law, interdicted sale as well as transport; the treaty stipulations of the Middle Ages were to the same effect.[4] Gentilis uses the words Theory.

[1] Walker, Hist. i. 197–9. Gentilis, however, had a clear conception of the territorial rights of a neutral state (ibid. 274–5).

[2] Cf. Kleen, Cont. 60; Neut. i. 383–4; Dav. Elem. 452.

[3] See, for example, the Dutch decree of 1599 and the proclamations issued by England in 1625 and 1626 (Kleen in 25 R. D. I. (1893) 14, 134; Twiss, War, 234–8); 'porter' was the word used in Art. 20 of the treaty of Southampton (Dum. V. ii. 480).

[4] Cf. Kleen, Neut. i. 385–6; 26 R. D. I. 405. It even appears that under a strictly literal interpretation of the civil law it might not have been sufficient to capture the prohibited goods *in itinere* before the actual completion of the sale by delivery (cf. Gent. H. A. bk. i. chap. 20 (p. 76); Zouch. pt. ii. sec. viii. § 10). In the treaty of 1613 between the Dutch and Lubeck the terms used with regard to trade in the prohibited

'afferre', 'deferre' (convey to, bring),[1] while 'subministrare' (furnish, supply) is the term employed by Grotius;[2] but the latter writer only speaks of transport by sea, and all the examples cited are such. When we consider how long it was before there emerged a definite conception of the distinction in the obligations of neutrality with respect to a state and its subjects and of the extent of the responsibility of the former for the acts of the latter, it is not surprising that the early writers on the law of nations fail clearly to distinguish in theory the act of carrying contraband goods from mere bargain and sale. That they do not distinctly treat the subject as one of maritime international law may also be due to the fact that they lived in an age of land wars.[3]

articles were 'envoyer ou faire avoir' (Art. 7; Dum. V. ii. 232); in that of 1614 between Sweden and Holland, 'être assez de . . . deffendre qu'ils soient aidez' (Art. 5; ibid. 247); and in that of 1615 between Holland and the Hanse towns, 'soient envoyez . . . fournissent' (Art. 7; ibid. 276).

[1] De iure belli, bk. i, chap. 21; bk. ii, chap. 22 (pp. 95, 97, 98, 256, 257); H. A. bk. i, chap. 20 (p. 73).

[2] De iure belli et pacis, bk. iii, chap. i, § 5, 1.

[3] Cf. Maine, I. L. 123.

CHAPTER VI

POSITION OF THE NEUTRAL GOVERNMENT WITH RESPECT TO TRADE IN CONTRABAND OF WAR

1. Where the State Itself carries on the Trade

Advance in idea of the obligations of neutrality in the eighteenth century.

Throughout the seventeenth century very little change took place either in theory or in practice, in the prevailing notions as to the duties of impartiality and abstention from participation in hostilities incumbent upon a neutral power. But during the eighteenth century there was a considerable advance, especially among theoretical writers, in the conception of the general principles governing the relations of belligerent and neutral states.[1]

Bynkershoek.

Bynkershoek, whose *Quaestiones Iuris Publici* was published in 1737, repudiates Grotius's doctrine that it is for the neutral to decide which party to a war has a just cause. Neutrals, he maintains, being friends to both parties, have not to sit in judgement between them, and therefore must not give or deny to one or the other party more or less in accordance with their opinions as to the justice or injustice of the cause of each, if not consistent with the duties of neutrality to interfere in any way in the war.[2]

Wolff.

Wolff, who wrote in 1749, calls those neutrals[3] 'who adhere to the side of neither

[1] Cf. Hall, I. L. 578–87; Westlake, I. L. ii. 202–6; Opp. I. L. ii. 350 f.

[2] Bk. i, chap. 9. Bynkershoek seems, however, to have thought that a neutral should take the justness of the cause into consideration if it was a question of rendering assistance previously promised by treaty to two allies who were both at war at the same time with each other (p. 72). Bynkershoek does not use the term 'neutrality'; he calls neutrals *non hostes*, and describes them as those *qui neutrarum partium sunt* (p. 67).

[3] *In bello medii.*

belligerent, and consequently do not mix themselves up in the war'.[1]

Vattel. In 1758 Vattel published his famous *Droit des Gens*, and although his doctrines may be in some ways less advanced than those of Bynkershoek,[2] he pronounces emphatically for entire abstinence from real participation in the war as the true test of neutrality. This attitude of impartiality, he says, 'relates exclusively to the war and requires (1) that the neutral people shall abstain from furnishing help when they are under no prior obligation to grant it, and from making free gifts of troops, arms, munitions, or anything else of direct use in war. I say that they must abstain from giving help, and not that they must give it equally, for it would be absurd that a state should succour two enemies at the same moment. Besides, it would be impossible to do so equally; the very same things—the same number of troops, the same quantity of arms, of munitions, &c., furnished under different circumstances, are not equivalent succour. (2) That in all matters not bearing upon the war a neutral and impartial nation shall not refuse to one of the parties, because of the existing quarrel, that which it accords to the other.'[3] 'It is necessary', writes De Martens in 1788,[4] 'for the observance of complete neutrality to abstain from all participation in warlike expeditions.'

De Martens.

Imperfect neutrality. Throughout the greater part of the century, however, a state was considered not to violate its neutrality in case it furnished one of the belligerents with such limited assistance as it had previously promised by treaty. But the fulfilling by Denmark in 1788 in favour of Russia

[1] Ius gentium, § 672 (p. 543).

[2] e.g. he would take the justice of the war into consideration when dealing with the passage of belligerent troops through a neutral country (bk. iii, chap. vii, § 135).

[3] Bk. iii, chap. vii, § 104.

[4] Précis, § 264 (p. 380).

of an obligation of limited assistance contracted under treaty, while declaring herself to be in a state of amity with Sweden, led to a serious protest on the part of the latter power; and before the end of the century a clear distinction was made between neutrality in the strict sense of the term and an imperfect neutrality.[1]

A neutral state must not assist either belligerent.

From the standard of entire abstinence from real participation in the war which has thus come to be recognized as the true test of state neutrality it follows that it is the absolute duty of a neutral power to refrain from all acts which may help the one belligerent to the disadvantage of the other. A neutral state is therefore bound to abstain from supplying, either in its corporate capacity or through the acts of its officials or public servants, to either belligerent money, ships, provisions, munitions of war, or anything at all that is likely to be useful to the belligerents in their military operations.[2] Such action Vattel characterizes as a 'démarche contraire sans doute à la neutralité'. 'Une nation qui,' he says, 'sans autre motif que l'appât du gain, travaille à fortifier mon ennemi, et ne craint point de me causer un mal irréparable, cette nation n'est certainement pas mon amie, et elle me met en droit de la considérer et de la traiter comme associée de mon ennemi.'[3]

France in 1778.

One ground of complaint of Great Britain against France in 1778 was that the French Government had itself furnished the revolted American colonies with supplies of arms and money, under the mask of private commercial transactions.[4]

Sweden in 1825.

In 1825, during the war of independence of the Spanish colonies in South America, the Swedish Government sold three old men-of-war to English merchants, who, as it afterwards appeared, were

[1] Cf. Hall, I. L. 581; Westlake, I. L. ii. 206–7.

[2] Kleen, Cont. 164, n.; Neut. i. 241–3; Manceaux, 140; Brochet, 87–8; Dav. Elem. 396; Opp. I. L. ii. 426; Lawr. War, 145.

[3] Bk. iii. chap. vii. § 113.

[4] Wheat. Hist. 291.

probably acting on behalf of the government of the Mexican insurgents. When Spain complained, Sweden rescinded the contract, notwithstanding that the ships had been sold in ignorance of their ultimate destination.[1]

Great Britain in 1863.

Similarly in 1863, during the American civil war, Great Britain stopped the sale of her surplus warships, because of the possibility of their purchase through private agents by one of the belligerents.[2] During the Franco-Prussian war, however, the United States Government took an opposite view of its duty where it was not dealing directly and knowingly with a belligerent. It did not suspend its sales of old warlike stores, which had commenced before the outbreak of hostilities, and France, either directly or indirectly, became a large purchaser. A committee of the Senate reported that the sales were lawful, and would have been so, even if the transaction had been effected directly with one of the belligerents. But it is generally considered that this opinion was erroneous in that it confounded the rights and duties of a neutral state with those of its private citizens.[3] It would be 'highly objectionable, as an unfriendly proceeding', observes Westlake,[4] 'that a public authority should sell arms or ammunition, or lend money, to a belligerent, even when such sale or loan was within its usual course, and could not be regarded as a participation in a specific operation of war.' A prominent United States Senator[5] has recently described such action as an 'outrageous breach of neutrality'.

United States in 1870.

Argentine Republic in 1904.

During the Russo-Japanese war the Argentine Government is stated to have broken off negotiations for the sale of certain of its war vessels on discovering that one

[1] Hall, I. L. 592; Cob. Cases, ii. 303–4.

[2] Opp. I. L. ii. 427; Cob. Cases, ii. 304–5; Dup. D. M. Ang. 436.

[3] Cf. Hall, I. L. 592; Lawr. Prin. 632; Scott, 747, n.; Cob. Cases, ii. 304; Moore, Dig. vii. 973–5; Dup. D. M. Ang. 436–7; Desp. D. I. 1238; Brochet, 88, n. 1.

[4] I. L. ii. 206.

[5] Senator Hitchcock (*The Times*, December 10, 1914).

of the negotiators, although representing himself to be the agent of Turkey, was really acting in the interest of one of the belligerents.[1] During the same war several vessels belonging to the North-German Lloyd Company and the Hamburg-American Company, some of which were officially classed as merchant cruisers, auxiliary to the German navy, were sold to Russia, who at once converted them into armed cruisers and incorporated them in her navy. The legality of the sale was upheld by the German Government as a purely commercial transaction, and Japan does not appear to have made any protest. But had the consent of the German Government been necessary for the disposal of the vessels, so that it became in effect a party to the transfer of its own auxiliary cruisers to a belligerent, there would undoubtedly have been a violation of the duties of neutrality as established by modern usage and authority.[2] That a neutral government is prohibited from furnishing supplies to a belligerent is recognized by the Rules and Regulations for the use of the Panama Canal by belligerents issued by the United States on November 13, 1914.[3]

Germany in 1904.

United States in 1914.

On the same principle a neutral state must not allow its subjects to make use of its administrative organization for the purpose of sending contraband to the belligerents. Thus, during the Spanish-American war of 1898, British subjects were forbidden to use the parcel post in order to send to Spain arms, munitions, provisions, or any other articles considered as contraband of war.[4] Article 6 of

Neutrals must not transmit contraband through the administrative organization of their state.

[1] Tak. R. J. 486–7; Smith & Sib. 110–11.

[2] Tak. R. J. 488–9; Smith & Sib. 108–9; Opp. I. L. ii. 390; Cob. Cases, ii. 305.

[3] 9 A. J. (1915), Sup. 126 (Rule 7; and cf. Rule 13, as to the use of repair facilities and docks belonging to the United States).

[4] 25 J. D. I. P. (1898), 624; Manceaux, 138–9; Brochet, 83, n. The exemption of belligerent and neutral 'postal correspondence' under 11 H. C. 1907, Art. 1, is not intended to include parcels sent by post (La Deux. Confér. iii. 1122; Pearce Higgins, 402; Westlake, I. L. ii. 185; the *Simla* (1915), 59 Sol. Jo. 546).

13 H. C. 1907. Art. 6.

the Hague Convention XIII of 1907 now forbids 'the supply in any manner, directly or indirectly, by a neutral power to a belligerent power, of war ships, ammunition, or war material of any kind whatever'.[1] Unlike similar conduct on the part of neutral traders in their private capacity, the failure of the neutral power in this duty would constitute, as we have noticed in Chapter II,[2] a breach of national neutrality for which the state as a whole would be liable to make reparation to the injured belligerent. Whether the goods were actually captured or not, the offence would be committed, and a diplomatic question, which might possibly end in war, would arise between the neutral government and the belligerent who had suffered through its misconduct.

Effect of breach of duty by the neutral state.

2. In Case of Illegal Shipbuilding and Illegal Expeditions

Further advance in idea of the obligations of neutrality.

After Vattel a further development took place in the conception of state neutrality with regard to certain acts of private persons in neutral territory which amount to more than mere trading and become something akin to active participation in a specific operation of war, and which therefore no longer fall within the conditions under which a state can tolerate them without a disregard of the neutrality due from its territory. No such obligation was recognized, however, until the lapse of a long time after the inception of the modern law of nations and the establishment of the principles of contraband of war. In 1721, on the occasion of a complaint being made by the Swedish minister that certain ships of war had been built in England and sold to the Czar, the judges were ordered to attend the House of Lords and deliver their opinions on the question whether the King of England had power to prohibit the building of ships

Opinion of English judges in 1721.

[1] Pearce Higgins, 447. [2] Supra, p. 10.

of war, or of great force, for foreigners, and they answered that the king had no power to prohibit the same.[1] In the *Twee Gebroeders*[2] Sir William Scott, while of opinion that no use of a neutral territory for the purposes of war is to be permitted, did not regard as prohibited such remote uses as procuring provisions and refreshments by a warship, and acts of that nature, 'which the law of nations universally tolerates'. Until towards the close of the eighteenth century, even the equipment and manning by neutral private adventure of cruisers to be employed under letters of marque in the service of a belligerent was not considered to be illegal under the common law of nations.[3]

Stowell's opinion.

But when war had broken out between England and France in 1778, Venice, Genoa, Tuscany, the Papal States, and the Two Sicilies subjected any person arming vessels of war or privateers in their ports to a fine; and in 1779 the States-General of the United Provinces issued a *placaat* reciting that it was suspected that subjects of the state had equipped and placed on the sea armed vessels under a belligerent flag, and declaring such conduct to be contrary to the law of nations, and to the duties binding on subjects of a neutral power.[4] A like provision occurred in the Austrian ordinances of 1803.[5]

Policy of smaller neutral states.

In 1793 the United States prohibited the equipment of vessels in their ports which were of a nature solely adapted for war, on the ground that such action, like the raising of troops, would involve a misuse or usurpation of the neutral's authority. The instructions issued to the collectors of customs, besides forbidding the original arming and equipping of vessels by a belligerent, prohibited the reception of any warlike equipment by

Policy of United States.

[1] Wheat. I. L. (Atlay's ed. 1904), 603; Fortes. Rep. 388.
[2] (1800), 3 C. Rob. 162; 1 E. P. C. 286. [3] Hall, I. L. 583–4.
[4] Martens, Rec. iii. 25, 47, 53, 62, 74; Hall, I. L. 584.
[5] Art. 3; Martens, Rec. viii. 106; Hall, I. L. 607.

vessels already belonging to him; but they did not specify as illegal the building and arming of a vessel intended to be delivered outside neutral territory, but not belonging to a belligerent at the moment of exit, although built to his order.[1] The law of Congress passed in 1794, revised and re-enacted by the Neutrality Act of 1818, went further, and made it penal to fit out and arm or procure to be fitted out and armed, within the jurisdiction of the United States, any vessel with the intent that such vessel should be employed in the service of any foreign state to cruise or commit hostilities against the subjects of another state at peace with the United States.[2] It is now definitely recognized that the circumstances in which a ship sets out from a neutral port may involve her in a question different from that of contraband, namely, whether the neutral territory is being used as a base of operations or for the augmentation or renewal of the naval or military forces of a belligerent.

Neutrality Acts of 1794 and 1818.

In order to appreciate these circumstances resort was had to the legal doctrine of intent. 'When a ship or cargo of arms is dispatched by a neutral owner in search of a market,' says Westlake,[3] 'his motive is the expectation that it will find a belligerent purchaser who will use it in war, but the intent so to use it can only be formed by the purchaser, and remains contingent as long as the expectation exists, so that the expectation is not an assistance knowingly given to it. But when a ship is dispatched from a neutral port by a belligerent owner, his intent to employ her in the war has been formed while she was still in neutral territory, so that her dispatch is an act of war and a usurpation of the neutral state's authority, and any one who has contracted with the

Doctrine of intent.

[1] Westlake, I. L. ii. 205; Hall, I. L. 607 8.
[2] Wheat. I. L. (Atlay's ed. 1904), 592.
[3] I. L. ii. 213-14; cf. Opp. I. L. ii. 405 6, 494; Bonfils, 961.

belligerent owner or worked for him about the ship with knowledge of his intent has identified himself with it. Thus the line between the export of contraband and the abuse of neutral territory is drawn by the intent of unneutral employment, formed within the territory by a person whose position in relation to the thing enables him to give effect to it.' So far as the neutral government is concerned, neutral subjects may by way of trade supply belligerents with vessels of any kind, provided they have not been built or fitted out within the neutral territory by order of the belligerent concerned.

Foreign Enlistment Act, 1819.

Provisions similar to those contained in the American Neutrality Act of 1818 for preventing and punishing the fitting out of armed vessels or supplying them with warlike stores were enacted by the British Foreign Enlistment Act of 1819. In France all persons exposing the state to reprisals or to a declaration of war are liable to punishment under the Penal Code, and on the outbreak of the American civil war in 1861 a proclamation of neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all French subjects from 'assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties'. Under this proclamation six vessels which were in course of construction in French ports for the Confederate States were arrested.[1] Other maritime powers, such as Holland, Denmark, Spain, and Italy, have adopted similar rules in their municipal law for preventing the armament or equipment within their territories of vessels of war intended for the service of a belligerent.[2]

French policy in 1861.

Policy of other maritime powers.

The *Alabama* claims.

In the case of the *Attorney-General* v. *Sillem*,[3] decided during the course of the American civil war, it was held that an unarmed vessel was contraband and nothing

[1] Hall, I. L. 609-10. [2] Id. 610; Smith & Sib. 106.
[3] (1863), 2 H. & C. 431.

more, and that therefore her sale under previous contract constituted no infringement of British neutrality, as interpreted by the Foreign Enlistment Act of 1819. The United States, however, claimed satisfaction from Great Britain on the ground of various breaches of neutrality by the latter country in connexion with the building, equipping, and otherwise assisting the progress of the *Alabama* and other vessels of the Confederate Government which preyed upon the commerce of the Federal States. To meet these claims, after various negotiations on the conclusion of the war, the treaty of Washington was signed on May 8, 1871, between Great Britain and the United States, referring the various questions to five arbitrators, who met at Geneva on December 15. It was stipulated in Article 6 of the treaty that 'In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case'. By these rules it was declared to be the duty of a neutral state 'to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use'.[1] The respective governments of the two countries were, however, unable to agree as to the true meaning of this language.[2]

The three rules of Washington.

[1] Martens, Nouv. Rec. Gén. xx. 702.

[2] Hall, I. L. 609.

In the meantime a Royal Commission was appointed in 1868 to inquire into the working of the Act of 1819, and, in accordance with their report, a new Foreign Enlistment Act was passed in 1870, the obligations established by which exceed what can strictly be required of a neutral state by international law. Under this Act a person has been convicted for sending out guns from England to Venezuela with the intention that they should form part of a naval expedition which was being prepared against the existing Venezuelan Government by revolutionaries.[1] In 1870 vessels were prohibited from sailing from English ports with supplies directly consigned to the French fleet in the North Sea, while belligerent warships were only allowed to procure within British waters fuel and provisions within the limits of strict necessity.[2] In 1875 a rule to the effect that a neutral state is bound to see that other persons do not within its ports or waters put vessels of war at the disposition of the belligerents, was adopted by the Institute of International Law.[3] This usage was also recognized and acted on by the British and other governments during the Spanish-American war in 1898, and Great Britain prevented two vessels, which were building in the United Kingdom for Brazil, but which had really been purchased by the United States, although before the war, from leaving British territory.[4]

Foreign Enlistment Act, 1870.

Subsequent practice.

Article 8 of the Hague Convention XIII of 1907[5] now declares that a neutral government is bound to employ

13 H. C. 1907. Art. 8.

[1] *R.* v. *Sandoval* (1887), 56 L. T. R. 526.
[2] Hall, I. L. 656; Cob. Cases, ii. 446.
[3] 1 Ann. (1877), 139.
[4] Moore, Dig vii. 861. Neutrality Orders to the same effect were also issued on the outbreak of the Russo-Japanese war in 1904 (Cob. Cases, ii. 373–4).
[5] For a comparison between the provisions of this Convention and the rules of the treaty of Washington cf. Pearce Higgins, 465–6; Cob. Cases, ii. 344–5.

the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended so to cruise, or engage in hostile operations, which has been adapted in whole or in part within the said jurisdiction to warlike use. Belligerent warships are forbidden to use neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament,[1] or for victualling, except to bring their supplies up to the peace standard. Similarly, they may only ship sufficient fuel to enable them to reach the nearest port in their own country.[2]

Shipping of war vessels in sections.

Some vessels extremely valuable in modern maritime warfare, such as river gunboats, torpedo boats, and submarines, may be constructed in parts which can be shipped in that form and be put together at their destination.[3] Such parts found by a belligerent on board a vessel destined to his enemy would unquestionably be liable to confiscation as contraband; but, unless they had been made specially to the order of a belligerent, it may be doubted whether the dispatching of such parts to a belligerent purchaser would in any case compromise the neutrality of the vendor's state as an act of illegal shipbuilding.[4] In the present war of 1914–15, however,

[1] Art. 18.

[2] Art. 19. But they may fill up their bunkers built to carry fuel in neutral countries which have adopted this method of determining the amount of fuel to be supplied. Within the succeeding three months they may not replenish their supply of fuel within a port of the same power (Art. 20). On signing this convention, Great Britain made reservations in regard to Art. 19 (P. P. Misc. No. 5 (1908)).

[3] Cf. the late Lord Justice Kennedy in 24 L. Q. R. (1908), 64.

[4] In 1879 Mr. Evarts, Secretary of State, held that the shipment to one of the belligerents in the war between Chili and Peru of a torpedo

the Government of the United States has forbidden the export to the warring powers of submarines in sections to be put together abroad, as involving a breach of national neutrality.[1]

3. In Case of Trade in Contraband by Neutral Individuals

No support for state responsibility in practice of seventeenth century

Throughout the seventeenth century we find no support, either in theory or in practice, for the doctrine that a neutral government is bound, apart from an express convention, to prohibit and prevent its subjects from trading in contraband of war, and that such trade, if not prohibited and prevented, furnishes a just ground of complaint on the part of the belligerent who suffers through it against the neutral state. On the contrary, as we have already remarked,[2] during the latter part of this century even the stipulations for the responsibility of the neutral sovereign, which had previously often been contained in the treaties dealing with contraband, began to be discontinued.

Treaty stipulations.

Article 34 of the treaty of 1662 between France and Holland,[3] incorporated in the Articles of Navigation and Commerce of July, 1667, between England and Holland,[4] and Article 23 of the treaty of May, 1667, between England and Spain,[5] simply stipulated that the contraband goods when captured should be unladen and declared confiscate before the judges of the Admiralty. In the treaty concluded in 1675 between Louis XIV and the Duke of Brunswick[6] the latter did not promise to restrain the individual action of his subjects in any way.

launch in sections, ready to be set up, or even as a completed seagoing vessel, would not be a violation of the neutrality laws of the United States (Moore, Dig. vii. 960–1).

[1] *The Times*, December 10 and 14, 1914; editorial comment in 9 A. J. (1915), 177–87.

[2] Supra, p. 51.

[3] Dum. VI. ii. 415.

[4] Dum. VII. i. 44; Chal. i. 156.

[5] Dum. VII. i. 31; Chal. ii. 18.

[6] Dum. VII. i. 312.

Similar provisions for the mere forfeiture of the ships and the guilty merchandise were contained in the conventions entered into between England and France in 1655,[1] and between England and Sweden in 1654[2] and 1661.[3] In the same way in the treaty of Whitehall of 1689 between England and Holland,[4] and under Articles 19 and 20 of the treaty of Utrecht, 1713,[5] it is only the transport of the noxious goods by sea that is prohibited, and no duty is imposed upon the neutral state to prohibit contraband trade to its subjects.

Pufendorf.

Pufendorf, who, in a letter dated May 23, 1693,[6] relating to the Anglo-Dutch treaty of 1689, recognizes the right of a belligerent to interfere with neutral trade in contraband of war, in no way suggests that the neutral state would be responsible for the trade of its subjects in the prohibited goods. Heineccius, whose dissertation *De Navibus ob Mercium Illicitarum Vecturam commissis* appeared in 1721, similarly recognizes the right of a belligerent to penalize the trade of neutral merchants in contraband of war, without any corresponding duty of prevention on the part of the neutral sovereign.[7]

Heineccius.

Bynkershoek.

Bynkershoek, after establishing the illegality of the transport of contraband,[8] declares that it is only this

[1] Dum. VI. ii. 122 (Art. 15). [2] Dum. VI. ii. 81; Chal. i. 25 (Art. 11).
[3] Dum. VI. ii. 385; Chal. i. 52 (Art. 11). [4] Dum. VII. ii. 238.
[5] Dum. VIII. i. 348; Chal. i. 403.

[6] This letter was addressed to a fellow-countryman named Gröning, who was writing a treatise entitled Libera Navigatio, and it is published as an appendix to that work, which appeared at Rostock in 1694. It is also inserted by Barbeyrac at bk. viii, chap. vi, § 7 (vol. ii. 558–9), and is to be found in Azuni's Droit Maritime de l'Europe (ii. 32–5; cf. Ward, Nent. 6 –7; Wheat. Hist. 144). In Pufendorf's De Iure Naturae et Gentium the subject of neutrality is not referred to at all.

[7] 'Quamvis enim alter populus forsan suo iure utatur dum talia hosti alterius subministrat, nec minus tamen iure suo utitur, qui se adversus illos defendit, qui hostem reddere potentiorem non dubitant' (chap. i, § 14 (p. 26)).

[8] Quaest. Iur. Pub. bk. i, chap. 9 (De statu belli inter non hostes). 'Non licet igitur alterutri advehere ea, quibus in bello gerendo opus habet' (p. 70). And cf. chap. 10 (De his quae ad amicorum nostrorum hostes non recte advehuntur).

form of traffic that is forbidden by the law of nations. It is a common and admitted practice (*vulgo servamus*), he says, that warlike instruments, although they may not be carried, may be lawfully sold by neutrals in their own country to either or both of the belligerent parties, although it is well known that they intend to use them in war against each other.[1]

Hübner. Hübner bases the liability of contraband articles to capture and confiscation upon the duty of neutrals to observe a strict impartiality towards the contending parties and to abstain from all direct interference in the operations of war.[2] In this connexion he speaks of *fournir* as well as *transporter*, but he nowhere suggests that the neutral state is under any obligation to prevent its subjects from supplying contraband to a state at war, and it may be inferred from the title of his book that it was only conveyance by sea that he regarded as infringing a belligerent's rights.

Vattel. Vattel states quite clearly that a power at war cannot hold a neutral sovereign responsible for the contraband commerce of his subjects. If a nation trades in arms, munitions of war, ships, or naval stores, a belligerent cannot complain, he says, because the neutral people sell all these things to his enemy, so long as they do not also refuse to sell the same things to him at a reasonable price.[3]

Policy of smaller neutral states. Towards the close of the eighteenth century, however, the same policy which induced various minor Italian states, as we have seen,[4] to forbid the building and fitting out of ships of war for belligerents, induced them also to deal in the same way with trade in contraband

[1] Ibid. chap. 22 (An liceat militem conducere in amicae Gentis Populo), at p. 160. From the well-established principle referred to in the text, Bynkershoek argues that it is lawful for a belligerent to enlist troops in a neutral country.

[2] De la Saisie des Batimens neutres (1759), vol. i, pt. ii, chap. i, § 10 (p. 194).

[3] Droit des Gens, bk. iii, chap. vii. § 113.

[4] Supra, p. 61.

of war. During the war of the American revolution Venice absolutely prohibited the traffic in contraband on her own territory, while Naples prohibited the building for sale of vessels of war, and the exportation of other contraband articles.[1] Similarly the first article of the three treaties by which the Armed Neutrality of 1800 was inaugurated provided that the contracting parties should prohibit to their subjects all trade in contraband of war with any of the belligerent powers.[2] There have also been instances during the nineteenth century in which neutral countries have attempted by their municipal law to prevent their subjects from trading in contraband of war. The British Government sometimes acted in this way during the wars of independence of the Spanish colonies in South America,[3] and the Baltic powers concluded several treaties in which the parties undertook to prohibit all contraband commerce to their subjects.[4]

Armed Neutrality, 1800.

Practice of nineteenth century.

During the war between Germany and Denmark in 1848 Great Britain, fulfilling a treaty obligation towards Denmark, prohibited the export of arms to Germany; but such export to Denmark remained undisturbed.[5] Austria, by decree of May 25, 1854, prohibited Austrian vessels from carrying articles of contraband as well as from transporting troops belonging to the belligerents in the Crimean war; while by a Swedish ordinance of April 8, 1854, Swedish sea captains were forbidden, unless under actual force, and in that case only after formal protest, to carry dispatches, troops, or articles of contraband for any belligerent power.[6] During the

[1] Smith & Sib. 101. Tuscany, however, permitted her subjects to continue their accustomed trade in such articles, both within the territory and for exportation, subject, in the latter case, to the belligerent right of seizing contraband goods going for the enemy's use.

[2] Wheat. Hist. 398.

[3] Kleen, Neut. i. 386; Cont. 68.

[4] Kleen, Neut. i. 386, n., and cf. Garner in 9 A. J. (1915), 398–9.

[5] Kleen, Cont. 68; Ortolan, D. I. i. 372. As to the effect of an anterior treaty upon future cf. Martens, 140.

[6] W[illiam] L. (Lawrence's ed. 1857), 572, n.; Kleen, Neut. i. 387.

Franco-Prussian war Belgium, Switzerland, and Japan officially interdicted trade in contraband of war on the part of their subjects, and Switzerland even went so far as to sequester until the end of the war all the factories in the country in which arms were made.[1]

By her neutrality decree of May 11, 1877,[2] Austria prohibited the transport by vessels under the Austro-Hungarian flag, with a destination for the belligerent states, of articles which, according to the general law of nations or the particular regulations published by the foreign governments concerned, were regarded as contraband of war. On the outbreak of the Spanish-American war in 1898 the export to the belligerents of everything capable of immediate use in war was prohibited by Holland, and of material of war by Brazil; and in the course of that war the German Government searched in the Elbe a Spanish ship supposed to be loaded with arms for use in Cuba.[3] So also in the neutrality regulations issued by the Chinese Government at the commencement of the Russo-Japanese war it was forbidden 'to buy up contraband of war for the belligerents' or 'to manufacture contraband of war'; and the observance of these rules was enjoined on foreigners within the Empire.[4] In the same war Sweden notified the liberty of the belligerents to export from her all goods except contraband

[1] Kleen, Cont. 52, 68; Neut. i. 386. Belgium, however, expressly reserved the right of free exportation for the future, and formally excepted from her prohibition of the transit and exportation of arms and munitions of war articles that could clearly be shown to be destined for a neutral government (Halleck, ii. 257, n.).

[2] Martens, Nouv. Rec. Gén., 2nd series, iii. 215.

[3] Westlake, I. L. ii. 299. As to the position when a vessel already laden with contraband for a belligerent calls at a neutral port cf. Manceaux, 140; Brochet, 85. In 1877 the Greek Government arrested a vessel calling at Corfu laden with contraband; and during the South African war Germany suggested that it would be the duty of Portugal to prevent the transmission to the Transvaal of goods landed at Delagoa Bay (P. P. Africa, No. 1 (1900), 7, 14).

[4] Moore, Dig. vii. 673.

of war.[1] By virtue of a Joint Resolution of Congress of March 13, 1912, the President of the United States is authorized to forbid, in his discretion, the export of arms or munitions of war to any American country in which he shall find conditions of domestic violence to exist.[2]

Belligerent protests against non-responsibility of neutral states.

There have also been occasions when belligerents have protested against the refusal of a neutral state to prohibit the export of contraband of war from its territory, and theoretical writers have supported the doctrine, which seems to have had its origin in the Italian universities,[3] that the belligerent injuriously affected by such a refusal is entitled to resent the conduct of the neutral government by war. One of the earliest exponents of this doctrine was the Abbate Galiani, Sicilian Secretary of Legation at Paris, who in the interest of the Armed Neutrality published in 1782 a work entitled *De' doveri de' principi neutrali verso i principi guerreggianti*. In it he contended that the conventional law of nations interdicting commerce with the enemy in contraband of war extends to the sale of the same articles within the neutral territory, and that neutral individuals cannot continue to sell arms and other warlike stores to the belligerents.[4]

Theoretical support. Galiani.

Attitude of the United States.

When the United States declared, in the instructions issued to the Commissioners of Customs in 1793, that 'the purchasing within and exporting from the United States *by way of merchandise* articles commonly called contraband . . . is free to all the parties at war, and is

[1] Westlake, I. L. ii. 299.

[2] 6 A. J. (1912), 477. The powers conferred upon the British Government by sec. 8 of the Customs and Inland Revenue Act, 1879 (replacing sec. 150 of the Customs Consolidation Act, 1853), of forbidding at any time, by Order in Council, the export of articles useful in war, have sometimes (cf. Smith & Sib. 432-3) been considered to refer to trade in contraband; but the powers thus given have no relation to the duties of neutrality, and their object is to enable Great Britain, when at war, to retain in the country articles of which she may herself be in need, or to prevent them from reaching the hands of her enemies (cf. Hol. Letts. 116; Owen, War, 350-1).

[3] Kleen, Neut. i. 351.

[4] Bk. i, chap. ix, § 7 (pp. 382-95).

not to be interfered with', Great Britain suggested that the American Government would 'deem it more expedient to prevent the execution of the President's proclamation than to expose vessels belonging to its citizens to those damages' to which it was admitted in the instructions they would be exposed through carrying articles of contraband.[1] France went further in 1796, and contended that neutral states are bound to restrain their subjects from selling or exporting contraband to the belligerent powers; to which the United States Secretary of State replied: 'Our citizens have always been free to make, vend, and export arms; it is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice.'[2]

The American civil war.

During the American civil war both parties, especially the Northern States, profited largely from the British market.[3] At the Geneva arbitration the United States leaned to the view that the character of contraband trade alters with the scale upon which it is carried on, and urged that though belligerents may not 'infringe upon the rights which neutrals have to manufacture and deal in military supplies in the ordinary course of commerce', yet that 'a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies'. But in the *Bermuda*[4] Chase, C. J., laid it down that in their own country neutrals may sell to belligerents whatever the latter choose to buy, and the Board which arbitrated in the matter of the *Alabama* claims gave no damages in respect

[1] Moore, Dig. vii. 750–1; Taylor, I. L. 639–40; Hist. Letts. 133; Hall, I. L. 78; Lawr. Prin. 699.
[2] Kent, 361–2; Hist. Letts. 133; Lawr. Prin. 699–700.
[3] Westlake, Col. Paps. 368.
[4] (1865), 3 Wall. 514.

of the purchase of arms in England by the Confederate agents.[1]

The Franco-Prussian war.

In August, 1870, during the Franco-Prussian war, Germany accused the British Government of not acting 'in conformity with the position of strict neutrality taken by it', in permitting its subjects to supply arms and ammunition to France.[2] But in the diplomatic correspondence Count Bernstorff did not appeal to any general rule prohibiting the transport of contraband to neutrals. He based his claim upon the fact that the German cause was just, that public opinion and even English statesmen had declared in this sense, and that in consequence England ought to observe, not merely a strict neutrality, but a neutrality calculated in a way to express efficaciously her sentiments, real or supposed, in favour of his country.[3] During the Chino-Japanese war in 1894 Japan seems to have complained of the export of arms and vessels of war from British ports with a destination for China;[4] and in 1904 Russia appears to have questioned the legality of British trade in contraband with Japan.[5]

State responsibility advocated by jurists of nineteenth century.

The doctrine of state responsibility expounded by Galiani was advocated by several jurists of the nineteenth century, notably Hauteteuille,[6] Pistoye and Duverdy,[7] Phillimore,[8] Field,[9] Woolsey,[10] Gessner,[11] and Kleen.[12] These writers recognize that carriage of contraband is directly prohibited by international law and constitutes a breach of the duties imposed by that law upon the

[1] Hall, I. L. 79; Moore, Dig. vii. 699; Lawr. Prin. 700; Cob. Cases, ii. 446.
[2] Hall, I. L. 79; Opp. I. L. ii. 428.
[3] Westlake, Col. Paps. 374–5; 2 R. D. I. (1870), 619, sq.
[4] Kleen, Neut. i. 382.
[5] Hershey, R. J. 183–4.
[6] Droits et devoirs, tit. viii. sec. iii.
[7] Traité, i. 394.
[8] I. L. iii. 405–6 (§ 230).
[9] Draft Code, 615 (§ 964).
[10] Introduction, 330 n. (§ 193).
[11] Droit des neutres, 115.
[12] Cont. 59–72; Neut. i. 378–87; cf. Hist. Letts. 121–37; Manceaux, 131; Brochet, 93; Gessner in 9 A. J. (1915), 398 and n. 42.

citizens of neutral states. But to punish the attempted breach only when it is intercepted, they consider illogical; and they argue that the neutral government should be under the same responsibility to prevent and punish the traffic of its subjects in contraband of war as it is under to prevent the use of its territory as a base for the naval or military operations of either belligerent. And as it makes little or no difference to the effectiveness of the assistance rendered to a belligerent whether the contraband goods are transported to him by sea or sold directly to his agents in the neutral country, it logically follows that the neutral government should be equally responsible for both forms of traffic. This is to be deduced, says Phillimore, from the fact that it is the true character of a neutral to abstain from every act that may better or worsen the condition of a belligerent.

Discussion at Institute of International Law.

The majority of the members of the committee, however, which was appointed by the Institute of International Law in 1874 to consider the treatment of private property in naval war, was of opinion that a neutral government is under no obligation to prevent trade in contraband by means of its municipal legislation.[1] Kleen himself admits this to be the predominant rule in theory and in practice,[2] but in introducing the *Projet de Règlement international de la contrebande de guerre*, which he had prepared in collaboration with Brusa in 1893, he contended that henceforth traffic in contraband of war, including *commerce passif* on neutral territory, should be regarded as an international crime which it should be the duty of neutral states to prevent or restrain, under the penalty of involving their own responsibility, but without prejudice to the right of restraint which the belligerents should still be entitled to exercise themselves.

Kleen's proposal.

Opposition thereto.

The suggestion to place this responsibility upon neutral

[1] 7 R. D. I. (1875), 605–8. [2] Cont. 49; Neut. i. 381.

governments encountered great opposition among the other members of the committee, but Kleen and Brusa replied to their critics and only made a few modifications in detail in the draft which they submitted to the committee at Paris in 1894.[1] This draft, very slightly altered, was adopted by the Institute at the plenary meeting on March 30, 1894.[2] The opposition still continued, however, and finally Perels put in a *contre-projet*,[3] whereupon the Institute decided to adjourn the discussion in plenary meeting to another session.

The Cambridge resolutions.

After the session at Paris the personnel of the committee was considerably changed, and when it met again at Cambridge in 1895 the ideas that prevailed were different from those of the preceding year. The draft prepared by Perels, with whom Westlake was now associated, was taken as the basis of the discussions. In this draft the prohibition of contraband was limited to transport by sea, and the neutral trader was to act simply at his own risk. Perels desired to add that the neutral state should be bound to forbid the unlawful transports to its subjects, but Westlake opposed this and the majority of the committee agreed with him. Owing to the incompatibility of the principles underlying this decision with those of Kleen's original draft, all stipulations as to the obligation of neutral states to prohibit commerce in contraband to their subjects, and all mention of such trade in the neutral territory, were omitted in the draft finally submitted by Kleen and Brusa in the name of the committee and adopted by the Institute at Venice in 1896.[4]

Bluntschli's doctrine.

Bluntschli endeavours to make a distinction between

[1] See the Report in 13 Ann. 75 sq. and the text of the draft at p. 101 sq.

[2] 14 Ann. 33 sq.

[3] 14 Ann. 43, 64 sq.

[4] 15 Ann. 189-233; Dupuis in 3 R. G. D. I. (1896), 650-1.

supply in single cases and on a small scale, on the one hand, and, on the other, supply on a large scale; and to hold the neutral government responsible only for the latter.[1] But, except possibly in the attitude taken up by the United States at the Geneva arbitration,[2] this distinction has not elsewhere found recognition, even in theory.[3]

Non-responsibility of neutral state predominant practice of nineteenth century.

In 1822 Story, C. J., observed in the course of his judgement in the case of the *Santissima Trinidad*:[4] 'There is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.' In the debate in the House of Commons on the *Terceira* affair in 1830 the opinion of Canning was cited to the same effect;[5] and Webster wrote in a similar way in 1842 with regard to the commerce of citizens of the United States whereby Texas had been supplied with arms and munitions for her war against Mexico.[6]

Crimean war.

During the Crimean war great quantities of arms and munitions of war were furnished to Russia by the manufacturers and contractors of Belgium and Prussia, and as these transports were made entirely by land the Anglo-French belligerents found no means to protect themselves against this traffic by the exercise of the right to capture contraband at sea. Such protest as the British Government made was based upon the fact that Prussia permitted action in contravention of her own

[1] Das moderne Völkerrecht, § 766 (p. 426); Lawr. Prin. 701–2.
[2] Supra, p. 73.
[3] Cf. Opp. I. L. ii. 398, n. 2, 428; Kleen, Cont. 52, n. 2, 55, n. 2, 67, n. 1.
[4] (1822), 7 Wheat. 283; Scott, 701.
[5] Hist. Letts. 133; Kleen, Cont. 67 8.
[6] Wheat. I. L. (Lawrence's ed. 1857), 571–2, n.

municipal law.[1] Both belligerents derived military advantages from the trade of the United States. In his message of December, 1854, President Pierce said: 'The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government.'[2] The non-responsibility of the neutral government for the trade of its subjects in contraband of war was also recognized by the English and Austrian proclamations issued in May, 1859, during the Italian war of liberation.[3]

Franco-Prussian and subsequent wars.

During the Franco-Prussian war the sale on neutral territory and export of contraband of war was allowed by both England and the United States. 'The carrier of contraband', observed Sir R. Phillimore in the *International*,[4] 'may violate the proclamation of the neutral state of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who has the right of capture. The offence is not cognizable by the municipal law of this country.' In June, 1877, Great Britain declared to Russia that according to international law the neutral subject who undertakes a contraband expedition does not commit any crime against his sovereign, and a neutral power is not under any obligation to prohibit or punish those who

[1] Cf. the Note of September 15, 1870, from Lord Granville to Count Bernstorff (Westlake, Col. Paps. 365–7).

[2] Hist. Letts. 132; Manceaux, 136; Westlake, Col. Paps. 364, 367.

[3] Manceaux, 136; Pist. et Duv. ii. 530–2.

[4] (1871), 3 A. & E. 321, 336; Bent. Cases, 208. In this case it was also held that the Foreign Enlistment Act, 1870 (supra, p. 65), in no way affects the previously existing law as to contraband.

attempt to transport articles of this kind by sea to the belligerent states.[1] In 1888 the United States Department of State replied to the Haytian minister at Washington that treaty stipulations as to what things should be regarded as contraband of war had never been held to bind either government to prevent its citizens from exporting such things to the territory of any other government.[2] During the Spanish-American war the French Government declared, with reference to the case of the *Fram*, that 'the neutral state is not required to prevent the sending of arms and ammunition by its subjects'; and a similar declaration was made by the Belgian Minister of Foreign Affairs, who said that the neutral sovereign does not intervene either to protect or to prohibit contraband trade.[3]

Neutrality proclamations.

The usual practice is for the neutral government merely to warn traders against the risks they run in engaging in contraband and other forms of prohibited commerce. Thus the British Proclamation of Neutrality of May 13, 1861, after reciting the Foreign Enlistment Act, warned all Her Majesty's subjects that if they offended by doing any of the acts therein prohibited, 'or by carrying . . . arms, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties, all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute, or by the law of nations, in that behalf imposed or denounced. And we do hereby declare that all our loving subjects and persons entitled to our protection who may misconduct themselves in the premises, will do so at their peril, and of their own wrong,

British proclamation in American civil war.

[1] Manceaux, 137.
[2] Moore, Dig. vii. 964.
[3] Hol. Letts. 124; Moore, Dig. vii. 747, 751–2; Manceaux, 137–8.

and that they will in no wise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct.'[1] The proclamations issued at the opening of the Turco-Italian war in 1911 and the Turco-Balkan war in 1912 did not refer specially to contraband, but, reverting to the form in use at the beginning of the nineteenth century,[2] merely warned British subjects generally against acts in derogation of the duty of subjects of a neutral power in a war between other powers or in violation or contravention of the law of nations in that behalf.[3]

In Turco-Italian and Turco-Balkan wars.

In reply to a question as to the reasons for this omission of the special warning against the carriage of contraband and other forms of prohibited commerce from the proclamation of neutrality, Mr. Acland said on behalf of the Prime Minister on October 30, 1911: 'The language used in the King's Proclamation of Neutrality, issued on the 3rd instant, was designed with a view to bringing it into closer harmony with modern requirements and usage than did the phraseology employed in similar instruments issued in past years. The carriage of contraband to a belligerent is not an offence against English law, but is undertaken subject to the usual risk of capture, and the penalties attaching thereto. . . . That being so, it appeared to His Majesty's Government no longer necessary to state that British subjects concerned in such operations would thereby necessarily incur the high displeasure of the Sovereign, and the King was accordingly advised to omit the phraseology referred to from his recent Proclamation.'[4]

[1] Hist. Letts. 131–2; Macqueen, 91–3; and cf. Sir Roundell Palmer's speech on the effect of the Queen's proclamation, given by Macqueen at pp. 94–8; and the proclamation of 1870 in Hall. Rights, 194–8.

[2] Cf. Hol. Letts. 126.

[3] Bent. Cases, 201; and see the French proclamation in 40 J. I. P. (1913), 278.

[4] 30 Hansard (1911), 531. Professor Holland, while approving of the omission of the reference to the King's 'high displeasure', con-

Insurance of contraband goods and other contracts connected therewith

By the municipal laws of some European countries, as for example Holland,[1] Spain,[2] and Portugal,[3] a policy of insurance on contraband goods is null and void. But in England and the United States the legality, within a neutral country, of contracts entered into for the purposes of contraband and other forms of prohibited trade between neutrals and belligerents has been repeatedly recognized in the decisions of the ordinary municipal courts.

enforced in England

In the case of *Ex parte Chavasse, In re Grazebrook*,[4] a contract to share in a joint adventure in blockade-running and for the importation of contraband into a belligerent country was held to constitute a valid partnership in respect of which an English court is bound to entertain proceedings for an account. Similarly, in the *Helen* [5] an action by a master for wages in respect of blockade-running was sustained; and Dr. Lushington observed in his judgement that the illegality of the commerce is of a limited character, and the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. A contract for the transport of contraband goods was enforced in the United States in the case of the *North Pacific Railway Co.* v. *the American Trading Co.*[6]

and in the United States.

In the American courts it has been distinctly held for over a century that a policy effected in the neutral

tended that the Government erred in not specifying, as in previous proclamations, the sort of acts to which the warning related, that the doers thereof might be prepared for consequences from which their own government would not attempt to shield them (Letts, 131–2). For the text of the United States Proclamation of Neutrality in the war of 1914–15, see 9 A. J. (1915), Sup. 110; and cf. the Circular issued by the Department of State on October 15, 1914, with reference to neutrality and trade in contraband (ibid. 124; infra, p. 296, App. D).

[1] Maritime Code, Marine Insurance, Art. 599, §§ 4 and 5 (Raikes, H. & B. 71).

[2] Code, Art. 781, § 4 (Raikes, S. & P. 70).

[3] Code, Art. 600, § 3 (Raikes, S. & P. 171).

[4] (1865), 34 L. J. N. S. Bank. 17; Tud. 1000; Bent. Cases, 221.

[5] (1865), L. R. 1 A. and E. 1; Cob. Cases, ii. 382.

[6] (1904), 195 U. S. 439, 465; Moore, Dig. vii. 656.

country upon the shipment of contraband to a belligerent country is perfectly valid. In *Seton* v. *Low*[1] the court held that the law of nations does not declare trade in contraband to be unlawful, but only authorizes the seizure of the contraband articles by the belligerent powers. The insurance of the transaction in the neutral country is therefore valid, because whatever is not prohibited to be exported by the positive law of the country is lawful. In *Richardson* v. *Marine Fire & Marine Insurance Co.*[2] the policy was upheld because there is no rule of the law of nations that the neutral shipper of contraband is an offender against his own sovereign and liable to be punished by the municipal laws of his own country. The same view was subsequently taken in England in the case of *Hobbs* v. *Henning*,[3] which was a claim under a policy of insurance upon goods which had been condemned as contraband by the courts of the United States under the doctrine of continuous voyage. The validity of a policy of insurance on a contraband transaction was also definitely established in *Ruys* v. *Royal Exchange Assurance Corporation*,[4] which was an action brought to recover for a total loss of the steamship *Doelwijk*.

Result of such enforcement.

As Historicus points out,[5] the holding such insurances valid is in effect to decide that the traffic in contraband within the neutral territory is lawful, and even that the transport of contraband to the belligerent is no offence against the law of the neutral state; for a policy of insurance on an adventure prohibited by the law of the country in which it is effected is absolutely void. The enforcement of such contracts by municipal law has been

[1] (1799), 1 Johnson, 1; Scott, 778.
[2] (1809), 6 Mass. 102, at pp. 112-3.
[3] (1864), 17 C. B. 791.
[4] [1897] 2 Q. B. 135. In English law the non-disclosure of the real character of such a venture may amount to a breach of contractual duty, which, according to its nature, may either invalidate the agreement or found a claim for damages (*Austin Friars S. S. Co.* v. *Strack* [1905] 2 K. B. 315).
[5] Letters, 138.

regarded as an exception from the general rule according to which every civilized nation is bound to treat the rules of international law as incorporated with its own national judicial system. But that trade in contraband of war is not illegal as between individuals in the neutral country results simply from the fact that the neutral government is not responsible for such trade and the national neutrality is in no way compromised by it.[1]

13 H. C. 1907, Art. 7.

In accordance with what has thus continued for several centuries to be the established practice, Article 7 of the Hague Convention XIII of 1907 now provides that 'a neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything that could be of use to an army or fleet'.[2] The language of many authorities,[3] however, lends support to the view that the obligation to refrain from the transport of contraband, imposed by international law upon the owners of the prohibited goods and the vessels in which they are carried under penalty of confiscation by the injured belligerent, results from the duty of neutrals to abstain from all participation in the war. On this ground Germany has vigorously protested against the manufacture and export by American firms of munitions of war for Great Britain and her Allies during the war of 1914–15,[4] but the American Ambassador in Berlin correctly pointed out that the delivery of war material by American firms to Germany's

German protest in the war of 1914–15.

[1] Id. 138–9, 145.

[2] Pearce Higgins, 448; and cf. Art. 7 of Convention V (ibid. 283).

[3] Cf. Pratt, xvii; Bonfils, 995; Boeck, 590; Dup. D. M. Ang. 264. In the *Commercen* (1816, 1 Wheat. 382) such conduct was referred to as a deviation from strict neutrality, and in the *Bermuda* (1865, 3 Wall. 514) as an unneutral participation in the war. Similarly, in the Report of the British Commissioners of January 18, 1753, the capture of contraband goods was justified, 'because supplying the enemy with what enables him better to carry on the war is a departure from neutrality' (Martens, C. C. ii. 48; Baty, P. L. 117).

[4] *The Times*, November 13, 1914; February 5 and April 6, 1915.

enemies was no breach of national neutrality,[1] and this was subsequently admitted by Germany in reply to one of the United States Notes.[2]

Attitude of United States.

In the session opened on December 7, 1914, however, a Bill was introduced into the Senate to make unlawful the sale of arms and ammunition to any country at war with which the United States is at peace.[3] But the prohibition of the export of arms and ammunition would obviously operate seriously to the detriment of a belligerent who had obtained the command of the sea, and the President and the State Department strongly disapproved of the movement in its favour as being distinctly unneutral, because, in the actual circumstances, it would ensure great benefit to one side to the disadvantage of the other.[4]

Mr. Bryan's opinion.

'There is no power in the Executive', said Mr. Bryan, Secretary of State, in his letter to Mr. Stone, the chairman of the Senate Foreign Relations Committee, in January, 1915,[5] 'to prevent the sale of ammunition to belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighbouring American Republics, and then only when civil strife prevailed.' He then refers to the enormous quantities of arms and ammunition furnished by manufacturers in Germany to belligerents in the Russo-Japanese and the Balkan wars, and he points out that on December 15, 1914, the German Ambassador presented a memorandum of his Government which stated that 'under the general principles of international law no

[1] *The Times*, December 4, 1914. [2] Id. February 19, 1915.
[3] Id. December 10, 1914.
[4] Id. December 21, 1914; February 11, 1915; and cf. the United States Note to Austria (id. August 17, 1915); and see Garner in 9 A. J. (1915), 399.
[5] 9 A. J. (1915), 148-9.

exception can be taken to neutral states letting war material go to Germany's enemies from or through neutral territory'. A resolution at the close of Congress on March 4, 1915, was amended so as to make it perfectly clear that it could not be interpreted as empowering the executive to interfere with the regular shipments of munitions of war to belligerents.[1]

Expediency of the established practice.

No doubt the actual practice of entrusting to the belligerent himself the powers necessary for the restraint of neutral trade which may be injurious to his operations in fact arose because it was easy for the belligerent to protect himself by summary action, while it was not easy for the neutral sovereign to give him an equal security. But the alternative method of making the neutral sovereign responsible for the conduct of his subjects would be attended with grave and obvious inconveniences, and therefore the prevention of traffic in contraband has remained simply an operation of maritime warfare on the same footing as blockade.[2] The obligation which international law imposes upon neutrals to abstain from transporting necessaries of war to the enemy of a belligerent is conditional upon the belligerent possessing the necessary strength to prevent such transport; a power which has lost the command of the sea has no more right to complain of the furnishing of munitions of war to its enemy by neutral individuals than it has to complain because neutrals continue to trade with the ports of its enemy which it is unable to blockade.

Intent with which goods supplied immaterial.

International law makes the carriage of contraband unlawful, not because the act of supplying such articles to a belligerent by a neutral individual is incompatible

[1] *The Times*, March 5, 1915.

[2] Cf. Opp. I. L. ii. 496; Halleck, ii. 243-4. 'A neutral has no right', said the Court in the *Franciska* (1855, Spinks, 293; 10 Moore, P. C. 50; 2 E. P. C. 356), 'to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.'

with an attitude of strict neutrality, but because to prevent the reception of such articles by the enemy is one of the recognized means of reducing the latter accorded to a belligerent in possession of the requisite naval power, in spite of the injury thereby occasioned to neutral traders. The actual intent with which the goods are supplied, that is whether the neutral merchant is acting *animo adiuvandi* or merely *animo commerciandi*, does not come into question at all. 'La saisie de la contrebande de guerre', says Despagnet,[1] 'est une mesure de défense pour les belligérants; elle n'est pas la répression d'un *délit* dans la notion duquel l'intention de nuire entrerait comme élément essentiel.'

And immaterial that established rule benefits one belligerent more than another.

'Une puissance neutre', declared Count Bernstorff in his Note of July 28, 1793,[2] 'remplit tous ses devoirs en ne s'écartant jamais ni de l'impartialité la plus stricte ni du sens avoué de ses traités. Les cas où sa neutralité est plus utile à une des parties belligérantes qu'à l'autre ne la touchent et ne l'atteignent pas. Cela dépend des situations locales et des circonstances du moment; cela varie; les pertes et les avantages se compensent et se balancent dans la suite du temps.'[3] The fact that Germany and Austria-Hungary cannot draw upon the American markets in the face of the naval superiority of Great Britain and her Allies does not make it the

[1] Desp. D. I. 1263; cf. Hansemann, 45-6.

[2] Martens, C. C. ii. 350.

[3] 'The usage of nations', wrote Bernard in 1870 (Neutrality of Great Britain in the American Civil War, 391), 'leaves the belligerent free to take advantage of these enterprises (sc. contraband and blockade) so far as they serve his turn, and to repress them as well as he can, so far as they assist his enemy, arming him for this purpose, at the expense of the neutral, with two important powers, the power of visit and search on the high seas, and that of capture and condemnation. The circumstances of a particular war may render such adventures very difficult or very easy—exceptionally serviceable to one belligerent, peculiarly troublesome to another; but it does not, on any of these accounts, become the duty of the neutral sovereign to stop them, nor is he chargeable with unfriendliness or negligence for not attempting to do so.'

duty of America to close her markets to the latter. She is under no obligation 'to equalize the difference due to the relative naval strength of the belligerents' by preventing all trade in contraband. On the contrary, to deprive a belligerent of the fruits of his naval supremacy under the established law of nations by prohibiting the export to him of the arms and ammunition which his command of the sea enables him to prevent his adversary from receiving, would be, as is recognized in the United States, a distinct breach of neutrality.

When a neutral state may forbid its subjects to trade in contraband.

Where, however, a neutral state is so situated that, unless it prohibits the export from, or transit through, its territory of articles required by one of the belligerents for the maintenance of the war, the other belligerent will be compelled in self-defence to prevent such articles from being imported into the neutral country, or where such a prohibition would not ensure benefit to only one side in the contest to the exclusion of the other, the neutral government may, so long as it is actuated solely by motives of self-interest, quite legitimately prevent its subjects from trading in contraband of war.

Policy of neutral states in war of 1914–15.

During the present war of 1914–15 the Danish and Swedish Governments have prohibited the export of various articles of warlike use.[1] Great Britain held up cargoes destined for Scandinavian ports until the government of the country of destination gave a guarantee against re-export to Germany, and arrangements were subsequently made to prevent such re-export of contraband articles. On October 28, 1914, a Bill was passed by the Danish Parliament containing drastic regulations as to the destinations of ships or cargo to be imported into or exported from Danish harbours, to enable the Government to give an effective guarantee to Great Britain as

Denmark

[1] See the lists in *The Times*, November 13 and December 7, 1914; and cf. Garner in 9 A. J. (1915), 393–4.

to Danish imports from America.[1] In order to eliminate the risk of a cargo being transferred to a German vessel during a coasting voyage, Norway and Denmark prohibited the dispatch of grain from the port of arrival to any other by sea; any grain to be forwarded had to be sent by rail.[2]

Holland. Large quantities of tea exported from England found their way into Germany through Holland till the latter country placed an embargo on the export of tea. The Dutch Government itself became the sole consignee of all food-stuffs and nitrate destined for Holland; it also prohibited the export of certain things either to Germany or to other countries, but under the Rhine Acts it is obliged to let through to Germany by the Rhine any consignments arriving either on a through bill of lading or the order of a merchant declaring that they are in transit, or on proof by documents of the transit.[3] At

Italy. first Italy did not prohibit the export of grain, but she was subsequently reported to have followed the lead of Holland and Denmark. The Italian Government was also said to have put in force a decree that shipments of copper to Italian consignees or 'to order' could not be exported or transhipped. The British policy of making effective arrangements with neutral countries for preventing the re-export of contraband goods to Germany received the approval and support of the United States Government.[4]

[1] *The Times*, October 30, 1914. [2] Id. October 28, 1914.
[3] Id. October 7 and November 17, 1914; and as to the Netherlands Oversea Trust, which is under heavy bonds to prevent goods consigned to it from being re-exported to Germany, see id. July 31, 1915.
[4] Id. January 12, 1915.

CHAPTER VII

THE INTERNATIONAL STATUS OF THE NEUTRAL INDIVIDUAL

Jurists differ in opinion.

The great majority of theoretical writers support the doctrine that a neutral state is not responsible for the carriage of contraband by its subjects, and that a belligerent cannot complain of the sale of contraband articles to his enemy on neutral territory. But there are great differences of opinion among jurists as to the nature of the compromise between the conflicting interests of belligerents and neutrals and as to the legal status of the neutral merchant and the nature of his relation to the belligerents.

Belligerent state and neutral individual under no obligation to each other. Kleen.

With some writers there is a tendency to eliminate individuals altogether from the theory even of those international relations in which they are particularly concerned. 'In the society of nations', says Kleen,[1] 'all neutral rights and duties pass through the state as intermediary, the state being the party immediately responsible and having rights.' In order to bring the branch of the law of neutrality which is concerned with neutral commerce into conformity with the view that international law is exclusively a law between states, it is presented under the guise of a duty of acquiescence on the part of the neutral state, and it is said that the belligerent state and the neutral individual can be bound by no obligation to each other. 'Individuals',

[1] Neut. i. 135. Rousseau asserted in his Contrat Social that states and men are things of such different natures that no true relation can be established between them (Cob. Cases, ii. 16).

Oppenheim.

says Oppenheim,[1] 'derive neither rights nor duties, according to international law, from the neutrality of those states whose subjects they are.' 'All duties which might necessarily have to be imposed upon individual human beings according to the law of nations are not international duties, but duties imposed by municipal law in accordance with a right granted to or a duty imposed upon the respective state by international law.'[2]

Carriage of contraband a mere commercial adventure.

Carriage of contraband, he contends, is a mere commercial adventure, undertaken at the personal risk of the neutral trader, and not an offence against international law; and he asserts that when belligerents seize and punish neutral carriers of contraband on the open sea without their home state having a right to interfere, individuals appear simply as objects of the law of nations.[3] The duty of neutral subjects to comply with the injunctions of belligerents regarding certain forms of prohibited trade is, he says,[4] 'a duty imposed upon them by these very injunctions of the belligerents and not by international law'. The carriage of articles of contraband by neutral merchantmen on the open sea is, so far as international law is concerned, 'quite as legitimate as their sale. The carrier of contraband by no means violates an injunction of the law of nations. But belligerents have by the law of nations the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. It is not international law, but the municipal law of the belligerents, which makes carriage of contraband illegitimate and penal.'[5]

Hall.

'The only duty of the individual', says Hall,[6] 'is to his own sovereign. . . . At the same time the only duty of

[1] I. L. ii. 363–4.
[2] Ibid. i. 19.
[3] Ibid. 366.
[4] Ibid. ii. 364.
[5] Ibid. 495–6.
[6] I. L. 77.

the belligerent state is to beings of like kind with itself; and it is merely bound to behave in a particular manner to the neutral individual because of the international agreement which sets limits to the severity which may be used in repressing his noxious acts.' It is said that the powers with which belligerents are invested are not conferred directly by international law, but are taken and given in conformity with it. When neutral individuals suffer under the rules of maritime capture, 'this happens because international law requires that the states to which they belong shall not protect them from the consequences of such serious misdeeds when imposed by other states in accordance with accepted practice'.[1]

Similarly, Professor Holland objects to the seizure of a contraband carrier being regarded as an exercise of authority by a belligerent state over a neutral subject; and he contends that a direct relation between a belligerent state and individual subjects of a neutral state 'should never be recognized by international law, which ought to be regarded as occupied exclusively with rights and duties subsisting between state and state'.[2] 'International law', he says,[3] 'always deals with the relations between states, and has nothing to do with the contraband trader, except in so far as it deprives him of the protection of his government.' He accordingly supports the doctrine that carriage of contraband is not a breach of international law, and on that ground criticizes some of the clauses usually inserted in British Proclamations of Neutrality.[4] Holland.

In the same way, Dr. Higgins says that contraband trade is not internationally unlawful,[5] and Dr. Pawley Bate contends that the neutral merchant involved in the carriage of contraband does not offend against international law, but only against the ordinance and interests Higgins. Bate.

[1] Lawr. Prin. 72 3.
[2] Jurisprudence, 371, 384.
[3] Letters, 124.
[4] Neutral Duties, 8; Letters, 113.
[5] Hague Peace Conf. 464.

Owen.

of the belligerent affected.[1] Douglas Owen says that there is nothing in itself illegal in the shipment of contraband to belligerents, and that neutrals are within their strict rights in transporting articles of that nature, while the exercise of such right is attended by the concurrent belligerent right of seizure and confiscation of the prohibited goods.[2]

But there is really a direct relation between the belligerent state and the neutral merchant, and the latter commits a direct violation of international law in transporting contraband of war.

The particular branch of the law of neutrality to which the law of contraband belongs appears, however, to involve in practice a direct relation between the respective belligerent states and neutral individuals:[3] and the act of transporting contraband in spite of the prohibitions of a belligerent in a position to punish such transport by the seizure and confiscation of the noxious goods appears to amount to a direct violation of international law and to constitute a breach of a duty imposed by that law immediately on all neutral individuals. This view that those subjects of neutral states who engage in contraband traffic, as owners of the noxious goods or of the ships which carry them, thereby offend against international law, and that the belligerent who seizes the property during the voyage and procures its condemnation in the prize court is, as it were, justly punishing persons who are guilty of a breach of that law, is supported by the language of British Proclamations of Neutrality and was also the view taken by Bynkershoek[4] and the earlier jurists. Similarly, Ortolan speaks of traffic in contraband as 'un commerce illicite en vertu des lois internationales',[5] and Duer[6] and Tudor[7] consider it to be an offence against the law of nations for the subjects of a neutral country to carry contraband of war to a belligerent.

This view supported by the earlier jurists.

[1] Declaration of London, 2, 13.
[2] Declaration of War, 161, 188, 349.
[3] Cf. Cob. Cases, ii. 283.
[4] Quest. Iur. Pub. bk. i, chap. 9 (cf. pp. 43–5, supra).
[5] Règles Int. ii. 166.
[6] Marine Insurance, i. 751–3.
[7] Cases, 986, 1000.

Twiss shows that the fact that an individual citizen of a neutral state should be liable to be treated as an adherent of a belligerent power, whilst the nation itself, of which he is a member, maintains neutrality, presents no difficulty. As the traveller becomes subject to the laws of the state wherein he is sojourning without any conflict thereby arising between the sovereignty of the state of which he is a natural born subject and the sovereignty of the state wherein he is sojourning, so the merchant on the high seas may become subject to the common law of the highway of nations without any prejudice thereby resulting to the sovereignty of the nation of which he is a citizen.[1] Bonfils treats neutral individuals in a similar way,[2] while Kleen admits that in the cases in which, by virtue of the concessions of positive international law, neutral individuals are abandoned to their own action with regard to belligerents, as, for example, where the law of contraband and the right of visit and search are applied to neutral ships on the high seas, there is an exception to the principle that neutrality is the affair of the state alone. In his cosmopolitan character the neutral individual may have direct relations with the belligerents without the intervention of his own state; he may find himself under the civil or criminal jurisdiction of a foreign belligerent state in the questions of neutrality of which the judicial decision has been left by positive international law to the local belligerent jurisdiction.[3]

Twiss. Bonfils. Kleen.

Lorimer also recognizes that the individual, *qua* person, has a separate international status which, in certain matters, leaves the question of belligerency or neutrality open to his personal decision; in these matters he enters into direct relations with the belligerent states.[4]

Lorimer.

[1] Twiss, War, 436 8 (§ 215).
[2] Manuel, 968 9.
[3] Kleen, Neut. i. 127 9, 131-4, 233-4.
[4] Lorimer, ii. 137, 164-5.

Lawrence. Lawrence speaks of the 'rights and obligations of belligerent states and neutral individuals'. In the Middle Ages, as he points out and as we have already seen for ourselves, the growth of trade forced commercial questions upon the attention of rulers long before the idea arose that states as corporate bodies had any duties towards one another in the matter of neutrality.[1] The direct relations thus created between belligerent states and neutral individuals have continued to subsist to the present day, and are regulated by that part of the law of neutrality to which the law of contraband belongs.

Westlake. 'A positive rule of international law', says Westlake,[2] 'may treat certain conduct of an individual as unneutral, allowing the injured belligerent to repress it by action on the individual wherever such action is possible without violating neutral territory, and precluding his neutral state from defending him against such repression, while that state is not called on to join in the repression.' 'It remains true that international law is the law of states, but there is no solid reason why states should not agree by such law that the responsibility for certain acts and their repression shall rest with the individual and the state directly concerned.'[3] The result may not be logical; but 'the existing rules as to neutral duties embody a compromise, and a compromise, unlike a principle, can have no logical consequences'.[4]

This relation established by international usage and custom.

The rules relating to contraband and other kindred topics, such as blockade and unneutral service, merely lay down the positive rules for determining the distinction between general commerce and the acts which a belligerent with sufficient command of the sea is entitled to regard as unneutral because of their interference with his maritime operations.[5] The origin of the belligerent

[1] Lawr. Prin. 655-6.
[2] I. L. ii. 195.
[3] Ibid. 197.
[4] Ibid. 196.
[5] Cf. ibid. 193-4.

rights and the corresponding neutral duties is to be found, as we have seen, not in the basic principle of modern neutrality which enjoins a loyal abstinence from real participation in a war on the part of those who do not avowedly participate in it, but in usage and custom engendered by the practice of nations in times prior to the growth and general recognition of this principle, which in no way affects the law of contraband. Recent international regulations have treated the law of neutrality as involving in some cases a direct relation between the belligerent states and neutral individuals. Articles 16 and 17 of the Hague Convention V of 1907 [1] recognize a definite international status of 'neutral persons'. Under Article 4 (2) of the Hague Convention XII of 1907 [2] a neutral individual was given a right of appeal in certain circumstances to the International Prize Court which it was the object of that convention to establish; but the right was expressly reserved to his country to forbid him to bring the case before the court or to undertake the proceedings in his place.[3] Similarly, Article 64 of the Declaration of London recognizes the immediate right to compensation of a neutral merchant injured by an unjustifiable seizure.

And recognized by recent international regulations.

[1] Pearce Higgins, 285 6. [2] Ibid. 409.
[3] Cf. Opp. I. L. i. 365.

CHAPTER VIII

NECESSITY OF DESTINATION FOR EMPLOYMENT IN NAVAL OR MILITARY OPERATIONS

Warlike use the criterion of contraband character.

THE theoretical basis of the law of contraband hitherto universally recognized is that naval or military exigencies alone shall be taken into account in determining the contraband character of goods, and that a belligerent is only entitled to prevent neutral traders from transporting to his enemy such articles as the latter may require for the prosecution of hostilities against him. The law of contraband must not be used to make the non-combatant population suffer directly as individuals so that they may be induced by their sufferings to put pressure upon their government to end the war.[1] The character of an article must therefore be determined by the use to which it will be put. There are some objects, such as arms and ammunition, called 'absolute' contraband, which, when destined for the enemy, carry their contraband character on their face. But there are other objects, such as food-stuffs and clothing, and many other articles of use alike in peace and war, called 'conditional' contraband, which may be as essential to the prosecution of hostilities as arms themselves, but with regard to which the conditions of seizure require to be defined with sufficient precision to prevent their being treated as contraband when clearly destined simply for the immediate use of individual members of the civil

Absolute and conditional contraband.

[1] Hall, I. L. 651-2; Dup. D. M. Ang. 252; Moore, Dig. vii. 681, 691; Hansemann, 46 8.

population. In the case of articles of the latter kind there must be not only a destination to the enemy but also a presumption that the goods will be used for warlike purposes; a *destination d'emploi* is required in addition to a *destination de direction*.[1] Their contraband character is thus conditioned upon the existence of this specific destination; hence the name.

Consignments to the belligerent government.

But if the belligerent government, whose function it is to supply the armed forces, also undertakes the function of supplying the civil population, it becomes impossible to distinguish between the one destination and the other, even though the department in question may be a civil department. When the state which is conducting war takes upon itself the conduct of commerce it may be held to impart a belligerent taint to its trading. Although Great Britain and the United States vigorously protested against the attempt of Russia at the outbreak of the Russo-Japanese war to treat provisions and other articles of double use as 'unconditionally contraband', no demur was apparently made against her subsequent reservation of the right to consider as contraband food consigned to the Japanese Government.[2]

The Declaration of London.

Article 33 of the Declaration of London provides that conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in the latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in

[1] Cf. Kleen, Cont. 32; Neut. i. 375–7.

[2] Infra, p. 135. During the Boer war Great Britain was prepared to seize articles conditionally contraband destined for the enemy's government or agents, provided they were also shown to be actually intended for the supply of troops or adapted for their use (cf. infra, p. 133). Prior to the establishment of the principle of 'free ships, free goods' by the Declaration of Paris (supra, p. 8) in 1856, there was no need to invoke the law of contraband for the condemnation of merchandise consigned directly to enemy authorities (cf. Baty, South Africa, 3; Ath. Jones, 48–9).

progress. This exception, as appears from the Report,[1] is intended to apply to such a case as where food-stuffs, or other articles of conditional contraband,[2] are destined for the use of the civil government of a colony during a European war which does not in fact affect the colonies of the belligerents, since the resources of the civil government of the colony could not be drawn upon for the needs of the war. The condemnation of articles sent to a civil government department is justified on the ground that 'the state is one, although it necessarily acts through different departments. If a civil department may freely receive food-stuffs or money, that department is not the only gainer, but the entire state, including its military administration, gains also, since the general resources of the state are thereby increased.'[3]

The position in the war of 1914–15.

The fact that in the present war of 1914–15 all the continental armies are conscript armies raised in accordance with Scharnhorst's idea of an armed nation goes still further to destroy the old distinction between the armed forces of a nation and the civil population. If the army is the 'people in arms', food for the people is necessarily, to a great extent, food for the army.[4] Foods may be imported for the use of civilians, but it is quite certain that if the army wants them it will take them. In the case of blockade the doctrine that war is a contention between states and not private persons, and is to be waged against the public forces of a state and not against its private citizens, is entirely disregarded. In the American civil war the victory of the Union was in great part due to the ruthless blockade of the Southern

[1] P. P. Misc. No. 4 (1909), 48–9; Pearce Higgins, 588; infra, p. 265.
[2] Other than gold or silver in coin or bullion or paper money, which are expressly excluded from the exception in question.
[3] P. P. Misc. No. 4 (1909), 48; Pearce Higgins, 587–8. By a 'government department' is meant one dependent on the central power, and local and municipal bodies are not intended to be included.
[4] Cf. Editorial Comment in 9 A. J. (1915), 212.

States in pursuance of the Northern policy to cut off not only military supplies, but everything that rendered life tolerable for the enemy population. In view of this admitted practice there can be no universal rule based on considerations of morality and humanity against the stoppage of articles of conditional contraband when not clearly destined for the use of the armed forces of the enemy.

The German attitude.

In reply to a memorial of complaint from a number of Hamburg merchants against the French attempt to declare rice absolute contraband in 1885, Prince Bismarck stated that it belonged to the belligerent powers to say what they intended to treat as contraband, and that 'the measure in question has for its object the shortening of the war by increasing the difficulties of the enemy, and is a justifiable step in war if impartially enforced against all neutral ships'. Again, in 1892, in answer to a motion brought forward by the Radical party urging the government to take steps to secure a guarantee for the immunity of private property at sea in time of war, the Imperial Chancellor, Count von Caprivi, declared: 'If some one equipped a ship to supply the wants of the enemy, then the other side would try to capture those supplies, even if they consisted only of food-stuffs and raw material indispensable for the enemy's industries. And I must say that if states act in this way they only use the means which the war gives them. In such conduct I should see absolutely no barbarity, or any difference from the measures taken in a war on land. And I believe that, inasmuch as no naval war has been waged on a large scale since the days of Nelson, views about naval war have arisen which under-estimate its force and its power.'[1] Moreover, in the present war German practices have tended to obliterate all distinctions between

[1] *The Times*, March 2, 1915.

civilians and combatants, and it is therefore not for Germany to complain if, in the application of the law of contraband, the general principle that the civil populations of the countries at war are not to be exposed to the treatment reserved for belligerents is not rigidly observed.[1]

[1] As to the effect of the German decree of January 25, 1915, placing the grain and flour supply of the Empire under government control, in still further obliterating the distinction between absolute and conditional contraband, cf. infra, pp. 187–8, and Garner in 9 A. J. (1915), 384–6.

CHAPTER IX

ATTEMPTS TO ABOLISH CONTRABAND

Some treaties granted a full and entire freedom of commerce between neutral and belligerent without any kind of restriction relative to contraband, so that even arms were allowed to be freely carried to the enemy. De Martens mentions a convention of this character of 1468 between England and the Duke of Brittany.[1] Complete freedom of trade was similarly stipulated for in Article 11 of the treaty of alliance and friendship entered into between England and Portugal in 1642.[2] This treaty was renewed in 1654.[3] All notion of contraband was also suppressed in the treaty of peace and alliance of 1661 between Portugal and the United Provinces, by Article 12 of which the unrestrained right was conceded to carry articles of that nature to the belligerent enemies of either of the contracting parties.[4] By Article 13 of the treaty of 1785 between the United States and Prussia the contracting powers declared that, in case one was at war while the other was at peace, such articles as arms, ammunition, and military stores carried in the vessels or by the subjects or citizens of the neutral to the enemies of the belligerent should not be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. But it was to be lawful to stop such vessels and articles, and to detain them for such length of time as the captors might think necessary to prevent the inconvenience or damage that might ensue from their proceeding, subject to the payment of compensation for the loss occasioned to the

Treaty stipulations.

The United States and Prussia.

[1] Précis, ii. 265, n. (a) (§ 318); Rym. V. ii. 159; and cf. Boeck, 596.
[2] Dum. VI. i. 239; Chal. ii. 263.
[3] Dum. VI. ii. 83; Chal. ii. 272.
[4] Dum. VI. ii. 368.

proprietors; and it was further to be allowed to the captors to use the whole or any part of the military stores so detained on payment of its full value to be ascertained by the current price at the place of its destination. This provision was renewed in 1799 and declared to be still in force in 1828.[1]

The abolition of contraband was also proposed by the United States in a note of Mr. Secretary Marcy of July 28, 1856, to the Russian minister at Washington;[2] and that the neutral trader should be allowed the same freedom of commerce in war that he has in peace has been propounded as ideally correct by some theoretical writers. At the Institute of International Law in 1874 Lorimer advocated the absolute freedom of trade between belligerents and neutrals, and the consequent suppression of the right of visit and search.[3] This position was also supported by Cocceji, Klüber, Rayneval, and von Bar, while Pierantoni and Kleen looked upon it as the ideal of the future to which international opinion and practice would gradually tend.[4] In 1901 the abolition of contraband was strongly advocated by the Bavarian general von Keller,[5] but the German jurist Herr Perels was entirely opposed to the idea,[6] which has generally been regarded as an unattainable ideal and quite impracticable at the present time.

Theoretical support.

British proposal at Second Hague Conference.

We have already referred[7] to the discussion at the Second Hague Conference in 1907 of the British proposal for the complete abolition of the doctrine of contraband. In the instructions to the British delegation at that conference Sir Edward Grey declared: 'His Majesty's

[1] Martens, Rec. iv. 42–3; vi. 678–81; Sup. xi. 619–20; Hub. and King, 149–59; Moore, Dig. vii. 676.
[2] Westlake, I. L. ii. 288. n. 1.
[3] Beckenkamp, 17.
[4] 21 Ann. 111, 157–8; Beckenkamp, 15, n. 2; Kleen, Cont. 44.
[5] Beckenkamp, 79.
[6] Int. öffent. Seerecht, 237. n.
[7] Supra, p. 16.

Government recognize to the full the desirability of freeing neutral commerce to the utmost extent possible from interference by belligerent Powers, and they are ready and willing for their part, in lieu of endeavouring to frame new and more satisfactory rules for the prevention of contraband trade in the future, to abandon the principle of contraband of war altogether, thus allowing the oversea trade in neutral vessels between belligerents on the one hand and neutrals on the other to continue during war without any restriction, subject only to its exclusion by blockade from an enemy's port.'[1] At the opening of the conference the British delegates accordingly made the following declaration: 'In order to diminish the difficulties encountered by neutral commerce in time of war, the Government of H. B. M. is prepared to abandon the principle of contraband in case of war between the Powers which may sign a convention to that effect.'

The voting thereon.

Many specious arguments were urged in support of this declaration,[2] and on the vote being taken in committee it was affirmed by the delegations of the following twenty-five states: Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark, Great Britain, Greece, Italy, Mexico, Netherlands, Norway, Paraguay, Peru, Persia, Portugal, Salvador, San Domingo, Serbia, Siam, Sweden, and Switzerland. Negative votes ere given by the delegations of four great powers and one small state: France, Germany, Montenegro, Russia, and the United States of America. And the delegations of five states abstained from voting: Spain, Japan, Panama, Rumania, and Turkey. But Spain afterwards adhered to the resolution.[3]

[1] P. P. Misc. No. 1 (1908), 16–17; Pearce Higgins, 622.
[2] La Deux. Confér. i. 257–8; Westlake, I. L. ii. 287–8; Col. Paps. 519–20; Desp. D. I. 1275; Boidin, 184–8; Dup. D. M. Conf. 270–83.
[3] Westlake, I. L. ii. 288 9; Desp. D. I. 1275–9.

Ultimate failure of the proposal.

The fourth committee having decided on September 24 not to pursue the matter further at the then conference, Sir Edward Fry issued to the delegations which had supported the British proposal an invitation to a meeting, accompanied by a draft to which he proposed that they should all adhere, declaring that in case of war between any two or more of the contracting powers, no non-contracting power being a party, ' (1) goods belonging to a subject of a neutral contracting power on board neutral or enemy ships cannot be condemned as being contraband ; (2) the flag of a neutral contracting power covers all goods on board '. Of the twenty-one delegations which attended this meeting besides the British, only that of Haiti supported the latter in being ready to sign. All the others supported or acquiesced in the view which M. de Kapos Mere (Austria-Hungary) and Count Tornielli (Italy) took the lead in expressing. Their votes had been given as a part of the proceedings of the conference, of which the principle was that unanimity or an approach to it was necessary for a result. To sign at the conference a convention outside it would damage the conference, and might prevent the powers from agreeing to another.[1]

Thus even the partial abolition of contraband by agreement between the powers then desiring it was not effected; and in view of the unfavourable reception accorded to the original proposal by the majority of the great powers, it was not renewed on the occasion of the Naval Conference of 1908–9.[2] But a proposal for the abolition of conditional contraband, also previously suggested at the Hague Conference in 1907 by the United States, was made at London and received the support of a few powers, but had to be withdrawn.[3]

[1] Westlake, I. L. ii. 289; Col. Paps. 535.
[2] P. P. Misc. No. 4 (1909), 23.
[3] P. P. id. 94; No. 5 (1909), 136–7.

CHAPTER X

CONTRABAND ARTICLES

THE edicts of the Church treated as contraband arms and ammunition, the raw materials serving for their manufacture, timber and other materials for the construction of ships, and also provisions.[1] Before the sixteenth century the distinction had hardly come to be taken between the traffic which neutrals might, and that which they might not, lawfully carry on with countries at war. As soon as we can distinguish a particular kind of trade which a belligerent may prevent neutrals from engaging in with his enemy, we also find two distinct tendencies with regard to the prohibited articles, the one in favour of the prevention of neutral trade in weapons and munitions of war alone, the other in favour of a prohibition of all supplies which might be useful in any way for warlike purposes.[2]

Divergent tendencies with regard to extent of belligerent interference with neutral trade.

England and Holland, as great maritime powers, employed in practice extensive and elastic lists of contraband, the contents of which were determined in each case according to the particular circumstances of the war in progress.[3] The following is a list of prohibited articles which was contained in an English Order in Council of July 27, 1589 :[4]

Extensive English and Dutch lists.

[1] Nys, Orig. 224 ; Kleen, Cont. 154, n. ; Neut. i. 350.
[2] Lawr. Prin. 697 ; Westlake, I. L. ii. 278.
[3] Kleen in 25 R. D. I. 135, 149–50.
[4] Chesney in 20 E. H. R. (1905), 663 ; and cf. Marsden in 67 Naut. Mag. (1898), 445–8.

Munitions.			*Victuals.*
cables	callyvers	leade	bacon
masts	mnskettes	matche	corne
anchors	armonr	ordinance (not	wheat
cordage	powder	belonging to	rye
pitch	brimstone	the ship)	barley
tarre	saltpetre	canvas	meale
tallow	boulletts	Dantzig pol-	beanes
pitchstones	copper	daynes	peason and such like.

In 1592 the Privy Council gave a very wide definition to 'canvas', and in 1597 a new list of 'prohibited' and 'licit' articles was drawn up at the request of the Danish ambassadors, as follows:[1]

Prohibited Articles.			*Licit Articles.*	
cables	ordinance	wheat	butter	beanes
cordage	sailyards	rye	cheese	iron
gunpowder	pitch	meale of	bacon	steele
hempe	tarr	wheat	stockfish	copper
masts	saltpetre	or rye	pease	rosin

Spanish practice.

The transport of naval stores was prohibited by Spain in her long war with Holland, and in 1625 the Spanish admiralty courts were directed to include provisions, medicines, and tobacco among prohibited merchandise.[2] Tobacco was included as victuals, on the ground that by its use the consumption of victuals might be prolonged, and it was only on the ground that this inference was erroneous that letters of reprisal were granted in England.[3] Elizabeth acquiesced in the principle of the *placaat* of 1599, by which the Dutch prohibited the carriage of all goods whatever to the Spaniards, as 'an effect of great necessity which had no law'.[4]

[1] Cheyney, in 20 E. H. R. (1905), 669.
[2] Nys, Orig. 226; Kleen in 25 R. D. I. (1893), 143, 150.
[3] Westlake, I. L. ii. 278.
[4] Twiss, War, 247 (§ 126).

France, on the other hand, being insignificant as a naval power till the war of 1672, desired a more restricted prohibition of neutral commerce. The ordinances of 1543 and 1584 prohibited only munitions of war;[1] in the negotiations of 1599 between Elizabeth and Henry IV with regard to the exemption of French subjects from search, Henry wished to limit his undertaking to the carriage of enemy's goods and the carriage to the Spaniards of 'arms, munitions, or other instruments or materials of war', and the French representatives were expressly unwilling to include provisions in the list. In the abortive negotiations for a treaty in 1602, the draft, probably emanating from the French side, which was discussed by the English and French commissioners, proposed by Article 6 only to prohibit the carrying any kind of arms to the enemy, though accompanying this with a proviso that the liberty of commerce should not be abused by the subjects of either power to the prejudice of the other. Similarly, Henry was less tolerant than Elizabeth of the Dutch *placaat* of 1599. While the other powers of Europe passed it over in silence, he merely directed his subjects to submit to it for the limited period of six months.[2]

Less extensive French lists.

The early treaties which distinguish between lawful and unlawful neutral trade with a belligerent do so only in vague and general terms and contain little particular enumeration of the prohibited articles. Owing to the origin of the law of contraband in the action of belligerents to protect and defend their own interests at a time when there were no generally recognized rules of international law to govern their relations with neutrals, the power to determine what things should be included in the forbidden class naturally became vested in the sovereign of the

Vagueness of early treaties.

Right to determine list of contraband vested in belligerents.

[1] Boeck, 37–8; Dup. D. M. Aug. 55, n.; supra, p. 34, n. 4.
[2] Westlake, I. L. ii. 278–9; cf. supra, p. 40 and n. 3.

country interested in stopping the noxious traffic.[1] At the end of the sixteenth century the principle was definitely established that it belongs to a belligerent to settle the list of contraband articles according to the circumstances of the war, either by an express declaration of the government formally notified to neutral powers, or by the decision of particular cases brought before the prize courts for adjudication.

Treaty of Southampton.

Upon this principle was based Article 20 of the offensive and defensive alliance concluded at Southampton on September 17, 1625, between Charles I and the United Provinces,[2] which was one of the earliest treaties to contain anything approaching a detailed category of contraband articles. The article referred to declared that 'all contraband goods, as are victuals and munitions of war (*munitions de bouche et de guerre*), ships, arms, sails, cordage, gold, silver, copper, iron, lead and the like, whencesoever they are carried to Spain or to any other country subject to the King of Spain or his adherents, shall be good prize together with the ships and men that they shall carry'. On December 31 Charles issued a proclamation specifying the goods liable to seizure under the treaty;[3] and as difficulties arose with regard to the meaning of what it summarily described as materials for ships or munitions of war, a further proclamation was issued on March 4, 1627, specifying as contraband: 'ordinance, armes of all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kindes, hempe, saile canvas, danuce pouldavis, cables, anchors, mastes, rafters, boate ores, baleks, capraves, deale board, clap

[1] Nys, Orig. 226-7; Dup. D. M. Conf. 21, 264; Hautefeuille, Neut. ii. 318; Kleen, Neut. i. 354.

[2] Dum. V. ii. 478; cf. supra, pp. 11, 51. This is the treaty which affords the first official mention of the word 'contraband' as used in international law to denote a prohibited neutral trade with a belligerent.

[3] Rym. VIII. i. 184; Twiss, War, 235-6.

board, pipe staves, and vessels and vessell stuffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sorts, all provisions of shipping, and all munition of warr, or of (*sic*) provisions for the same.'[1]

Opinion of Sir Leoline Jenkins.

The right of a belligerent state, in order to meet the special requirements of a particular war, to draw up at its commencement a list of articles to be contraband during its continuance was recognized in an opinion given by Sir Leoline Jenkins to Charles II in 1674 with reference to a case in which pitch and tar belonging to English subjects on board a Swedish vessel bound to Rouen had been captured by a Spanish privateer during war between France and Spain. He began by pointing out that such goods were not made contraband by the Anglo-Spanish treaty of 1667,[2] and then went on to say that unless they were affected by being in the Swedish ship, they 'cannot be judged by any other law but by the general law of nations; and then I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general notification made by Spain to all the world that they will condemn all the pitch and tar they meet with '.[3]

Later treaty stipulations.

During the seventeenth, eighteenth, and earlier part of the nineteenth centuries a very great many treaties were concluded between numerous states for the purpose of settling what articles should be regarded between the parties as contraband of war.[4] But while they accentuate the marked difference we have noticed between the French and English points of view, it is impossible to

[1] Rym. VIII. ii. 156; Rob. Col. Mar. 65; cf. Marsden in 25 E. H. R. 252; Twiss, War, 237–8. [2] Dum. VII. i. 31 (Arts. 24 and 25).
[3] Wynne, Life and Correspondence of Sir Leoline Jenkins, ii. 751.
[4] Hall, I. L. 638–41; Bonfils, 996–8; Cob. Cases, ii. 439; Brochet, 16–20.

establish any general rules from their conflicting provisions.[1] Article 11 of the treaty of Whitehall of 1661 between England and Sweden [2] prohibited a list of things which may be described as arms, adding *et quaecunque alia bellica instrumenta*, and money, provisions (*commeatus*), saltpetre, horses, horse furniture, ships of war and guardships. A stipulation followed in the same article that 'neither of the confederates shall suffer any of his subjects to give aid or lend ships, or be in any way useful to the enemies or rebels of the other to his prejudice or detriment'.

French attitude maintained.

France, however, still maintained her leaning towards a more restricted form of prohibition, and on May 10, 1655, she concluded a treaty of commerce [3] at Paris with the Hanse towns in which a catalogue of contraband was set forth omitting provisions. Four years later she obtained the assent of Spain to her point of view by the treaty of the Pyrenees, 1659.[4] Article 12 of the latter treaty prohibited as contraband a list of things which may be described as arms, adding *et autres assortiments servants à l'usage de la guerre*, but no materials except saltpetre; Article 13 declared that victuals should be free except when carried to Portugal—an exception dictated by the policy of the moment—or to blockaded places. In 1681 the famous *Ordonnance de la marine* of Louis XIV laid down that 'arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated'.[5] Within a few years after the Anglo-Swedish treaty of 1661 England adopted the system of the treaty of the Pyrenees in treaties of 1667 with

[1] Cf. Westlake, I. L. ii. 286–7; Boeck, 593–4.

[2] Dum. VI. ii. 385; Chal. i. 52; and cf. Art. 7 of the treaty of Westminster of 1654 between England and Holland (Dum. VI. ii. 74).

[3] Dum. VI. ii. 103 (Art. 2).

[4] Dum. VI. ii. 261.

[5] Valin, Ord. ii. 264 (Art. 11).

Spain [1] and Holland [2] and of 1677 with France,[3] and she agreed upon the same policy with France again in 1713 [4] and 1786.[5] But such treaties in no way expressed British policy as apart from special agreement, and their principles were not acted upon in dealing with states with which no convention existed.

Vagueness of early text writers. Gentilis.

The language of the early systematic writers is as vague and general as that of the early treaties. Gentilis speaks quite generally of 'provisions and articles of regular use in war',[6] 'munitions of war',[7] and 'necessaries of war'.[8] From the long chapter in the *Hispanicae Advocationis* in which he considers the case of an English vessel captured on her way to Constantinople with a small quantity of gunpowder and other munitions of war among her cargo, it is clear that he recognized that while a belligerent might lawfully prevent the transport of warlike stores to his adversary, it was not open to him to put a universal ban upon neutral trade.[9] From his description of the noxious part of the cargo in question as *vetitae undique res* [10] it would appear that he also recognized the existence of a class of merchandise which it would be unlawful for neutrals to transport to a belligerent on some occasions or in some circumstances but not in others.

Grotius.

Grotius divided articles of trade during war into three classes: [11] (1) articles exclusively or primarily used for war, such as arms and ammunition, which are always contraband; (2) articles susceptible of use in war as well

[1] Dum. VII. i. 27.
[2] Dum. VII. i. 44.
[3] Dum. VII. i. 327.
[4] Dum. VIII. i. 348; Chal. i. 403.
[5] Martens, Rec. iv. 169 (Art. 22).
[6] Commeatum et quod in bello usui esse solet (De iure belli, bk. i, chap. 21, p. 97).
[7] Commoda bello (ibid. p. 98).
[8] Necessaria ad bellum (id. bk. ii, chap. 22, p. 257).
[9] 'Etiam illa erant solum propter res bello utiles, hic de omnibus agitur' (bk. i, chap. 20, p. 81).
[10] Ibid. p. 74.
[11] De iure belli et pacis, bk. iii, chap. 1, § 5.

as for purposes of peace (*ancipitis usus*), such as money, provisions, ships and articles of naval equipment, which on account of their double use are contraband or not according to the circumstances of the case and the special needs of the belligerents; and (3) articles which are not susceptible of use in war at all, as things serving only for pleasure, and which are therefore never contraband. In order to determine when things useful both in war and in peace may be treated as contraband, Grotius selects as tests of liability the belligerent's necessity,[1] the neutral's knowledge of his necessity, and the justice of his cause. The first standing alone will authorize the belligerent who meets with the goods to intercept them subject to an obligation to indemnify the neutral. The second makes the neutral culpable with a liability, if harm to the belligerent who meets with the goods has not yet followed, to their being detained and security for the future exacted from him; but if the surrender of a place[2] or the conclusion of peace has been hindered, then to their confiscation by way of redress. And when the justice of the belligerent with whom he meets on his way is very evident, the neutral will be liable, not only civilly but criminally, to punishment which in practice must depend on the belligerent's discretion.[3]

Zouch. Zouch, who wrote in the middle of the seventeenth century, copies the above passage from Grotius with a slight variation, and also mentions the case in which Spain claimed to treat tobacco as contraband on the ground that by its use the consumption of food is

[1] In this connexion Grotius expressly refers to the explanation of the doctrine of necessity which he had previously given in the second book (chap. ii, §§ 6–9). The conditions there laid down for the exercise of this right are: (1) It shall not be exercised until all other possible means have been used; (2) nor if the right owner is under a like necessity; (3) retribution shall be made as soon as possible.

[2] This would be more analogous to a case of blockade.

[3] Cf. Wheat. Hist. 128–9; Westlake, I. L. ii. 281–2.

protracted.[1] 'When arms or ships have been declared contraband (*prohibitum*),' he remarks,[2] 'a question is raised whether if iron, out of which arms are made, or planks or timber, out of which ships are built, are carried, they are liable to forfeiture. This is doubtful,' he says, 'because we cannot safely argue from the finished article to the material, and the scope of a penal statute or edict ought not to be enlarged. But, on the other hand, it is decided that when there exists the same reason for prohibiting the material and the article, the same rule should apply to both, chiefly to guard against fraud . . . the civil law forbids not only arms but also iron to be carried to the enemy; and the canons which do not allow galleys, that is to say, triremes, to be conveyed to the Saracens, also forbid the conveyance of galley-stays, that is, the timber and planks out of which triremes are built.' Zouch appears to have in mind, however, rather the construction of the terms of a particular edict of contraband than the question whether the articles he mentions may be treated as contraband by the common law of nations.

Loccenius and Molloy.

Contemporary with Zouch was the Swedish professor Loccenius, of whose work *De Iure Maritimo et Navali* an English translation was published by Molloy in 1682. 'Although the goods of friends,' it is said in this treatise,[3] 'according to the circumstances of the case, may be preserved by adjudication and restored to their owner, yet all manner of goods have not that privilege. For though the freedom of trade preserves the goods of friends against the rigour of war, yet it does not those goods that supply the enemy for war, as money, victuals, ships, arms and other things belonging thereto.' The threefold classification of Grotius is adopted, and the liability of

[1] Iuris et iudicii fecialis, pt. ii, sec. viii, §§ 7, 12 (cf. supra, p. 106).
[2] Ibid. § 8.
[3] Bk. i. chap. i. § 25.

articles *ancipitis usus* is stated to be governed according to the state and condition of the war; 'for if a prince cannot well defend himself or endamage the enemy without intercepting of such things, necessity will then give a right to the condemnation.'[1]

Heineccius. Heineccius, writing in 1721, states that the contemporaneous usage of nations included in the list of contraband not only munitions of war of every kind, saltpetre, and horses, but cordage, sails, and other naval stores, together with provisions, the right of intercepting which latter articles he seems to place upon the same ground of necessity with Grotius.[2] Bynkershoek, on the other hand, writing a few years later, apparently strives to limit the number of prohibited articles as rigidly as is possible, consistently with the rules applied by his own nation. He lays down broadly that everything is contraband which may be employed by belligerents for purposes of war, whether it is a completed instrument of war, or some material in itself suitable for warlike use; but he strenuously contends against admitting into the list of contraband those things which are of promiscuous use in peace and war. He considers the limitations assigned by Grotius to the right of intercepting them—confining it to the case of necessity, and under the obligation of restitution or indemnification—as insufficient to justify the exercise of the right itself.[3] 'If', he says, 'all materials are prohibited out of which something may be made which is fit for war, the catalogue of contraband goods will be immense; for there is hardly any kind of material out of which something, at least, fit for war may not be fabricated.' He allows material for building ships, however, to be confiscated, 'if the enemy is in

Bynkershoek.

[1] Bk. i, chap. i, § 24; chap. iii, § 11.
[2] De nav. obvect. chap. i, § 14.
[3] Quaest. Iur. Pub. bk. i, chap. 10 (pp. 79–80).

great need of them, and cannot well carry on the war without them.' He also states that provisions are often excepted from the general freedom of neutral commerce 'when the enemies are besieged by our friends or are *otherwise* pressed by famine.'[1]

Vattel, whose *Droit des Gens* appeared in 1758, enumerates 'arms and munitions of war, timber, and everything which serves for the construction and armament of vessels of war and horses, as being always liable to capture as contraband; and provisions under certain circumstances, 'when there are hopes of reducing the enemy by famine'[2] In the following year Hübner published his treatise *De la saisie des bâtimens neutres*, in which he adopts Grotius's classification of contraband goods. In the first class, always liable to capture and confiscation when going to the enemy, he includes munitions of war, ships of war, and such naval stores as ship timber, sails, and cordage of a certain size. In the second class he includes coined money, provisions of all kinds, iron in bars, copper, pitch, tar, hemp, and clothing of all kinds; which articles he considers liable to capture and confiscation under certain circumstances.

Vattel

Hübner

England continued to treat naval stores as contraband during her war with France in 1689, and also in the war of the Spanish succession in 1700, except when such articles, being of the growth and produce of [illegible], were found on board vessels belonging to that country.[4] France also included naval stores in 1704, but in the commercial treaty concluded between France and Great Britain in 1713,[5] at the termination of the war by the peace of Utrecht, they were omitted from the list of

Articles *recipitis sus*

[1] Ibid. chap. 9 (p. [illegible]; Cf. Vliet [illegible] 129; Twiss, W. [illegible] 239 (§ 138); Beckenkamp, [illegible]

[2] Bk. iii. chap. viii. § [illegible]

[3] Vol. i. pt. ii. chap. i. [illegible] and 6.

[4] Wheat. Hist. 126–7; [illegible]en in 25 R. D. I. (1893) 134.

[5] Dum. VIII. i. 348; Cf. [illegible] i. 403–4 Art. 20).

contraband. The right of a belligerent to declare articles *ancipitis usus* contraband by special notification according to the particular circumstances of the war was expressly upheld in the case of the *Med Guds Hielpe*,[1] decided by Sir Henry Penrice in 1745 and affirmed five years later on appeal, where a Swedish vessel had been seized carrying a cargo of pitch and tar which the court held was unmistakably designed for the use of the French. In the course of the judgement of the Court of Admiralty three classes of articles are enumerated, according to the classification of Grotius, and it was held that pitch and tar, being of a mixed nature and capable of use for civil purposes and also for fitting ships of war, are sometimes contraband and sometimes not. 'Sovereign princes at war', it is expressly laid down, 'may declare such and such things to be contraband, and after notice to their allies, their subjects may certainly seize them.' In the result both ship and cargo were condemned, and that in spite of the fact that pitch and tar were not enumerated in Article 11 of the treaty of 1661 between Sweden and England.[2] The court thought that 'those enumerated were mentioned rather for example than by way of exclusion, and that there are other contraband goods than what are mentioned in that article.' In the case of the *Fortune de la Mer*,[3] the same court stated, 'The Crown may make a declaration what shall be contraband, and then every convener shall be liable to confiscation.' In the *Jonge Tobias*[4] salt consigned to Dunkirk, a port of naval equipment, was pronounced contraband. In the *Young Andreas*[5] tallow and twenty tons of butter, captured on a Prussian ship bound from Dublin to Rochefort with butter, tallow, and coals, were condemned as contraband.

The *Med Guds Hielpe*.

[1] Pratt, 191; 1 E. P. C. 1.
[2] Dum. VI. ii. 385; Chal. i. 52. Cf. Westlake, I. L. ii. 281.
[3] (1745), Pratt, 40.
[4] (1747), Pratt, 190; 1 E. P. C. 3.
[5] (1747), Pratt, 99; 1 E. P. C. 3.

The dispute with Prussia over the Silesian Loan.

On the outbreak of the war with France and Spain in 1744 the King of Prussia instructed his minister in London to discover what objects the British Government would consider as contraband.[1] Baron Andrié spoke to Lord Carteret on the subject and was informed that timber and other materials for shipbuilding, ropes, sails, flax, and tar were not regarded as articles of contraband, and that the commerce of Prussian subjects would not be interfered with, provided their vessels were not found carrying munitions of war to the enemies of England, or provisions to a place besieged or blockaded by the English.[2] It was chiefly on account of this express assurance by the British secretary of state, as well as on the ground that Great Britain had in her treaties with Holland and other maritime powers confined the list of contraband to munitions of war, that in the dispute over the Silesian Loan in 1752–3 Frederick the Great complained because Prussian vessels carrying ship timber to France were detained in 1745 and, although their cargoes consisted of articles other than munitions of war strictly so called, were condemned by the British prize courts. 'If the English minister had stated from the beginning', said the Prussian commissioners in their *exposition des motifs*,[3] 'that he regarded these commodities

[1] Martens, C. C. ii. 2. [2] Ibid. 4.

[3] Ibid. 32; and cf. Manning, 294. By the treaties of Breslau and Berlin, 1742, by which Silesia was ceded by Austria to Prussia, Frederick II had stipulated to assume the payment of the loan made by certain English merchants to Maria Theresa in 1735, and secured by a mortgage upon the revenues of the province (Wheat. Hist. 206–7). It was the assignment of this mortgage by the Commissioners to the Prussian claimants by way of indemnity for the seizure and condemnation of their vessels and goods that gave rise to the case of the Silesian Loan. The matter was ultimately adjusted by a compromise in the treaty of Westminster, 1756, whereby the British Government agreed to pay £20,000 in liquidation of all claims from Prussian subjects; the King of Prussia agreeing, on his part, to fulfil his engagements with regard to the Silesian Loan (Martens, C. C. ii. 87). The principal point of dispute was the capture of enemy property on neutral vessels.

as contraband, the king would not have failed to warn his subjects not to risk sending them until an agreement had been come to on the subject with the English court.'

Conditional contraband.

As we have already seen,[1] it is a fundamental principle of the law of contraband that it shall not be employed for the purpose of putting immediate pressure upon the civil population as individuals; and in order to ensure the due observance of this principle it is necessary, before articles, such as clothing and foodstuffs, of use alike in peace and war, can be condemned as contraband, to show something more than that they are simply destined to the enemy's country. In the decisions of Sir William Scott (afterwards Lord Stowell) we have an authoritative exposition of the circumstances under which articles of double use may be treated as contraband, and of the principles by which the action of Great Britain was guided at the time of the Napoleonic wars.

The *Jonge Margaretha*.

The *Jonge Margaretha*,[2] decided in 1799, is the leading case on the subject. It was the case of a Prussian ship taken in April, 1797, when England was at war with France and Holland, on a voyage from Amsterdam to Brest with a cargo of cheese. 'If it could be laid down as a general position', said Lord Stowell in the course of his judgement, 'that cheese being a provision is universally contraband, the question (sc. as to the guilt or innocence of the traffic) would be readily answered: but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the

[1] Supra, chap. viii (pp. 96–7).

[2] 1 C. Rob. 189; 1 E. P. C. 100. Cf. the earlier cases of the *Endraught* (1798), 1 C. Rob. 22; 1 E. P. C. 36; and the *Ringende Jacob* (1798), C. Rob. 89; 1 E. P. C. 60.

decisions.' The modern established rule he took to be that provisions 'are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.' After observing that the fact that the goods are of the growth of the country exporting them or are in their native and unmanufactured state will tend to preserve provisions from being liable to be treated as contraband, he continued, 'but the most important distinction is whether the articles were intended for the ordinary use of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval or military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination.'

Contraband character determined by nature of port of destination.

In accordance with the principle of this case the court refused to condemn a quantity of tallow destined for Amsterdam, on the ground that Amsterdam was a great mercantile port, as well as a port of naval equipment.[1] When a treaty stipulated that timber for the construction of ships should be regarded as contraband, it was held that if the character of the timber was

Other similar cases.

[1] The *Neptunus* (1800), 3 C. Rob. 108; 1 E. [illegible].

ambignous, its nature in reference to the treaty should be decided by reference to the character of the port of destination. 'Timber has frequently from particular circumstances', said Lord Stowell, 'a definite and determinate character: it may be denoted by a particular form, as knee timber, which is crooked timber, peculiarly useful for the building of ships, or it may be distinguished by its dimensions of size; but as to other timber, generally, which is as much a thing of ambignous use as anything can be, the fair criterion will be the nature of the port to which it is going. If it is going to Brest, the destination may be reasonably held to control and appropriate the dubious quality, and fix upon it the character of ship timber—if to other ports of a less military nature, though timber of the same species, it may be more favourably regarded.'[1] Wines,[2] resin,[3] and brimstone[4] were also held to be conditionally contraband according to the predominant characteristic of their port of destination. Pitch and tar,[5] saltpetre,[6] masts,[7] hemp,[8] and sailcloth[9] were held to be absolute contraband.

The wars of the French Revolution.

On the outbreak of war between France and England in 1793 the National Convention decreed on May 9 that

[1] The *Twende Brodre* (1801), 4 C. Rob. 36; 1 E. P. C. 334.
[2] The *Edward* (1801), 4 C. Rob. 68; 1 E. P. C. 350.
[3] The *Nostra Signora de Begona* (1804), 5 C. Rob. 97; 1 E. P. C. 433.
[4] The *Carpenter* (1810), 2 Acton, 11; 1 E. P. C. 433, n.
[5] The *Sarah Christina* (1799), 1 C. Rob. 237; 1 E. P. C. 125; The *Maria* (1799), 1 C. Rob. 340; 1 E. P. C. 152; The *Twee Juffrowen* (1802), 4 C. Rob. 242; 1 E. P. C. 384.
[6] The *Jesus* (1756–61), Burrell, 164; 1 E. P. C. 6.
[7] The *Staudt Embden* (1798), 1 C. Rob. 26; 1 E. P. C. 37; the *Charlotte* (1804), 5 C. Rob. 305; 1 E. P. C. 490. But in the case of the *Vryheid* ((1778), Hay and Marr. 188; 1 E. P. C. 13), the decision of which was influenced to a certain extent by the Anglo-Dutch treaty of 1674, the court ordered a cargo of masts, captured on a Dutch ship bound for Rochefort, to be sold for the use of his Majesty, by whom all freight, expenses, and charges were to be paid.
[8] The *Maria*, supra, n. 5; The *Ringende Jacob*, supra, p. 118, n. 2; The *Apollo* (1802), 4 C. Rob. 158; 1 E. P. C. 368.
[9] The *Neptunus*, supra, p. 119, n. 1.

neutral vessels laden with provisions destined to an enemy's port should be arrested and carried into France, although treaties were then existent between France and the Hanse towns, Hamburg, the United States, Mecklenburg, and Russia, in which it was stipulated that provisions should not be contraband of war. In answer to this decree the Privy Council on June 8 issued instructions to British cruisers 'to detain all vessels laden with corn, flour or meal, bound to any port in France, or any port occupied by the armies of France, and to send them into a British port in order to subject the cargoes to the right of pre-emption.'[1] As a result a dispute arose with Denmark in which Lord Hailes claimed on behalf of the British Government the right to treat provisions as contraband, although expressly excepted in the treaty of 1780, on the ground that the French corn-trade was no longer a commerce between the merchants of one country and those of another, but that almost the entire trade was in the hands of the Executive Council and the different municipalities; and that the trade could therefore no longer be looked upon as one of the ordinary speculations of commerce, but must be regarded as a direct operation of a hostile government. It was also contended, as laid down by Vattel,[2] that the employment of famine against the whole population was a legitimate means of reducing the enemy to reasonable terms of peace.[3]

Dispute with Denmark.

A serious disagreement also occurred with the United States, the government of which country maintained

And with the United States.

[1] Wheat. Hist. 373 sq.; Kent, 356–7; Phillimore, iii. 422 (§ 245); Moseley, 79–83.

[2] Cf. supra, p. 115.

[3] Martens, C. C. ii. 339–40; Manning, 367–70. Similarly Lord Stowell, referring in 1805 to the famine existing in Spain and to the fact that Great Britain had permitted food to be conveyed there, observed: 'It must always be remembered that this government might have availed itself of the interior distress of the enemy's country as an instrument of war' (the *Ranger*, 6 C. Rob. 125, at p. 126).

that provisions could only be treated as contraband when destined for a place actually invested or blockaded. The point still remained open and unsettled by the treaty of 1794,[1] which, while recognizing that provisions, though not generally contraband, might become so according to the existing law of nations in certain cases, omitted to define the circumstances under which the case would arise. In a treaty made between the two countries at London in 1806, Lord Stowell's criterion of the contraband character of articles *ancipitis usus*, viz. the nature of the port of destination, was incorporated as the test of the character of pitch and tar.[2]

Decisions of American prize courts.

Similar tests were also adopted in the decisions of the American prize courts, although there so much stress was not laid upon the predominant characteristic of the port to which the vessel transporting the goods was bound. Thus, in the case of the *Commercen*,[3] decided by the Supreme Court of the United States in 1816, Story, J., held that provisions may become contraband 'on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.' Again, in the case of the *Peterhoff*,[4] decided by the same court in 1866, it was laid down as a general principle that articles which may be and are used for purposes of war and peace, according to circumstances, are 'contraband only when actually destined to the military or naval use of a belligerent'.

[1] Martens, Rec. v. 674 (Art. 18). [2] Ath. Jones, 32.

[3] 1 Wheat. 382; Scott, 765. The *Commercen* was followed in the *Bénito Estenger* ((1900) 176 U. S. Rep. 568), a case arising out of the Spanish-American war of 1898.

[4] 5 Wall. 28, 58; Scott, 760. And cf. the *Sally* (1915), 9 A. J. 521.

Result of American decisions.

By emphasizing the fact that, as a general rule, articles of promiscuous use must be shown to be destined for the enemy's naval or military use in each case, and do not become generally contraband under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it, the American cases, while adopting the threefold classification of Grotius, tended to confine the doctrine within the limits of the principle under which it is forbidden to use the law of contraband in order to put immediate pressure upon the civil population as private individuals.[1] 'In the case of articles *ancipitis usus*,' says Dana,[2] 'inquiry may be made into the circumstances for the purpose of determining their probable use in the particular instance.' 'If the condition of the port of destination, or the character and state of the war, make it satisfactorily appear that goods capable of direct military as well as civil use will in all probability go directly into military use, or directly tend to relieve an enemy from hostile pressure, the belligerent has the right to intercept them.'[3]

Modern British doctrine of conditional contraband.

As we have already noticed,[4] those articles which are useful in peace but can also be adapted to the purposes of war, and which therefore require the existence of special circumstances to determine their contraband character, are termed in the Anglo-American system 'conditional' contraband; while those articles—including some objects *ancipitis usus* specially valuable and essential to a belligerent for the conduct of hostilities, such as the necessary machinery and material for the manufacture of arms and ammunition, and vessels and articles of naval equipment[5]—for which any kind of hostile destination is sufficient, are termed 'absolute' contraband.

[1] Opp. I. L. ii. 483; Westlake, I. L. ii. 283; Cob. Cases, ii. 423.
[2] Wheat. Dana, 630.
[3] Ibid. 634. Cf. Wharton, Digest, iii. 411, 415; Moore, Dig. vii. 691.
[4] Supra, chap. viii (pp. 96–7).
[5] Cf. Moseley, 34.

The modern British practice in reference to conditional contraband was thus summed up in the Manual of Naval Prize Law published in 1888:[1] 'All goods, fit for purposes of war and peace alike (not hereinbefore specified as absolutely contraband), on board a vessel which has a hostile destination, are conditionally contraband; that is, they are contraband only in case it may be presumed that they are intended for purposes of war. This presumption arises when such hostile destination of the vessel is either the enemy's fleet at sea or a hostile port used exclusively or mainly for naval or military equipment.' This adoption of the character of the port of destination of the vessel as the criterion of the contraband nature of the cargo was merely a working rule, and British statesmen have refrained from categorically defining what circumstances would authorize the condemnation of articles *ancipitis usus* as conditional contraband.

Continental practice.

Towards the end of the nineteenth century the general practice of continental countries tended to follow the rule, inaugurated by France, of restricting contraband character to objects expressly made for war and fitted for immediate employment in warlike operations, and of excluding articles of double use from the list of contraband in every case. As secondary maritime powers it was obviously to their interest to adopt such a policy. They were not sure of being able as belligerents to enforce a stringent rule; they were certain, as neutrals, to gain by its relaxation. It was accordingly one of the objects of the Armed Neutrality of 1780 between Russia, Denmark, and Sweden, by defining articles of contraband by reference to Articles 10 and 11 of the treaty of June 20, 1766,[2] between Great Britain and Russia, to limit articles of that nature to munitions of war and sulphur, and

Armed Neutrality of 1780.

[1] § 63, p. 20; cf. supra, p. 14.
[2] Martens, Rec. i. 395; Chal. i. 7.

particularly to exclude from that category timber and other naval stores, which all the northern powers exported in large quantities. Spain, France, Holland, the United States, Prussia, and Austria acceded to the alliance in the course of 1781, and it was joined in the next year by Portugal, and finally by the Two Sicilies in 1783.[1] It was recognized at the time that the exclusion of naval stores from the list of contraband would be an exception from the law of nations. The accession of France, Spain, Holland, and the United States was an act of hostility directed against England, and it was eventually stipulated that, in the matter of contraband, each state should keep to its existing agreements with other states; with the result that the attempt to put a strict limitation upon the list of articles of that nature completely failed.[2]

In nineteenth century.

Holland and Denmark have remained almost constantly faithful to the principles of the Armed Neutrality, and the Swedish decree of April 8, 1854, reproduced the rules of 1766 and 1780.[3] France generally adhered to her original practice of limiting contraband to articles specially made for military use. In 1854 she added sulphur and saltpetre, and the same rules were applied in 1859 and 1870.[4] Since the end of the seventeenth century the Spanish regulations have been little else but a copy of the French.[5] The Austrian decree of March 3, 1864, renewed almost exactly the Anglo-Russian list of 1766, but in 1870 that country, as neutral, forbade its subjects to carry to the belligerents articles reputed contraband by international law or by the ordinances published by the belligerents.[6] Germany maintained the Prussian *Règlement des Prises* of June 20, 1864, which no longer included sulphur and saltpetre among

[1] Wheat. Hist. [illegible] 7; Moore, Dig. 559–61, 681.
[2] Twiss, War, 26[illegible]; Hall, I. L. 644; Opp. I. L. ii. 481.
[3] Bonfils, 1003.
[4] Id. 1001–2. [5] Id. 1001. [6] Id. 1001.

the prohibited articles, but, like the treaties of the Armed Neutralities, included saddles and bridles. In the Franco-German war, however, Germany attempted to declare coal contraband.[1] By a ukase dated May 24, 1877, Russia declared to be contraband besides arms of all kinds, 'le matériel et les munitions de pièces explosibles, telles que mines, torpilles, dynamite, pyroniline et autres substances pulminantes; le matériel de l'artilerie, du génie et du train . . . et en général tous les objets destinés aux troupes de terre ou de mer.'[2] During the negotiations for the treaty of Berlin of 1885, which provides for the free navigation of the Congo and the Niger in time of war, except in the case of contraband, the Russian Government declared that it would never consider coal as contraband.[3]

Continental jurists.

There was also a tendency among modern continental jurists to argue away altogether the Anglo-American distinction between absolute and conditional contraband, and to hold nothing to be contraband but objects expressly made for war and fitted for immediate employment in warlike operations.[4] As a general rule they were opposed to the treatment of articles susceptible of peaceful as well as warlike use as contraband subject to special conditions, when they termed such goods 'relative' or 'indirect' contraband; and they also objected to the extension of the list of contraband to suit the particular circumstances of the war under the name of 'accidental' or 'occasional' contraband.[5] Some of them, however,

[1] Hnb. and King, Introd. viii–x; Bonfils, 999.
[2] Martens, Nouv. Rec. 2nd ser. iii. 217.
[3] P. P. Africa, No. 4 (1885), 132; Hall, I. L. 656–7; Bonfils, 1004.
[4] Kleen, Cont. 30–7, 91–111; Neut. i. 396–424; Desp. D. I. 1259–61; Beckenkamp, 12–13; Cob. Cases, ii. 424; Lawr. Prin. 706–7; Manning, 387–8. Woolsey also contended that articles *ancipitis usus* should be deemed free, and that the doctrine of 'occasional' contraband, or contraband according to circumstances, was not sufficiently established to be regarded as a part of the law of nations (Introduction, 334–9 (§§ 195–6)).
[5] Kleen, Cont. 91–2; Beckenkamp, 12.

admit the existence of a class of goods of ancipitous use which are so important for belligerent operations that it is impossible to deny their contraband character in all circumstances.[1] Some practically admit the Anglo-American doctrine.

Thus, while Ortolan insists upon the importance of giving weight to the presumption of the purely commercial character of articles of double use, he admits that there may be exceptional circumstances in which their liability to be treated as contraband will arise; but he contends that provisions, from their general necessity, ought always to be free. In an earlier edition of his work he made the same reservation with regard to coal, but in his fourth edition (1864) he quotes approvingly from Pratt's *Contraband of War*: 'In the present application of steam to purposes of war, this article (coal) would without doubt, if destined to a port of naval military equipment, be considered as falling under the description of contraband.'[2] Massé similarly admits that circumstances may determine whether articles doubtful in their nature are contraband in the particular case; as the character of the port of destination, the quantity of the goods, and the necessities and character of the war.[3] Ortolan. Massé.

Bluntschli declares that such things as clothing, money, horses, timber for shipbuilding, sails, canvas, iron plates, steam-engines, and coal may be confiscated as contraband when it can be shown that they are destined for a warlike use.[4] Heffter ranks such articles among prohibited goods when their hostile use and destination is beyond all doubt.[5] Klüber allows the existence of doubtful cases, which must be ruled by surrounding circumstances, though he insists that the presumption should be in favour Bluntschli. Heffter. Klüber.

[1] Cf. Dup. D. M. Ang. 245–7; Hall, I. L. 648–50; Opp. I. L. ii. 482; Lawr. Prin. 707; Hershey, R. J. 162–3.

[2] Règles Int. 232, n.; Pratt. liii.

[3] Droit Comm. i. 209–12. Tetens, a Swedish writer, takes the same view (Sur les droits réciproques, 111–13).

[4] D. I. § 805 (pp. 468–9). [5] Droit Int. § 160 (pp. 390–1).

of the freedom of trade.[1] Such writers do not agree upon the conditions requisite to the lawful seizure of conditionally contraband goods, but for practical purposes they concede all that is essential in the Anglo-American position.

Discussions at Institute of International Law.

At the discussion of the subject by the Institute of International Law in 1874 the majority of the members of the committee were against a specific enumeration of contraband articles. Vidari, Rolin, and Woolsey desired that a definition should be drawn up, but they could not agree upon its wording. Lorimer was opposed to every form of definition, and Westlake contended that the determination of the list of contraband must be left to the belligerents' discretion, but they should make their views clearly known and neutrals ought to have a right of objection. Only Westlake was in favour of conditional contraband (*contrebande par accident*).[2] In 1877 the following resolution was adopted at the session at Zurich: 'Sont toutefois sujets à saisie: les objets destinés à la guerre ou susceptibles d'y être employés immédiatement. Les gouvernements belligérants auront à l'occasion de chaque guerre à déterminer d'avance les objets qu'ils tiendront pour tels.'[3] A similar provision was incorporated in § 30 of the *Projet de règlement international des prises maritimes* adopted at Turin in 1882.[4]

Kleen's proposal.

In the *avant-projet* introduced by Kleen in 1893 it was proposed, in return for the establishment of state responsibility for the contraband trade of individuals, to restrict the list of contraband articles. Only objects which, as arms and ammunition, are made expressly for war and by their nature destined to warlike use were to be considered contraband. Articles susceptible of peaceful as well as warlike use were not to be treated as

[1] Droit des gens, § 288 (pp. 363–4).
[2] Beckenkamp, 11–13.
[3] Id. 19–21; 2 Ann. 110–13, 152.
[4] Beckenkamp, 23.

contraband either on the ground that they are destined to be employed in the war by the belligerent consignee, or because the neutral trader transports them with the intention of assisting or favouring a belligerent. Absolute contraband was to constitute for the future the sole chapter of contraband of war; conditional, relative, and accidental contraband were to be abolished. The transport of things necessary to the enemy, other than articles of absolute contraband, was only to be forbidden in the single case where it would be 'effectué systématiquement pour le compte d'un belligérant, en vertu d'une convention spéciale conclue, directement ou indirectement, avec un gouvernement belligérant ou ses autorités en vue de pourvoir à ses besoins sur le théâtre des hostilités'.[1]

Opposition thereto.

To this proposal Lardy objected that belligerents could not be expected to give up the right of seizing things which, without being absolute contraband, would, if received by the enemy, exercise a decisive influence on the issue of the war. He suggested that in the case of articles of double use pre-emption should be adopted in the place of the usual penalty of confiscation. In the *contre-projet* prepared by Perels in 1895 contraband of war included not only articles capable of being immediately employed in war and the machines and instruments specially made for constructing them, but also articles capable of peaceful as well as warlike use, at any rate when their destination to the naval or military forces of the enemy follows from the circumstances.[2] After discussion the committee adopted a resolution approving conditional contraband when resulting from an immediate and special destination to the armed forces or military operations of the enemy, and declared in advance by the belligerent government conformably to § 30 of the *Règlement*.[3]

[1] Kleen, Cont. 254; 13 Ann. 109. [2] 14 Ann. 64–5. [3] Ibid. 192.

Règlement pted at Venice in 1896.

In the session at Venice in the following year, 1896, the discussion turned principally upon two points: (1) the desirability of defining contraband or enumerating the articles; (2) whether belligerents should be obliged to allow articles of double use to be conveyed to the enemy without hindrance when they may be useful to him for the continuation of hostilities. Perels and Westlake favoured definition, but Desjardins insisted on enumeration in order to limit clearly the notion of contraband, and the amendment of which he was the author was accepted by the Reporter (Brusa) and voted by the Institute. It was accordingly declared: 'Sont articles de contrebande de guerre: (1) les armes de toute nature; (2) les munitions de guerre et les explosifs; (3) le matériel militaire (objets d'équipement, affûts, uniformes, etc.); (4) les vaisseaux équipés pour la guerre; (5) les instruments spécialement faits pour la fabrication immédiate de munitions de guerre.' To this it was added: 'Sous la dénomination de munitions de guerre doivent être compris les objets qui, pour servir immédiatement à la guerre, n'exigent qu'une simple réunion ou juxtaposition.'

Pre-emption of conditional contraband.

Perels strongly opposed the abolition of conditional contraband, and an amendment in favour of the pre-emption of articles *ancipitis usus* was made by General Den Beer Portugael and others. Ultimately the Institute adopted a resolution unequivocally condemning the doctrine of conditional or relative contraband, and then declared for a belligerent a right of sequestration or pre-emption, at his pleasure, but subject to an equitable indemnity, of 'those articles which, being on their way to a port of his enemy, could serve equally for warlike and peaceful circumstances'.[1] In the draft code of the law of neutrality drawn up by the Institute at Ghent in 1906 the provisions relating to contraband (§§ 42–5) were

[1] 15 Ann. 230 f.

practically identical with those proposed by Kleen and adopted by the Institute at Paris in 1894.[1]

Change in continental opinion.

Owing to the vast extension in variety and importance, during the latter part of the nineteenth century, of the auxiliary appliances of war, such as rails, motors, signalling apparatus, &c., and the increasing dependence of European countries upon overseas supplies for food, it began to be realized on the Continent that under the modern conditions of warfare articles which are largely used in the industries of peace may be of enormous importance in war. But, owing to the repudiation of the Anglo-American doctrine of conditional contraband, when commodities other than arms and munitions of war were treated as contraband they did not constitute a distinct class in respect of which any special proof of actual destination for military or naval use was required. In practice, consequently, we meet with European states which, in spite of their reprobation of the British doctrine as unduly oppressive to neutrals, have enforced or adopted, when belligerent, rules of contraband that frequently exceed in severity the rules enforced under the British system.[2]

France in 1885.

Thus France, during the war[3] with China in 1885, in spite of her traditional policy as to victuals, claimed to treat rice bound for ports north of Canton as contraband, by reason of the importance of rice in feeding the Chinese population as well as the Chinese armies.[4] Great Britain, however, refused to recognize the validity of any captures made on this ground unless the rice was in course of carriage to Chinese camps or a place of naval or military equipment; and Lord Granville declared that

British protest.

[1] 14 Ann. 33-4; 21 Ann. 112-13, 158-9.

[2] Cf. Westlake, I. L. ii. 285; Editorial Comment, in 9 A. J. (1915) 212.

[3] Or what was virtually war (cf. Bonfils, 1002; Westlake, Col. Paps. 582).

[4] Hall, I. L. 658-9; Lawr. War, 164-5; Bonfils, 1002-3.

there must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind are intended for the ordinary use of life and to show prima facie, at all events, that they are destined for military use. In consequence of the British protest the French Government changed the line of its argument and suggested in justification of its action that the rice in question was tribute paid to the Chinese Government and used by it in lieu of money for the pay of its soldiers.[1] Hostilities terminated, however, before a case of seizure arose, and therefore the controversy never came to a decision. But the German Government refused to protest in order to protect its merchants against any disadvantage they might suffer through the treatment of rice as contraband: and Prince Bismarck declared, as we have already had occasion to observe,[2] that it belonged to the belligerent powers to say what they intended to treat as contraband, and that 'the measure in question has for its object the shortening of the war by increasing the difficulties of the enemy, and is a justifiable step in war if impartially enforced against all neutral ships'.

German attitude.

Chino-Japanese war of 1894–5.

During the Chino-Japanese war of 1894–5 China considered rice and horses as contraband and also claimed to treat in that way chlorate and potass intended for the manufacture of matches (fuses), and the water which was as indispensable as coal for the steam-engines of the warships. Japan declared lead contraband, and in her regulations divided contraband articles into two classes in accordance with the Anglo-American practice. The second or conditional class was to be contraband when destined to either the enemy's fleet at sea or a hostile

[1] Moore, Dig. vii. 682; and see the correspondence in P. P. France, No. 1 (1885) and Misc. No. 2 (1911).

[2] Supra, p. 99.

port used exclusively or mainly for naval or military equipment '.[1]

Spanish-American war of 1898.

The divergence between the Anglo-American and continental views upon contraband was particularly noticeable at the commencement of the war between Spain and the United States in 1898. The Spanish royal decree of April 23 set out only one list of contraband goods and, though in fact comprising only articles primarily destined for warlike use, virtually claimed to include as contraband any articles that the government might determine to be so.[2] The American instructions of June 20, on the other hand, recognized two lists and treated as conditional contraband, ' coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions when destined for an enemy's ship or ships, or for a place that is besieged '.[3]

Boer war.

During the Boer war Lord Salisbury declared that ' foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of their seizure '. Proceedings against the *Herzog*, a German vessel captured on the way to Lourenço Marques, the Portuguese port in Delagoa Bay, were directed to be discontinued, unless the provisions on board were destined for the enemy's government or agents, and were also for the supply of troops or were specially adapted for use as rations for troops.[4]

Russo-Japanese war.

In the Russo-Japanese war Japan followed the system

[1] Bonfils, 1095, n. 2; Holland, Stud. 125.
Moore, Dig. vii. 669 70; Brochet, 29 30.

[2] Moore, Dig. vii. 669.

[3] P. P. Africa, No. 1 (1900), 16.

she adopted in her war with China of dividing contraband articles into two classes in accordance with the Anglo-American practice. In the first class were comprised arms, ammunition, explosives, and materials (including lead, saltpetre, sulphur, &c.) and machines for manufacturing them, cement, uniforms and equipments for army and navy, armour plates, materials for building ships and their equipments, and all other articles to be used solely for hostile purposes; all which were contraband when they passed through, or were destined to, the enemy's territory or to the enemy's army or navy. In the second class were comprised provisions and drinks, clothing and materials for clothing, horses and harness, fodder, wheeled vehicles, coal and other kinds of fuel, timber, currency, gold and silver bullion, and materials for telegraph, telephone, and railroad lines: which were to be contraband when destined to the enemy's army or navy, or when destined to the enemy's territory and it might be presumed from the position of such destination that they were intended for the use of the enemy's army or navy.[1] The latter provision was not intended to mean that the goods in question should be treated as contraband on the mere presumption that they might eventually be used by the enemy's armed forces; but only when from all the surrounding circumstances, such as the nature and character of the locality of their hostile destination, the kind and nature of the goods themselves, &c., it might reasonably be assumed that they were intended for the use of the enemy's army and navy.[2]

Russia, on the other hand, following the continental practice which refused to recognize the existence of an intermediate class of goods between contraband and non-contraband, at first published one long and comprehensive list, including therein many things requisite

[1] Tak. R. J. 191. [2] Ibid. 193-5; Hol. Letts. 134, 135-6.

for the civil population as well as for military authorities, such as rice and provisions,[1] every kind of fuel, horses and beasts of burden, materials and objects for telegraphic and telephonic installations or for the construction of railways, boilers and every kind of naval machinery, and subsequently raw cotton; the whole of which articles were regarded as conditionally contraband of war. As a result, however, of the vigorous protests of the British and United States Governments,[2] which insisted that goods primarily used for peaceful purposes could be treated as contraband only when actually and specially destined for the armed forces of the enemy, Russia modified her original proclamation so far as to admit the conditionally contraband character of rice, provisions, horses, beasts of burden and other animals, which were to be seized only when destined for the government of the enemy, or his administration, army, navy, fortresses, naval ports, or purveyors.[3] The necessity for recognizing a distinction between absolute and conditional or relative contraband had also previously been indicated by the Russian Supreme Prize Court in the cases of the *Arabia* and the *Calchas*, in which it was held that, in the case of the articles last referred to, by destination to the enemy was meant destination to the enemy's government, contractors, army, navy, fortresses, or naval harbours, and not for private individuals, subjects of the enemy's country.[4]

Merchantmen frequently carry a gun and some amount

[1] Which were absent from the list published by Russia in 1900. The Russian decree of May 13/25, 1877, enumerated only articles primarily destined for warlike use, but included generally 'all objects destined to land or sea forces' (Moore, Dig. vii. 667, 670).

[2] P. P. Russia, No. 1 (1905), 9, 11; Hershey, R. J. 167 83; Tak. R. J. 497 512. Mr. Hay's dispatch will also be found in: 20 L. Q. R. (1904), 339 42.

[3] Tak. R. J. 512; P. P. Russia, No. 1 (1905), 27 8.

[4] Ath. Jones, 90; Hershey, R. J. 171 8; Cob. Cases, ii. 137 8.

Articles carried for the defence of the neutral vessel.

of ammunition for the purpose of signalling, and, if they navigate in parts of the sea dangerous on account of piracy, they frequently carry sufficient arms and ammunition to enable them to defend themselves against an attack by pirates. Hostile destination being an essential element in the conception of contraband, the object of which is to empower a belligerent to prevent the increase of the naval and military resources of his adversary, it follows that all articles carried by a neutral vessel for her own use are never contraband apart from the ship to which they belong, and must be treated by the captor as no more obnoxious than the innocent part of the cargo.[1] Even in times of almost lawless violence, when belligerents recognized practically no limits to the extent of their contraband lists, it was the practice to leave unmolested those things that were considered necessary for the legitimate defence of the vessel. The immunity of such articles was recognized in Edward III's treaty with the Count of Flanders in 1370[2] and also in the list of contraband issued by the Privy Council in 1589.[3]

Their immunity from seizure recognized from the earliest times.

Gentilis.

'Quod sint Angli excusandi', wrote Gentilis,[4] 'etiam quia pulvis ille et caetera eius generis portabantur pro usu navis. Sic Suarezius in casu suo Genuensium, quod lex ipsos non teneret qui pro usu navis portarent quae portari vetita alias. Licet prohibitum sit exportare triticum, non de eo tamen intelligitur prohibitio quod quis portat pro suo usu.' He even went so far as to say that if the quantity carried was in excess of that required for the use of the ship, the superfluous part might be

[1] Kleen, Cont. 172 f.; Neut. i. 421-5; Bynk. 593; Opp. I. L. ii. 493 f.; Cob. Cases, p. 123, n. 31.

[2] Rym. III. ii. 872; cf. Nys, D. I. iii. 630.

[3] Supra, p. 106.

[4] Hisp. Adv. Lk. i. chap. 20 'De navi Anglica ad Turcos profiscente cum mercibus aliis et commeatu [pulvere tormentario]', pp. 76-7.

sold without incurring any liability. 'Etiam addo, quod vendere Angli poterant licite, si quid superfuisset eorum quae ferebantur pro usu navis. Ut sic de his, quae usus tantum sui causa comparari possunt, responsum est, eadem et vendi posse, si mox nec usus eorum sit.'

Treaty stipulations.

A similar immunity in favour of articles carried for the use of the ship was generally stipulated for in the treaties concluded on the subject of contraband. Thus, Article 11 of the treaty made between Great Britain and Russia at Petrograd in 1766[1] prohibits the transport of the particular things enumerated 'beyond the quantity necessary for the use of the ship or beyond that which each man serving on board the vessel or passenger ought to have'. In 1799 Lord Stowell held that a vessel might not carry a larger quantity than was actually requisite for her own protection on the suggestion of a speculation of purchasing other vessels.[2] The same exception in favour of arms and other things necessary 'for the defence' or 'for the use' of the vessel or her crew is to be found in the decrees or regulations of continental countries in the nineteenth century, such as those of Sweden of April 8, 1854, of Austria of March 3, 1864, and July 29, 1870, and of Prussia of June 20, 1864;[3] and the principle was also recognized in § 37 of the *Règlement international des Prises* voted by the Institute of International Law in 1882, provided the vessel did not make use of the articles in question to resist visit and search.[4]

Modern international practice.

[1] Martens, Rec. i. 395–6; Chal. i. 7.

[2] The *Margaretha Magdalena* (1799), 2 C. Rob. 138.

[3] Kleen Cont. 174, n. 2; Hub. and Klag, Introd. x.

[4] Beckenkamp, 24. Similarly Art. 46 of the draft Code of Neutrality adopted by the Institute in 1906 provided: 'Les articles réputés contrebande selon l'art. 42 seront exceptés et laissés libres à bord des navires de commerce pour autant qu'ils sont indispensables aux besoins et à la sécurité du navire, de son équipage et de ses passagers' (21 Ann. 143, 159). In his Draft Code Field expressly confines this exception to goods 'on board a vessel that is exempt from capture' (pp. 552–3, § 860).

During the Russo-Japanese war Japan declared that goods 'which from their nature and quantity were clearly to be considered as intended for the use of the ship that carried them would not be regarded as coming under the category of contraband of war'.[1]

[1] P. P. Russia, No. 1 (1905), 8.

CHAPTER XI

HOSTILE DESTINATION

Necessity for hostile destination.

The object of the law of contraband being to enable a belligerent to prevent the transport to his adversary of such articles or commodities as would assist the latter in the conduct of hostilities against him, and not merely to empower him to seize war material for his own use, it follows that in order to constitute contraband, not only must the goods be in their nature capable of warlike use, but they must also be taken on a hostile destination.[1] There is a considerable trade in arms and ammunition at all times; but the contents of an arsenal found on their way to neutral magazines would no more be contraband than cargoes of Paris fashions or children's toys. So manifest is the necessity for a hostile destination as an essential element in contraband character, that by early theoretical writers, such as Grotius and Gentilis, it is assumed rather than expressly stated.

In the course of the dispute that arose in 1782 between Spain and Denmark with reference to the seizure of the Danish corvette *St. Jean*,[2] the Spanish minister declared that if the cargo consisted of munitions of war it was contraband. But to this it was replied that by the law of nations and international conventions it is necessary to add a destination for the enemy; and that trade in munitions of war between neutral countries remains perfectly lawful in spite of a war between other powers. In accordance with this principle it was held in the case

[1] The *Hendric and Alida* (1777), Hay and Marr. 96; Tod. 998. Cf. Opp. I. L. ii. 490; Lawr. Prin. 711; Cob. Cases, ii. 428; Bonfils, 996, 1069.

[2] Martens, C. C. ii. 193.

Guilty destination changed.

of the *Imina*[1] that if the guilty destination has been voluntarily changed for an innocent one during the voyage, a capture made after the change has been effected will not result in condemnation. Similarly a Danish vessel captured in 1806 at the Cape of Good Hope, where she had touched after the surrender of Cape Colony to the British, was released on the ground that, as Great Britain was in possession of the place, 'long before the time of seizure, the goods had lost their noxious character of going as contraband to an enemy's port'.[2] One ground of the illegality of the seizure of the *Malacca* by the *Petersburg* in the Russo-Japanese war was the fact that the ammunition on board was the property of the British Government and was destined for the use of the British fleet in Chinese waters.[3]

Distinction between destination of goods and that of vessel.

In considering the subject of hostile destination care must be taken not to confuse the destination of the goods with that of the vessel which carries them. Although the systematic writers of the sixteenth, seventeenth, and eighteenth centuries make no definite distinction between these two forms of hostile destination, they appear to have regarded that of the goods as the decisive factor. This rule has been followed almost invariably on the Continent, although the burden of proof has been regulated by the destination of the vessel.[4] From the outset there was a tendency to establish a general presumption of hostile destination when the noxious goods were found in the neighbourhood of the enemy's country.[5] The jurists say, observes Zouch,[6] that a judge must presume

Continental practice.

[1] (1800) 3 C. Rob. 167; 1 E. P. C. 289. *Secus*, if the diversion of destination is only in consequence of *vis maior*, such as rapture by the enemy (the *Minerva* (1801), 3 C. Rob. 229; 1 E. P. C. 301).

[2] The *Trende Sostre* (1807), 6 C. Rob. 390, n.; 1 E. P. C. 588.

[3] Smith and Sib. 161.

[4] Dup. D. M. Ang. 254–5; Perels, 259–60.
Cf. Wheat. Hist. 140.

[5] Iuris et iudicii fecialis, bk. ii. sec. 8, § 10.

that a person intended to go to a prohibited place if he has been found on the confines of that place and off the route of the place to which he alleges he was bound. But, as a general rule, if it appeared from the ship's papers that the cargo was destined for an enemy port or fleet, then it could be captured, although the vessel herself was only going to a neutral port; while, on the other hand, if the goods were on their way to a neutral port, they would escape seizure, although the vessel had a hostile destination.

Anglo-American practice.

In the British practice of the eighteenth century, however, the destination of the cargo was generally presumed to be that of the ship;[1] the same rule was followed by the United States prize courts prior to the civil war,[2] and was also laid down in the Italian Mercantile Code.[3] If the vessel's port of final destination or any intermediate port of call was hostile, or if she was to meet enemy naval forces at sea or in a neutral port, the goods could be seized notwithstanding that it might appear from the ship's papers or otherwise that they were not intended for the hostile port, but were intended either to be forwarded beyond it to an ulterior neutral destination, or to be deposited at an intermediate neutral port.[4] Subsequently this rule was so far relaxed in the case of a ship calling at several ports, some neutral and some hostile, that the presence on board of goods which were bona fide documented for discharge at a neutral port *before* the ship reached an enemy port, could not be made a ground for detention; but if there was no such documentary evidence, then that port which was least

[1] Westlake, I. L. ii. 293; Hist. Letts. 188; Cob. Cases, ii. 429.
[2] Dav. Elem. 459. [3] Art. 215 (Raikes, Italy, 179).
[4] The *Richmond* (1804), 5 C. Rob. 325; the *Trende Sostre* (1807), 6 C. Rob. 390, n.; 1 E. P. C. 588; the *Commercen* (1816), 1 Wheat. 382; Scott, 765; Owen, War, 187; Dup. D. M. Ang. 256; Kleen, Cont. 77, n.

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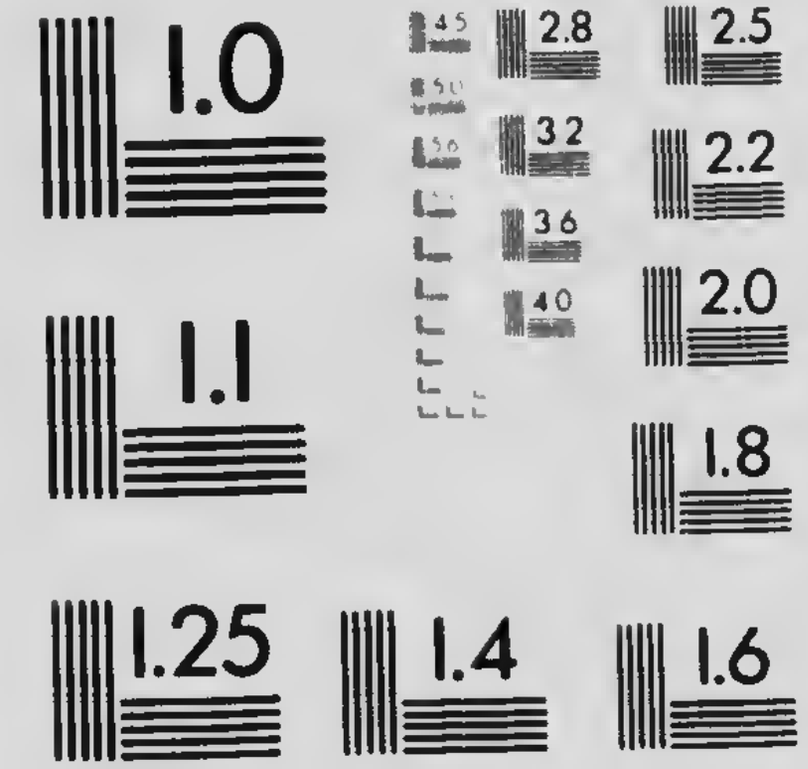

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favourable to the neutral was presumed to be the destination of such part of the cargo as would be contraband if carried to that port.[1]

The main object of this rule was to raise a presumption of hostile destination for the goods whenever the vessel by which they were carried was to come in contact with the enemy at any point in the course of her voyage; and in order to raise a contrary presumption of innocent destination for the cargo, the neutral destination of the ship must have been indisputable. If the destination of the latter was uncertain and dependent upon contingencies, the onus was on the master to prove that it was neutral and that any intention to call at an enemy port had been entirely abandoned. In order to establish a hostile destination it was sufficient that the vessel was found at sea sailing on a course for an enemy port, although her papers showed her to be bound for a neutral one.[2] The transfer of contraband articles from one enemy port to another, where they are required for the purposes of war, is treated in the same manner as an original importation into the enemy country.[3] It is sufficient if the territory to which the contraband goods are destined is merely temporarily occupied by the enemy.[4]

[1] See P. P. Misc. No. 4 (1909), 4.

[2] The *Haabet* (1805), 6 C. Rob. 54; 1 E. P. C. 524; the *Franklin* (1801), 3 C. Rob. 217; 1 E. P. C. 298; the *Minerva* (1801), 3 C. Rob. 229; 1 E. P. C. 301; the *Twende Brodre* (1801), 4 C. Rob. 33; 1 E. P. C. 332; the *Commercen* (1816), 1 Wheat. 382; Scott, 735.

[3] The *Edward* (1801), 4 C. Rob. 68; 1 E. P. C. 350.

[4] Cob. Cases, ii. 35, n. (y).

CHAPTER XII

THE DOCTRINE OF CONTINUOUS VOYAGE

Not required by conditions of transport of eighteenth and early nineteenth centuries.

As Sir Edward Grey pointed out in his Reply[1] to the United States Note of December 28, 1914, the difficulties of land transport at the time of the Napoleonic wars rendered it impracticable for a belligerent to obtain supplies of sea-borne goods through a neighbouring neutral country. Prior to the increase in the facilities of transport through the introduction of steamers and railways it was unnecessary, as a general rule, for a belligerent to consider the possibility of an ulterior guilty destination of the cargo of a vessel bound for a neutral port. Hence the unqualified *dictum* of Sir Wm. Scott in the *Imina*[2] that 'goods going to a neutral port cannot come under the description of contraband . . . the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port'. There was no suggestion in that case of any ulterior hostile destination of the cargo, and when Lord Stowell said that the goods must be taken in the actual prosecution of the voyage to a hostile port, he was referring to the point that the proceeds cannot, as a general rule, be taken on the return voyage.[3]

On the same principle, in the case of the *Frau Margaretha*,[4] where, owing to the nature of the cargo, it was

[1] *The Times*, February 18, 1915. Cf. Lushington, Manual, Introd. xiv; Hol. Letts. 147–8.

[2] (1800) 3 C. Rob. 167; 1 E. P. C. 289.

[3] Cf. Westlake, I. L. ii. 297; Cob. Cases, ii. 428; Hist. Add. Letts. 40; Owen, War, 184–5; 15 L. Q. R. 184–5; 17 id. 27, 193; 23 id. 200; 24 id. 463; Elliott in 1 A. J. 73; Woolsey in 4 id. 832.

[4] (1805) 6 C. Rob. 92; 1 E. P. C. 532, n.

necessary to prove a destination to a hostile port of naval or military equipment,[1] Sir Wm. Scott refused to condemn cheese on a vessel destined to Quimper on the ground that the cargo might be carried on to Brest, the famous port of naval equipment, since the former port, though in the vicinity of the latter, was situated on the opposite side of a projecting headland so as not to admit of immediate communication except by land carriage. But on the following day, in a similar case,[2] the same judge held a destination to the ordinary commercial port of Corunna sufficient, because it was in such close proximity to the naval port of Ferrol, being situate in the same bay, that the noxious goods might be immediately and in the same conveyance carried on to the latter port.

But applied when really necessary.

In an earlier case[3] of a Danish ship taken with a cargo of ship timber bound from Christiansand with an alternative destination to St. Malo or Brest, the court decided that at the time of capture the destination of the cargo was the innocent commercial port of St. Malo. But in the course of his judgement Sir Wm. Scott said: 'It could never be permitted to be averred that a cargo of this sort might go on an innocent destination to St. Malo and then be sent to Brest or Rochefort. If that were the case it must be pronounced a case of condemnation.' Nearly half a century before this case the British Admiralty judges condemned a cargo of saltpetre captured on a vessel on a voyage to a neutral port from which she was to proceed to France, to which country the cargo was ultimately destined.[4]

In case of carriage of dispatches.

Carriage of dispatches is, as we have seen,[5] analogous

[1] Cf. supra, p. 119.

[2] The *Zelden Rust* (1805), 6 C. Rob. 93; 1 E. P. C. 532.

[3] The *Twende Brodre* (1801), 4 C. Rob. 33; 1 E. P. C. 332; and cf. the *Franklin* (1801), 3 C. Rob. 217; 1 E. P. C. 298.

[4] The *Jesus* (1756-61), Burrell, 164; 1 E. P. C. 6.

[5] Supra, p. 9.

to that of contraband; and in the cases of the *Susan* and the *Hope*[1] neutral American vessels were condemned by Sir Wm. Scott for carrying, on voyages from Bordeaux to New York, official dispatches destined to the French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was specially employed by the French Government. The decision in the subsequent case of the *Rapid*[2] also proceeded distinctly upon the footing that the carriage of hostile dispatches would not necessarily be considered innocent because the ship's voyage was to terminate at a neutral port. 'It is to be observed', remarked Scott in that case, 'that where the commencement of the voyage is in a neutral country and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his (the master's) vigilance, and therefore it may be proper to make some allowance for any imposition which may be practised upon him.'

Rule of the War of 1756.

That voyages distinct in fact may together constitute one continuous voyage in law was definitely decided in the application of what is known as the 'Rule of the War of 1756', according to which a colonial or coasting trade that has been exclusively limited in time of peace to the country to which it rightfully belongs cannot be

[1] (1808), 6 C. Rob. 461, 463, n.; 1 E. P. C. 614, n.; Moore, Dig. vii. 727–8.

[2] (1810), Edw. 228. The case of the *Eagle* (1803), mentioned by Sir William Grant, M.R., in the *William* (1806, 5 C. Rob. 401; 1 E. P. C. 511), has sometimes been referred to as an instance in which the doctrine of continuous voyage was applied by Lord Stowell to a case of contraband (cf. Smith and Sib. 223; Elliott in 1 A. J. 73; Woolsey in 4 id. 830); but as the vessel was proceeding to the hostile port of Havannah at the time of her capture, the hostile destination of the cargo was immediate, and there was no need to invoke the doctrine of continuous voyage.

thrown open to neutrals in time of war.[1] In the eighteenth century and earlier it was the practice of European states to exclude foreign ships from commercial intercourse with their colonies, and also from their coasting trade. In 1604 the Venetian ambassador wrote to the doge and senate touching two Venetian vessels which had been captured south of the line by the Dutch. They were trading with Spanish licences between Spanish America and Spain, and had been condemned by the Dutch court as good prize, upon the ground that by taking licences from Spain for a trade which was prohibited to non-Spanish ships, the Venetian traders had made themselves allies of Spain, then at war with the Hollanders. In 1630 Charles I enforced a similar rule against neutrals carrying on the coasting trade of Spain.[2]

In the wars of the latter part of the eighteenth century the naval preponderance of Great Britain was such that the other maritime belligerents were unable to safeguard their colonial trade, and in 1756[3] France opened her colonial trade to Dutch ships, but excluded other neutrals. The British prize courts refused to recognize the validity of any such device for the protection of the trade in question, holding that it was inconsistent with neutrality for the subject of a neutral state to interpose in time of war in a trade between a belligerent state and its colonies, when the neutral was forbidden by the laws of the belligerent state to take any part in such trade in time of peace. The same policy was maintained in 1793 when France threw open her colonial trade to all neutrals indiscriminately.[4]

[1] Cf. Westlake, I. L. ii. 294–6, Twiss, Cont. Voy. 12 13; Hist. Add. Letts. 33 9; 24 L. Q. R. 461; Elliott in 1 A. J. 61–72; Leech in 46 Journ. Royal United Service Institution (1902), 1524.

[2] Marsden in 25 E. H. R. (1910), 244.

[3] Hence the name of the rule in question.

[4] The *Immanuel* (1799), 2 C. Rob. 186; 1 E. P. C. 217.

Doctrine of continuous voyage applied to prevent evasion.

Great Britain conceded to neutrals, however, the right to import the products of the enemy's colonies into a neutral country and to export the goods of a neutral country, other than contraband, to any port of the enemy which was not blockaded, because they had not been excluded from such trade in time of peace.[1] The inevitable result of this was that attempts were made to evade the rule by the device of consigning the goods in the first instance to some neutral port, such as Marblehead or Emden, from which trade with the colony or the home country was permissible. Then, after the customs duties had been paid, the cargo was reshipped and conveyed to the prohibited port ostensibly as neutral merchandise. In the case of vessels captured on their way from the neutral port to the enemy country the British courts held that where there was a distinct intention from the beginning of the voyage to send the goods from the colony to the mother country and there had been no actual importation of the cargo into the common stock of the country where the transhipment took place, there was only a single mercantile transaction and the two voyages made in law but one.[2]

[1] Where a cargo which had gone from the neutral port of Hamburg to the belligerent port of Bordeaux was captured while going from there to the French port of San Domingo, the doctrine of continuous voyage was applied in favour of the neutral to protect the cargo against the contention that it was sailing from one French port to another (the *Immanuel*, supra).

[2] The *Polly* (1800), 2 C. Rob. 361; 1 E. P. C. 248; the *Maria* (1805), 5 C. Rob. 365; 1 E. P. C. 495; the *William* (1806), 5 C. Rob. 385; 1 E. P. C. 505; the *Ebenezer* (1806), 6 C. Rob. 250; the *Jungo Charlotta* (1809), 1 Act. 171; 2 E. P. C. 9, n. The important and difficult question to be determined in all the cases of continuous voyage was whether the importation into the neutral country had been made in good faith for the purpose of adding goods to the common stock of the country, or was merely colourable and intended to conceal an original design of exportation to the belligerent country. In December, 1805, the Lords of Appeal held in the *Essex* (cited in the *William* (1806), 5 C. Rob. 402; 1 E. P. C. 512) that while the landing of the goods and the payment of the duties was evidence of importation, it was not conclusive; that the original intention of the importer to tranship and export the colonial produce was the test of the continuity of the voyage, and that this

Whether only one ship must be engaged.

It is doubtful whether a voyage was ever considered a continuous colonial one where the ships engaged in it were different. From Lord Stowell's judgement in the *Polly*[1] it would appear that he thought the rule would still apply although the same vessel was not employed throughout the whole voyage. But in the *William*[2] it was only cocoa which the neutral vessel had herself brought from Venezuela to Marblehead that was finally condemned; sugar which had been brought by other vessels from Havana to Marblehead was allowed to pass. In the case of the *Thomyris*,[3] on the other hand, where a cargo of barilla had been brought to Lisbon in an American vessel from Alicant, in Spain, and was there put on board another American vessel for the purpose of being carried to Cherbourg, it was held that the sale of goods at an intermediate port, and their transhipment to another vessel for conveyance to their final destination did not break the continuity of the voyage; and that consequently the barilla was subject to condemnation under the Order in Council of January 7, 1807, prohibiting the trade from one enemy's port to another.

Not essential that vessel should be captured on second part of voyage

In every reported case in which the doctrine of continuous voyage was applied to the prohibited colonial trade the vessel concerned appears to have been captured only after she had actually left the neutral port and was on her way to the hostile one. But although the case does not seem to have happened, the same principle must have applied if the capture had been made during the first part of the transport, supposing the intention

intention was to be ascertained from all the attending circumstances. The application of the doctrine of continuous voyage to illegal trading with the enemy was recognized by the Supreme Court of the United States in a case which arose during the war between the United States and Mexico (*Jecker* v. *Montgomery* (1851), 13 How. (U. S.), 498).

[1] (1800), 2 C. Rob. 361; 1 E. P. C. 248.

[2] (1806), 5 C. Rob. 285; 1 E. P. C. 505.

[3] (1808), Edw. 17; 2 E. P. C. 6. Cf. Hist. Add. Letts. 36; Ath. Jones, 262, 267–70; Baty, South Africa, 15–16.

to be proved that the goods were only being sent to the neutral port in order to be subsequently transhipped or transported further on the same or another ship to the enemy country.[1] This may also be inferred from Lord Stowell's decision in the case of the *Mercurius*,[2] where a vessel intending to call at a British port in order to enable her to obtain a licence to trade with a blockaded port was captured before reaching a British port. In holding that the voyage to the blockaded port was not continuous, the court very carefully distinguished the case before it from one infringing the prohibition to engage in the enemy's colonial trade. 'This is very different', said Scott, 'from the case of American ships touching at their own ports, to which it has been assimilated; here the voyage was *to be continued* only if legalized by the government which would have a right to complain of the illegality.'

Principle applicable to all similar questions.

The principles of these decisions with reference to the Rule of the War of 1756, in which the interposition of a neutral port of call was held to be no protection to the trade that was really being carried on between the colony and the home country, are obviously applicable to all questions, such as contraband voyages, where it may be necessary to determine the true character of the adventure in regard to its termination; it seems impossible to believe that Lord Stowell would have hesitated, in a necessary case, definitely to apply the doctrine of continuous voyage or ultimate destination to carriage of contraband.[3] Where the same vessel is

[1] Cf. Westlake, I. L. ii. 296; Elliott in 1 A. J. (1907) 72–3; Editorial Comment in 9 id. (1915), 215.

[2] (1808), Edw. 53; 2 E. P. C. 15. In the *La Flora* ((1805), 6 C. Rob. 1; 1 E. P. C. 515) Scott refused to consider a circuitous ulterior destination to England, either in the same or another ship, as an identical consignment within the meaning of the Order in Council permitting Spanish wool to be consigned to a merchant of the United Kingdom.

[3] Cf. Hist. Add. Letts. 38; Westlake, I. L. ii. 296.

engaged in both parts of the voyage this would result from the application of the principle which imputes a hostile destination to the cargo when one of the ports at which the vessel is to call belongs to the enemy.[1] 'The ostensible destination of the vessel', says the Manual of Naval Prize Law,[2] 'is sometimes a neutral port, while she is in reality intended, after touching, and even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be "continuous" and the destination is held to be hostile throughout'.

The *Commercen*

In 1816 the Supreme Court of the United States decided in the case of the *Commercen*,[3] where a Swedish neutral vessel was captured by an American cruiser while conveying grain to Bilboa, a neutral port, for the use of the British troops in Spain, that the fact that the destination of the vessel was a neutral port was no bar to the condemnation of the cargo as contraband when it was clear that it was to be delivered to the enemy. Where the object was to aid the enemy in his military operations, the court could not perceive 'how the destination to a neutral port can vary the application of this rule;[4] it is only doing that indirectly which is prohibited in direct courses'. As a matter of fact, however, the noxious goods were to be delivered directly to belligerent vessels lying in the neutral port, and therefore the actual decision in the *Commercen* would not extend to cover the case where it is intended to convey the contraband articles to the enemy by sea or land carriage beyond the neutral port to which the vessel is immediately destined.[5]

[1] Cf. Dup. D. M. Ang. 259. [2] Holland's ed. (1888), § 71.
[3] 1 Wheat. 382; Scott, 765; cf. Hist. Add. Letts. 28–9.
[4] i.e. the rule prohibiting carriage of contraband to the enemy. 'It is certainly true', said Story, J., 'that goods destined for the *use* of a neutral country can never be deemed contraband.'
[5] Cf. Baty, South Africa, 10, n.; Opp. I. L. ii. 501, n. 2.

Whether in such a case the vessel can be considered to be carrying contraband of war while on the way to the neutral port was first judicially decided in 1855 by the French Conseil général des Prises in the case of the *Vrow Anna Houwina*,[1] a Hanoverian ship taken during the Crimean war in transit from Lisbon to Hamburg with 973 sacks of saltpetre on board. It was notorious at the time of the seizure that Hamburg was the intermediary port used for the transmission of warlike stores by overland transit to Riga in Russia, and that it had become a staple market for sulphur and saltpetre, which it never was before; while the saltpetre on board, being described in the ship's papers simply as 'merchandise', was not truly declared. For these and other reasons the French council concluded that if the *Vrow Anna Houwina* herself was not chartered to carry the noxious part of the cargo on to some Russian port in the Baltic, it was nevertheless intended ultimately to reach the enemy, and it was accordingly condemned as contraband.[2]

Applied to contraband by France in 1855.

The *Vrow Anna Houwina*.

Seven years later the United States courts applied the same principle and condemned goods seized on board vessels bound for neutral ports, usually Matamoras or Nassau, when it might reasonably be inferred from the surrounding circumstances that the goods were going on to ports of the hostile Confederate States.[3] The four principal cases on the subject are the *Stephen Hart*,[4] the *Bermuda*,[5] the *Peterhoff*,[6] and the *Springbok*.[7] With

And by United States during the civil war.

[1] Calvo, D. I. v. 52 (§§ 1961, 2767); Rémy, 44–5; Ath. Jones, 273–5; Baty, South Africa, 11–12; 25 R. D. I. 55.

[2] As the real destination was inferred from the surrounding circumstances, it was deemed immaterial whether the saltpetre was to be carried on by ship to the Baltic or discharged at Hamburg and carried overland to Russia.

[3] Cf. Moore, Dig. vii. 698–700; Elliott in 1 A. J. 76.

[4] (1865), Blatch. Prize Cases, 387; 3 Wall. 559; Scott, 852; Moore, Dig. vii. 704–7.

[5] (1865), 3 Wall. 514; Moore, Dig. vii. 708–15.

[6] (1866), 5 Wall. 28; Scott, 760; Moore, Dig. vii. 715–18.

[7] (1866), 5 Wall. 1; Moore, Dig. vii. 719.

the exception of the case of the *Peterhoff*, however, where the sea carriage of the goods was to terminate at the Mexican port of Matamoras, from which there was communication with the Confederate territory by land or inland navigation, the carriage of contraband was presented to the courts in these cases in connexion with blockade-running; and unfortunately the judgements do not distinguish with desirable clearness between the two different sets of conditions involved.[1]

The *Peterhoff*.

In the *Peterhoff* it was laid down that contraband goods are liable to confiscation if there is ground for the belief that they are to be transported across neutral territory to a hostile country. 'It is true', said the court, 'that these goods, if really intended for sale in the market of Matamoras, would be free of liability, for contraband may be transported by neutrals to a neutral port if intended to make part of its general stock in trade.' But there was nothing in the case which tended to convince the court that the articles of warlike use had been sent to Matamoras with this object, while all the circumstances indicated that they were destined for the use of the rebel forces then occupying Brownsville.

The *Stephen Hart*.

In the *Stephen Hart* it was said that the test is whether the contraband goods 'are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them'. It was similarly declared in the *Bermuda*, where, according to the bills of lading, the cargo was to be delivered at the island of Bermuda 'unto order or assigns', that a neutral vessel may not take on board a contraband cargo ostensibly for a neutral port, but destined in reality to be carried to a belligerent port either in the same or in another ship. The doctrine

The *Bermuda*.

[1] Cf. Westlake, I. L. ii. 297–8; Moore, Dig. vii. 717; 15 L. Q. R. 27–8.

of continuous voyage, said Chase, C. J., 'is equally applicable to the conveyance of contraband to belligerents; and the vessel, which with the consent of the owner is so employed in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed in the last, if the employment is such as to make either so liable'.

The *Springbok* was the case of an English vessel taken on a voyage from London to Nassau, a British port in New Providence, with a cargo composed chiefly of innocent goods, but having on board a number of contraband articles. From the nature of this part of the cargo and other surrounding circumstances the court concluded that the goods were ultimately destined for one of the rebel ports; one ground taken as justifying the conclusion that Nassau was not the real destination of the cargo was derived from the form of the bills of lading and manifest, which did not disclose the contents of the packages or name any consignee, the goods being deliverable simply to 'order or assigns'.[1] The British owners of the cargo, in petitioning the Crown to claim compensation, objected to this particular part of the judgement on the ground that the bills of lading were, on the testimony of some of the principal brokers of London, 'in the usual and regular form of consignment to an agent for sale at such a port as Nassau'. To this

The *Springbok*.

[1] In the District Court Mr. Justice Betts held that the ship's papers were simulated and false, and condemned both ship and cargo. But the Supreme Court on appeal found that the papers were regular and all genuine, and adjudged that the ship should be restored on the ground laid down in the *Bermuda*, that where goods destined ultimately for a belligerent port were 'being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connexion on the part of her owners with the ulterior destination of the goods', the ship, though liable to seizure in order that the goods might be confiscated, was not liable to condemnation as prize (Twiss, Cont. Voy. 20, 22; Moore, Dig. vii. 720). As to the actual reason for the original seizure of the *Springbok*, cf. Baty, P. L. 71, 99.

British attitude.

the Foreign Office replied that no doubt the form was usual in time of peace; but a practice which might be 'perfectly regular in time of peace under the municipal regulations of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visit of belligerent cruisers'.[1] It had also been laid down by Dr. Lushington in the case of the *Abo*[2] that when the cargo is shipped *flagrante bello*, the bills of lading ought to express on their face for whose account and risk the property was shipped.

The Law Officers[3] were consulted with reference to the practice of the United States and they were of opinion that if the goods were consigned to Nassau with the intention that they should be sent on to a belligerent destination, the vessel and its contents might be condemned. The only difficulty was as to the sufficiency of the evidence of such an intention; but they considered that if the neutral seeks to evade the law by the mere trick of introducing a neutral port as a false and merely colourable destination, and the circumstances of the case raise a strong presumption that the goods were, from the outset, intended for delivery to one of the belligerents, then the other belligerent's right of capture ought clearly to be upheld. The British Government refused to interfere in favour of the owners of the vessels and cargoes; and the claims for compensation made before the international commission under Article XIII of the treaty of Washington of May 8, 1871, in respect of the *Peterhoff*, *Springbok*, and two other vessels were all disallowed, except that $5,065 was awarded as damages for the detention of the *Springbok* from the date of the decree

[1] Moore, Dig. vii. 723 4.
[2] (1854), Spinks, 42; 2 E. P. C. 285.
[3] At that time Sir W. Atherton and Sir Roundell Palmer (afterwards Lord Selborne).

of the District Court until her discharge under the decree of the Supreme Court.[1] In litigation arising at the time and subsequently out of insurances on cargoes seized and condemned under the doctrine of continuous voyage or ultimate destination, English courts held that the goods were properly described as contraband.[2]

Previous opinion in England.

Prior to these decisions of the courts of the United States it appears to have been generally assumed in England that if a neutral port was the bona fide destination of a neutral ship, and the intended termination of the voyage in which she was captured, neither the ship nor her cargo, if the latter was also neutral property, could be rightfully condemned in a belligerent's court as good prize of war; and that a prize court would not inquire what was the ulterior destination of the cargo after it had been landed from the ship at its port of arrival.[3] 'The destination of the vessel', said the Manual of Naval Prize Law published by Lushington in 1866,[4] 'is conclusive as to the destination of the goods on board . . . if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transhipment, overland conveyance, or otherwise.' The attitude of the American prize courts called forth protests on the part of many learned authorities, and there was a consensus

[1] Moore, Dig. vii. 723-6; Dav. Elem. 467, n.; Opp. I. L. ii. 502; P. P. Africa, No. 1 (1900), 18; Misc. No. 1 (1900); Elliott in 1 A. J. 85-7.

[2] *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.), 791; 34 L. J. (C. P.), 117; *Seymour* v. *London and Provincial Marine Insurance Co.* (1872), 41 L. J. (C. P.), 193; *Ruys* v. *Royal Exchange Assurance Co.* [1897], 2 Q. B. 135. Cf. 15 L. Q. R. 24; 17 id. 12, 193; 23 id. 199.

[3] Twiss, Cont. Voy. 14, 30; Hist. Letts. 191-2.

[4] § 178 (pp. 37–8). Holland repeated this (§§ 72-3, p. 22), but he noted that it was opposed to the decisions in America, and he inserted a clause (§ 71, *supra*, p. 150) as to an ostensible destination of the vessel to a neutral port.

of juridical opinion that their decisions involved an extension of the doctrine of contraband.[1] In any case, however, the doctrine of continuous voyage is but an application of the general rule of law that one is not 'permitted to do by indirection what he is forbidden to do directly'; and therefore, even if it had been applied to contraband for the first time in the American civil law, it would not really have been an extension of the rules relating to that subject.[2]

Necessity for the doctrine of continuous voyage.

The older British practice of looking primarily to the destination of the ship as the decisive factor in the carriage of contraband worked well enough under the conditions of land and sea transit that existed at the end of the eighteenth and the beginning of the nineteenth centuries; but it fails hopelessly now.[3] The ease with which, in consequence of the development of railway and other forms of inland communication in the last century, a neutral merchant can now supply a belligerent with the necessaries of war by combined sea and land carriage, renders the law of contraband practically useless for dealing with a continental enemy unless it is carried out to its logical conclusion through the application of the doctrine of continuous voyage. It is along these lines that international practice has developed. Each case must be judged on its merits according to the attendant circumstances, and a reasonable belief from the circumstances surrounding the trade that the shipments are intended ultimately to find their way to the hands of the enemy must be held sufficient to justify their seizure, or at any rate to make it incumbent upon their owner to prove that their ultimate destination is innocent.[4]

[1] Cf. Twiss, Cont. Voy. 32-3; Elliott in I A. J. 88-94; Hall, I. L. 668-9; Ath. Jones, 254-8.

[2] See Elliott in I A. J. 96; and cf. Reddie, xii.

[3] Cf. Hansemann, 48-9; Bent, Cases, 220.

[4] Cf. Editorial Comment in 9 A. J. (1915), 213, 217.

Later practice of nineteenth century.

The doctrine of continuous voyage was recognized by a Swedish decree of July 29, 1870,[1] which declared that the prohibition to trade in contraband of war had no relation to the transport of such articles between neutral ports except where the articles belonged to or were destined for the belligerent powers or persons within their jurisdiction. In 1885 the French Government claimed the right to seize vessels carrying contraband goods to China while on a voyage from a neutral port to the English port of Hong Kong; but Great Britain protested against any such proceeding on the ground that it was open to a neutral vessel to trade to any neutral port.[2] What she objected to most, however, was the general declaration by France of rice destined for any Chinese port north of Canton as contraband of war.[3]

Discussion at Institute of International Law.

A committee of the Institute of International Law, comprising the names of such jurists as W. E. Hall, F. de Martens, L. Renault, and Sir Travers Twiss, condemned the doctrine of continuous voyage as applied to contraband of war, and their report was adopted by the Institute at the session at Wiesbaden in 1882.[4] But Kleen was in favour of the doctrine, and § 7 (1) of the *avant-projet* adopted at the Paris session in 1894 provided that the goods should be presumed to be destined to the enemy if either they themselves had that destination, directly or indirectly, or if the vessel had it alone.[5] At the session at Cambridge in 1895 Perels proposed as § 8: 'Si les objets transportés sont en route pour un port

Doctrine condemned in 1882.

[1] Kleen, Cont. 78, n.

[2] Hansemann, 43, n. 1; Geffcken in 17 R. D. I. 148; Elliott in 1 A. J. 97.

[3] Supra, pp. 131–2.

[4] 14 R. D. I. (1882), 328; Moore, Dig. vii. 731; Hansemann, 49. The resolution of the Institute referred particularly to the decision in the case of the *Springbok*.

[5] 13 Ann. (1894–5), 102; Beckenkamp, 38; Hansemann, 42.

neutre, il y a présomption que leur destination est neutre. Toutefois cette présomption peut être renversée par des preuves contraires. Dans ces cas, le fait qu'ils sont destinés à l'ennemi doit être démontré avec certitude, en tenant compte des circonstances spéciales et par un examen attentif des papiers de bord.' This proposal was not accepted, however, and in the resolution adopted all that was required was that the goods should be transported by sea on behalf of, or destined to, the enemy.[1]

The point gave rise to a prolonged discussion in 1896, at the session at Venice. Desjardins desired to restrict the application of the doctrine of continuous voyage to the case of a neutral port which 'n'est qu'une étape choisie pour tromper les belligérants sur la véritable destination du chargement'. But this was opposed by Westlake and the Italian members on the ground that it would exclude the case of contraband destined to a neutral port, not with the intention of deceiving a belligerent, but simply because the other belligerent had no seaboard. Finally the Institute adopted the following rule: 'A destination for the enemy is presumed when the carriage of the goods is directed towards one of his ports, or towards a neutral port which, by evident proofs arising from incontestable facts, is only a stage in a carriage to the enemy as the final object of the same commercial transaction.'[2] Article 44 of the draft code of the rules of neutrality, drawn up by the Institute at Ghent in 1906, prohibits as *actes de contrebande* 'the acts of the neutral state or its subjects in supplying or bringing . . . articles of contraband to a belligerent . . . whether directly or indirectly, with manifest and provable

But finally approved in 1896.

[1] 14 Ann. (1895 6), 192 3; Beckenkamp, 63; Hansemann, 49 50; Dupuis in 3 R. G. D. I. (1896), 654 5.

[2] 15 Ann. (1896), 122, 218, 222, 231; Beckenkamp, 68; Hansemann, 50.

knowledge of their hostile destination as the final object of the same mercantile transaction '.[1]

In 1896 the doctrine was also again judicially affirmed by the Italian Prize Court in the case of the *Doelwijk*,[2] a Dutch vessel bound with a cargo of arms and ammunition from Rotterdam to the port of Djibonti, a French possession on the Red Sea. As France was not at that time at war in any part of Africa it was presumed that the noxious articles were intended to be transported overland to Abyssinia, with which Italy was then at war; but confiscation was refused on the ground that before the trial peace had been established. The question also arose in the previous year in connexion with the *Gaelic*,[3] a British mail steamer which called at Yokohama during the Chino-Japanese war in the regular course of her voyage from San Francisco to Hong Kong. As in 1885, the British authorities in Japan contended that the neutral destination of the vessel precluded search, it being immaterial whether anything on board her had a hostile destination ulterior to that of the ship. The Spanish instructions of April 24, 1898, disallowed search in the case of a vessel destined for a neutral port unless met in the vicinity of an enemy port or unjustifiably out of the course indicated by her papers. The American instructions of June 20, on the other hand, simply required that the contraband goods should be destined to an

Maintained by Italy in 1896.

The *Doelwijk*.

The *Gaelic*.

[1] Sont interdits comme actes de contrebande les faits, par l'État neutre ou ses ressortissants, d'apporter ou de livrer des articles de contrebande à un belligérant, à une place ou un port sous sa domination, à sa force armée, ses ressortissants, agents ou navires, soit directement soit indirectement, mais avec connaissance évidente et prouvable de leur destination ennemie comme but final de la même opération commerciale (21 Ann. (1906), 113, 158–9; Hansemann, 52).

[2] Moore, Dig. vii. 744; Bonfils, 1011; Desp. D. I. 1270; Dup. D. M. Eng. 260–1; 24 J. I. P. 268; 4 R. G. D. I. 39–42; Hansemann, 42; Elliott in I A. J. 97–9.

[3] Tak. C. J. 59–63; Westlake in 15 L. Q. R. 24; Col. Paps. 461–2; Elliott in I A. J. 99–100.

enemy port or fleet and did not stipulate that such hostile destination should be direct.[1]

Applied by Great Britain during the Boer war.

During the Boer war Great Britain found herself in the same position with regard to the South African Republics as Italy had been in with regard to Abyssinia in 1896; and in 1900 British cruisers held up the *Bundesrath*, *Herzog*, and *General*, German liners bound for the Portuguese neutral port of Lourenço Marques in Delagoa Bay, on the ground that they were carrying contraband goods destined for the Boers. Germany protested against the seizure of these vessels and endeavoured to show that British authority was against the application of the doctrine of continuous voyage to contraband. But Great Britain refused to admit the principle that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another; adopting the view propounded in Bluntschli's *Droit international codifié*,[2] she maintained that articles ultimately destined for the enemy are contraband, although the vessel carrying them is bound for a neutral port only. She emphatically denied that the passage quoted in the German protest from the Prize Manual,[3] 'that the destination of the vessel is conclusive as to the destination of the goods on board', could apply when at the time of seizure the noxious merchandise was consigned or intended to be delivered to an agent of the enemy at a neutral port, or was, in fact, destined for the enemy's country.[1] Although the vessels were eventually released without being brought in for adjudication owing to the difficulty of proving that their cargoes were destined for the use of

German protest.

[1] Kleen, Neut. ii. 264, n.

[2] § 813: Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi, il y aura contrebande de guerre et la confiscation sera justifiée (p. 173).

[3] § 72 (p. 22).

[1] P. P. Africa, No. 1 (1900), 18–19; Moore, Dig. vii. 739–43; Hansemann, 43.

the armed forces of the enemy, the principle of the applicability of the doctrine of continuous voyage or ultimate destination to the carriage of contraband was plainly established.[1] In the Russian Special Instructions of September 20, 1900, it was said that by the designation 'to the enemy' is meant transportation to his fleet, to one of his ports, or even to a neutral port if the latter, according to obvious and indisputable proofs, merely serves as an intermediate station to the enemy as the final goal of the transportation.[2]

Discussion at the Second Hague Conference.

At the Second Hague Conference France proposed that where the enemy has access to the sea only through a neutral country, the fact that a vessel is destined to a port of that country should not be sufficient to establish the innocence of the transport.[3] Brazil suggested a provision on the lines of that proposed by Desjardins in 1896[4] that hostile destination should be presumed in the case of transport to a neutral port which by manifest and indisputable proof is only a stopping-place chosen in order to deceive the belligerents as to the true destination.[5] Lord Reay declared on behalf of Great Britain that the doctrine of continuous voyage stood or fell with

[1] Professor Holland, who was responsible for the above-mentioned passage in the Prize Manual (cf. supra, p. 155, n. 4), defended the position taken up by the British Government in 1900 as 'an innovation which seemed to be demanded by the conditions of modern warfare' (Letts. 146). The United States Government deprecated the raising of any issue as to the suggestion made by Lord Salisbury that 'an ultimate destination to the citizens of the Transvaal, even of goods consigned to British ports on the way thither', might, if the 'transportation was viewed as one continuous voyage', be held to constitute in a British vessel such a 'trading with the enemy' as to bring the vessel within the provisions of the municipal law (Moore, Dig. vii. 685).

[2] Moore, Dig. vii. 670; cf. the rules adopted by the Institute of International Law in 1896 and 1906 (supra, pp. 158–9). In Art. 15 of the Japanese Prize Regulations of 1904 it was stated that the destination of a vessel is generally considered as also the destination of her cargo (Tak. R. J. 492).

[3] Hansemann, 57; Annexe to Actes, iii.

[4] Supra, p. 158.

[5] Hansemann, 57; Annexe to Actes, iii.

the existence of the law of contraband.[1] The German delegates, however, strenuously opposed the doctrine, and a long discussion took place. But as neither side was inclined to make any concessions, nothing resulted from the deliberations of the committee; and the question of continuous voyage was never really detached from the other problems of contraband of war.[2]

Attitude of the powers at the London Conference.

Germany again opposed the doctrine at the Naval Conference of London, and in this attitude she was supported by Austria-Hungary and Spain; while Russia opposed its application to land transport, and Holland contended that it applied solely to transport to enemy territory without transhipment in a neutral port. But the majority of the states represented at the conference recognized the doctrine of continuous voyage to a greater or less extent.[3] In the instructions to the British delegates Sir Edward Grey said: 'His Majesty's Government believe the most widely established rule to be that the destination of the contraband cargo, and not that of the vessel by which it is conveyed, is the decisive factor. In other words: it may be laid down that the fact of the destination of the carrying ship being a neutral port will not relieve the cargo from condemnation if it is established that the contraband did in fact possess a belligerent destination. This principle may rightly be extended not only to cases where the contraband is to be carried on to the enemy by transhipment, but also to cases where the goods are forwarded by land transit through neutral territory.'[4]

The doctrine of continuous voyage was supported by the Prussian Regulations of 1864,[5] and now has a con-

[1] La Deux. Confér. i. 855.
[2] Hansemann, 58–9.
[3] P. P. Misc. No. 5 (1909), 94–6; Hansemann, 59–63.
[4] P. P. Misc. No. 4 (1909), 24.
[5] 17 L. Q. R. 197; Westlake, I. L. ii. 298.

census of learned opinion, including that of Gessner [1] and Perels,[2] in its favour.[3] Some systematic writers of the nineteenth century, such as Hall and the editors of Wheaton, as we have seen,[4] opposed the doctrine as an undue encroachment on the rights of neutrals; and it is obviously no easy matter to determine the degree of cogency to be required in the evidence of the ulterior hostile destination of the cargo. The presumption that the contraband goods are destined for the enemy, though it can hardly amount in any case to positive proof, should leave no reasonable doubt as to the justice of the sentence. In the British view, as laid down at the London Conference,[5] the doctrine only holds good when the whole transportation is made in pursuance of a single transaction preconceived from the outset. If the goods were intended to reach the enemy without the intervention of a fresh commercial transaction, they can lawfully be condemned as contraband; but if the evidence went no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere, they are immune from capture. Where the neutral port to which the vessel was bound appeared to be specially adapted through its situation or it was known that from it the enemy was furnished with material of war, the American courts assumed an intention in the mind of the owner of the cargo directed to a hostile destination after the termination of the voyage mentioned in the ship's papers.[6]

Opposition of some text writers.

Difficulties in the application of the doctrine.

[1] Droit des neutres sur mer. 121.
[2] Int. öffent. Seerecht, 259 (§ 45); 14 Ann. 63.
[3] Cf. Westlake, I. L. ii. 298; Opp. I. L. ii. 504; Kleen, Neut. i. 388-9; Bare. Prob. 94; Elliott in 1 A. J. 102.
[4] Supra, pp. 155–6.
[5] P. P. Misc. No. 4 (1909), 8; No. 5 (1909), 95.
[6] Hansemann, 40; Mr. Bryan's letter to Mr. Stone (9 A. J. (1915), 446).

CHAPTER XIII

CONTRABAND UNDER THE DECLARATION OF LONDON

The Second Hague Conference.

THE distinction between absolute and conditional or relative contraband was adopted as the basis of the discussion of the subject at the Second Hague Peace Conference in 1907. The United States, as we have already seen,[1] were in favour of the complete abolition of conditional contraband, but although the suggestion received some support from the representatives of other powers, it met generally with so unfavourable a reception that it was not proceeded with. Brazil proposed to qualify the abolition of conditional contraband by permitting belligerents to sequestrate or purchase certain named articles—provisions, coal, raw cotton, and men's clothing—when destined either for an enemy port or for a neutral one clearly proved to be a stage (*étape*) towards an enemy destination. The German proposal, following the course adopted by Perels in 1895,[2] maintained conditional contraband when diplomatically declared in advance by the belligerent government. The French proposal, like the rule finally laid down by the Institute of International Law in 1896,[3] limited absolute contraband rather strictly, and then, while nominally proclaiming the freedom of neutral commerce in all things not absolutely contraband, allowed to belligerents the power of 'restraining its freedom' by a diplomatic notification of the things they intend to intercept, which might be

[1] Supra, chap. ix. p. 104.
[2] Supra, p. 129.
[3] Supra, p. 130.

confiscated if their hostile purpose (*but nettement hostile*) was proved, but otherwise only pre-empted.[1]

The memoranda submitted to the London Conference.

The distinction was also recognized in the majority of the memoranda submitted by the powers represented at the Naval Conference of 1908–9. According to the German Memorandum articles of the second or conditional class should be considered contraband when destined to the armed forces or to the government service of a belligerent, and there would be an irrebuttable presumption of such destination if the goods were consigned to enemy authorities. This destination was also to be presumed (although, in these cases, the presumption might be rebutted) if the goods were consigned to a trader (*commerçant*) who, as a matter of common knowledge, supplied articles of that kind to the enemy, or if they were consigned to a fortified place belonging to a belligerent or other place serving as a base for the operations or victualling of his armed forces; unless it was a question of proving the contraband character of the vessels themselves bound for one of those places.

Germany.

Russia.

According to the Russian Memorandum articles of the second class (*contrebande de guerre relative*) destined to the armed forces of the enemy would be liable to confiscation unless the claimants proved that the goods transported were not destined to be used for the purposes of the war. Destination to the armed forces of the enemy included destination to (*a*) the enemy's army or fleet, (*b*) a naval port or fortified place of the enemy, (*c*) a port occupied by the enemy, and (*d*) any other enemy port if the goods were transported for the enemy government or its purveyors.

Japan.

The Japanese Memorandum deemed articles coming within the category of conditional contraband to be destined for the enemy's military or

[1] Westlake, I. L. ii. 289–90; La Deux. Confér. iii. 1156 sq. (Annexes 28–32).

naval forces when they are destined to enemy territory *and*, from circumstances connected with the place of destination, there is reason to believe that they are intended for the military use of the enemy.[1]

United States.

The United States Memorandum deemed articles of the second class to be contraband when actually and specially destined to the enemy's military or naval forces; the

France.

French Memorandum treated in the same way coal and petroleum destined directly and solely for the use of an

Great Britain.

enemy fleet or naval port. According to the British Memorandum there should be a presumption that conditional contraband is on its way to assist in the warlike operations of the enemy only if there is proof that its destination is for the naval or military forces of the enemy, or for some place of naval or military equipment in the occupation of the enemy, or if there has been fraudulent concealment or spoliation of papers.[2]

Question of abolition of conditional contraband raised.

In the deliberations of the Conference the question of the abolition of conditional contraband was raised by Holland and Spain, but it was outside the scope of the British programme, which limited the discussion to the *existing* rules of international law.[3] As was therefore to be expected, the Declaration of London adopts the principle of the Anglo-American distinction between absolute and conditional contraband. Article 22 enumerates eleven classes of articles (including, besides practically every object that is exclusively used for war, saddle, draught, and pack animals suitable for use in war, and clothing, equipment, and harness of a distinctively military character) which may without notice[4] be treated as

List of absolute contraband.

[1] Cf. supra, p. 134.
[2] P. P. Misc. No. 5 (1909), 66-9.
[3] Ibid. 136–7; cf. supra, p. 104.
[4] *De plein droit*; i. e. after ratification of the Declaration the list would come into force for the signatory powers *ipso facto* on the outbreak of war without the necessity for any formal promulgation or notification (cf. P. P. Misc. No. 4 (1909), 44, 78).

contraband of war under the name of 'absolute contraband'. The items are:

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.
4. Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddle, draught, and pack animals suitable for use in war.
8. Articles of camp equipment, and their distinctive component parts.
9. Armour plates.
10. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.
11. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Articles exclusively used for war may be added to this list by a declaration to be notified to the governments of other powers, or their representatives accredited to the power making the declaration.[1]

Such goods are liable to capture if shown to be destined Destination of

[1] Art. 23. A notification made after the outbreak of hostilities is to be addressed only to neutral powers.

absolute contraband.

Doctrine of continuous voyage applies.

to territory belonging to or occupied by the enemy, or to his armed forces; and it is immaterial whether their carriage is direct or entails transhipment or a subsequent transport by land.[1] When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy, there is an irrebuttable presumption of their hostile destination, as is also the case when the ship's only or first port of call is an enemy one, or she is to meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.[2] To this extent the principle of assuming the hostile destination of the cargo from that of the vessel carrying it is retained, in accordance with the previous British practice; the provision is justified in the Report on the ground that the fact that, before reaching the ostensible neutral destination of the goods, the vessel will come in contact with the enemy, would occasion too great a risk for the belligerent whose cruiser searches her.[3] No such conclusive presumption is raised under the Declaration merely because the vessel is to proceed to an enemy port *after* calling at the neutral port for which the goods are documented.[4]

Conclusiveness of the ship's papers.

Article 32 provides that the ship's papers are conclusive proof as to the voyage on which she is engaged unless she has deviated in a manner that cannot be satisfactorily explained; but, according to the Report, this only means that the papers are assumed to be correct in the absence of evidence that they are fraudulent. Thus, a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers.[5] Unless the provision is qualified in this way

[1] Art. 30. [2] Art. 31.
[3] P. P. Misc. No. 4 (1909). 48; infra, App. A, p. 263.
[4] Cf. Dup. D. M. Haye et Lond. 298-300.
[5] P. P. Misc. No. 4 (1909), 50; infra, App. A, p. 267. The same

it is obviously open to the objection that it would leave a belligerent the helpless victim of fraudulent neutrals.[1]

List of conditional contraband.

Article 24 enumerates fourteen classes of articles and commodities (including foodstuffs, forage, clothing, money, railway material, and fuel), susceptible of use in war as well as for purposes of peace, which may without notice [2] be treated as contraband of war under the name of 'conditional contraband'. The items are :

1. Foodstuffs.
2. Forage and grain, suitable for feeding animals.
3. Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
4. Gold and silver in coin or bullion ; paper money.
5. Vehicles of all kinds available for use in war, and their component parts.
6. Vessels, craft, and boats of all kinds ; floating docks, parts of docks and their component parts.
7. Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.
8. Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connexion with balloons and flying machines.
9. Fuel ; lubricants.
10. Powder and explosives not specially prepared for use in war.
11. Barbed wire and implements for fixing and cutting the same.
12. Horseshoes and shoeing materials.

construction applies to the similar provision of Art. 35 with regard to conditional contraband (cf. infra, p. 174).

[1] Cf. Gibson Bowles, Sea Law, 179–80.

[2] Cf. p. 166, n. 4, supra.

13. Harness and saddlery.
14. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

Articles susceptible of use in war as well as for purposes of peace may be added to this list[4] by a declaration to be notified as provided in Article 23.[1]

Destination of conditional contraband.

Article 33 provides, as we have previously had occasion to observe,[2] that conditional contraband shall be liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in the latter case (provided the consignment in question is not of gold or silver in coin or bullion or paper money) the circumstances show that the goods cannot in fact be used for the purposes of the war in progress.

Proof of requisite destination.

The burden of proving the destination required by Article 33 is thrown in the first instance upon the captor; but owing to the difficulty of proving this directly, except in the unlikely case of a manifest consignment immediately to the armed forces or a government department of the enemy, Article 34 provides that such destination shall be presumed to exist if the goods are consigned to either (1) enemy authorities; (2) a trader[3] established in the enemy country who, as a matter of common knowledge, supplies articles of the kind in question to the enemy;[4] (3) a fortified place belonging to the enemy; or (4) any other place serving as a base for the

[1] Art. 25. The intention of a power to waive the right to treat as contraband an article comprised in any of the classes enumerated in Arts. 22 and 24 is to be similarly notified (Art. 26).

[2] Supra, pp. 97–8.

[3] *Commerçant*, the word in the French text, has a wider meaning than 'contractor' (cf. Bent. Decl. 72; Opp. I. L. ii. 491, n. 1).

[4] i.e. the government of the enemy; cf. Pearce Higgins, 551, n.; Westlake, Col. Paps. 663; Cob. Cases, ii. 442, n. (n); Bent. Decl. 72–3; and the judgement of the Russian Supreme Prize Court in the *Calchas* (Ath. Jones, 88; Cob. Cases, ii. 138, n. (b); supra, p. 135).

armed forces of the enemy. No such presumption arises, however, in the case of a merchant vessel bound for one of the two latter places, if it is sought to prove that she herself is contraband. Moreover, the presumptions raised by this Article, unlike those raised by Article 31 in the case of absolute contraband, are rebuttable; and the neutral owner is at liberty to show, if he can, that his goods are in fact intended for the civil population and not for the armed forces or a government department of the enemy. On the other hand, proof of the hostile destination required by Article 33 is not confined to the four cases mentioned in Article 34; but in any other case the captor would run the risk of being ordered to pay compensation to the owners of the captured vessel and cargo, if he failed to prove the existence of special circumstances indicating the culpable destination of Article 33. During the Russo-Japanese war it was the practice of the Russian prize courts to saddle the neutral in every case with the onus of proving innocence, the owners of the captured cargo apparently being required to show that no part of it might eventually come into the hands of the enemy's armed forces. Such a rule Mr. Hay described in the United States protest as 'in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent state'.[1]

The presumptions raised are rebuttable.

Practice of Russian prize courts in 1904.

Of the presumptions of hostile destination raised by Article 34, two, viz. those in the case of consignments to enemy authorities or to a fortified place belonging to the enemy, agree with the previous British practice. The term 'place serving as a base for the armed forces of the enemy' is rather indefinite and appears to be wider in extent than the 'place of naval or military equipment' of the former British rule. It would certainly

Base for armed forces.

[1] Tak. R. J. 505–6.

include, as the German Memorandum upon which the clause is founded expressly stated, a base of supply as well as one of operations.[1] In Westlake's opinion, however, 'a purchase or two by or from a contractor or any other merchant will not make a base of supply. The expression, whether in its primary architectural sense or in any of its metaphorical senses, implies some kind of permanence. It may be a magazine from which forces can be supplied as occasion requires, or a government office charged with supply, or something else. But either the English or French language would be violated by calling the place of casual or occasional transactions a base.'[2]

Doctrine of continuous voyage excluded.

Except where enemy country has no seaboard.

As a result of Articles 35 and 36 the Declaration provides that, except in cases where the enemy's country has no seaboard, like the Boer Republics in 1900, conditional contraband shall only be liable to capture when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port. In this way it was proposed to exempt conditional contraband, in ordinary cases, from the doctrine of continuous voyage. But the matter was very hotly disputed at the Conference, and the British delegates only agreed to this provision as a contribution to the compromise between conflicting theories and practices, and in order to secure the recognition of the principle in relation to absolute contraband.[3]

A matter of compromise.

[1] Cf. supra, p. 165, and Opp. I. L. ii. 491, n. 2; and see the discussions at the Conference (P. P. Misc. No. 5 (1909), 138, 150–1, 287–8).

[2] Letter to the *Spectator*, April 1, 1911, at p. 476; and cf. Westlake, Col. Papers, 663; Bent. Decl. 73; Hall, I. L. 600; and Arts. 1 and 5 of the circular issued by the United States on September 19, 1914, with reference to merchant vessels suspected of carrying supplies to belligerent vessels (9 A. J. (1915), Sup. 122).

[3] P. P. Misc. No. 4 (1909), 96; No. 5 (1909), 163–4, 194–5; Desp. D. I. 1291; Scott in 8 A. J. (1914), 315–16.

Effect of Article 35.

The effect of Article 35 is not altogether to substitute, in the case of conditional contraband, the destination of the ship for that of the cargo as the decisive factor. It rather makes proof of the hostile destination of the vessel a *sine qua non* of the establishment of the hostile destination of the cargo required by Article 33, which latter fact must be shown quite independently of the former. Under the Declaration it would be necessary to prove the hostile destination of both ship and goods; for the presumptions raised by Article 34 refer to the person or place to which the goods are consigned, and not to the destination of the vessel. If the captor could prove that, although the goods were documented for discharge at a neutral port, it was intended to reload them in the same vessel and to carry them on to an appropriate hostile destination, the deposit at the neutral port would presumably be regarded as 'an unreal and fraudulent transaction', and therefore as not amounting to a 'discharge' within the meaning of Article 35. But in every other case a mere leaving of the cargo at the neutral port would protect it from condemnation, however clearly it might appear that it was intended sooner or later to transport it by sea or land to the enemy. 'Whether the destination of the ship is neutral or hostile', said Westlake, 'depends on whether she is to deposit the particular goods concerned at a neutral port or to carry them on to an enemy one.'[1]

The Report states without limitation that conditional contraband 'is only liable to capture when it is to be discharged in an enemy port', from which it would follow that if the goods are consigned to a neutral port at which the vessel will touch *after* leaving the enemy

[1] Letter to *The Times*, March 16, 1911 (Col. Paps., 672-4); and cf. the letters from the same jurist to *The Times* of March 18 (Col. Paps. 674-5), and to the *Spectator* of April 15, 1911.

country, they cannot be captured. But although, with regard to conditional contraband, no conclusive presumption of enemy destination arises when the ship's first port of call is hostile,[1] the terms of Article 35 do not preclude the captor from proving in such a case that the cargo has in fact the destination required by Articles 33 and 34. The provision that the ship's papers are conclusive proof both as to the voyage on which she is engaged and as to the port of discharge of the cargo, unless she has deviated in a manner that cannot be satisfactorily explained, must be understood with the same qualification as the similar provision in Article 32 in the case of absolute contraband.[2] If the papers are fraudulent the captor may disregard them.

Free list. Article 27 provides generally that articles which are not susceptible of use in war may not be declared contraband, and Article 28 specifies the following seventeen classes of commodities (including several articles, such as cotton, resin, metals, and paper, which have in particular cases been treated as contraband[3]) which it provides are not to be declared contraband :

1. Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of textile industries, and yarns of the same.
2. Oil seeds and nuts ; copra.
3. Rubber, resins, gums, and laes ; hops.
4. Raw hides and horns, bones, and ivory.
5. atural and artificial manures, including nitrates and phosphates for agricultural purposes.
6. Metallic ores.
7. Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
8. Chinaware and glass.

[1] Cf. Art. 31 (2) (supra, p. 168). [2] Cf. supra, p. 168 and n. 5.
[3] Cf. Westlake, Col. Paps. 662.

9. Paper and paper-making materials.
10. Soap, paint, and colours, including articles exclusively used in their manufacture, and varnish.
11. Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
12. Agricultural, mining, textile, and printing machinery.
13. Precious and semi-precious stones, pearls, mother of pearl, and coral.
14. Clocks and watches, other than chronometers.
15. Fashion and fancy goods.
16. Feathers of all kinds, hairs, and bristles.
17. Articles of household furniture and decoration; office furniture and requisites.

Other articles exempt from seizure.

The Declaration also provides, in accordance with what we have seen to be the established practice,[1] that articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage, may not be treated as contraband.[2]

Articles serving exclusively to aid the sick and wounded are similarly exempted from treatment as contraband; but in case of urgent military necessity such articles may be requisitioned, subject to the payment of compensation, if their destination is the same as that required by Article 30 for absolute contraband.[3] This provision refers, of course, to ordinary merchant vessels whose cargo includes things of the kind mentioned. Hospital ships enjoy special immunity under Hague Convention X of 1907.[4] To these free articles may be added the postal correspondence of neutrals or belligerents, whether official or private in character, which Article 1 of Hague

[1] Supra, pp. 136–8.
[2] Art. 29 (2).
[3] Art. 29 (1).
[4] Pearce Higgins, 358–94.

Convention XI of 1907[1] renders inviolable if found on board a neutral or enemy ship at sea.

Practice in the Turco-Italian war of 1911.

At the commencement of the Turco-Italian war in 1911 Italy issued a decree respecting the right of capture and prize in conformity with the principles laid down in the Declaration of London which it was declared should be observed 'in so far as the dispositions of the laws of the kingdom allow'. Under Article 6 of this decree the following articles were declared to be contraband: cannons, guns, carbines, revolvers, pistols, sabres, and all sorts of portable firearms; munitions of war, military implements of all kinds, and in general everything which, without manipulation, can serve directly for land or sea armament. Such articles were subject to capture and confiscation if their destination was proved to be the enemy's territory or naval forces, whether transported directly or by means of transhipment or of transit overland.[2] The Italian Government expressly declared that it would not regard coal and foodstuffs as contraband, whatever their destination.

The contraband list officially issued by the Turkish Government comprised the articles enumerated in Articles 22 and 24 of the Declaration of London, with the addition of iron bars or rivets of $\frac{3}{4}$ in. or $\frac{5}{8}$ in. diameter. The Porte also announced that Turkey intended to conform to the Declaration and that cargoes of grain from Black Sea ports, carried in neutral vessels, would be allowed to pass, unless they were consigned to Italian ports and destined for Italian forces of administration. Such destination would be presumed if the goods were addressed to Italian authorities or to merchants known to supply the Italian Government, or when they were destined for

[1] Pearce Higgins, 396, 401-2. This does not include parcels sent by post (supra, p. 59, n. 4).

[2] Barc. T. I. War, 124; Rapisardi-Mirabelli in 15 R. D. I. (1913), 120-3; Boeck in 39 J. D. I. P. (1912), 462-7.

certain specified fortified places.[1] During the Turco-Italian war the rule of Article 35 of the Declaration came into question. In January, 1912, the *Carthage*, a French mail-steamer plying between Marseilles and Tunis, was captured for carriage of contraband by an Italian torpedo-boat because she had an aeroplane destined for Tunis on board. As the destination of the vessel was neutral, and as aeroplanes were conditional contraband under the rules of the Declaration of London, France protested against the capture of the vessel. Italy thereupon agreed to release her, and the parties arranged to have the question as to whether the capture of the vessel was justified settled by the Permanent Court of Arbitration at the Hague, which held Italy liable in damages because the seizure had been made without sufficient grounds to assert the hostile destination of the aeroplane.[2]

In the Balkan war Greece declared that she would consider as contraband the articles enumerated in Articles 22 and 24 of the Declaration of London, except that the articles specified under items 8 and 9 in the latter Article would be considered as absolute and not conditional contraband.[3]

[1] Ibid. 98–9; *The Times*, October 11, 12, and 17, 1911.

[2] Opp. I. L. ii. 506, n.; 7 A. J. (1913), 623; 40 J. I. P. (1913), 1025; Rusé in 16 R. D. I. 2nd ser. (1914), 101–36.

[3] 40 J. I. P. (1913), 1025; and with regard to coal, see ibid. 717, 1426.

CHAPTER XIV

CONTRABAND IN THE WAR OF 1914–15

Impossibility of conclusive list of contraband goods.

It is impossible to draw up a list of contraband articles that will hold good for all time and in all circumstances. Apart from the distinction between absolute and conditional contraband, articles and commodities of use in war are continually changing. Different wars are waged under different conditions, while the needs of all countries cannot be the same owing to the variations in their situation and means. Under certain circumstances it may injure a belligerent to carry to his enemy articles which, under other circumstances, would be perfectly harmless.[1] It has accordingly been the invariable practice from the inception of the law of contraband for maritime nations to exercise their discretion, subject to such restrictions as may attach either by treaty or under the customary law of nations, with regard to the objects to be treated as contraband, and to include in that category all articles and commodities which, from the changing phases of the war, or from novel modes of conducting war, may be capable of rendering material support to the naval or military power of the enemy.

Recognized in international practice.

In 1866 Spain declared that a belligerent has the right to declare new articles to be contraband of war when, from the circumstances of the war, they become, on the part of the enemy, elements for undertaking and carrying on hostilities.[2] The same principle was incorporated in the resolution adopted by the Institute of International Law in 1877.[3] Similarly, in the correspondence with

[1] Cf. Manning, 352–3; and Professor Holland's letter to *The Times* of August 24, 1915.

[2] Moore, Dig. vii. 673.

[3] Beckenkamp, 20; supra, p. 128.

Chile in 1885, the United States acknowledged that with the lapse of time the just rights of belligerents may require an addition to the articles heretofore regarded as contraband of war;[1] and Mr. Bryan, the late United States Secretary of State, supported this practice in his letter to Mr. Stone, the chairman of the Senate Foreign Relations Committee, defending the neutrality of the United States in the present war of 1914–15.[2]

List to be settled by application of general principles.

The extent to which a belligerent is entitled to interfere with neutral trade in a particular war can only be determined by applying to its special conditions the general principle that neutral traders are bound to refrain from carrying to the enemy of a belligerent, who has sufficient command of the sea to prevent such carriage, any object capable of assisting that enemy in his warlike operations.[3] The list of contraband articles must be settled by the application of general principles to the particular circumstances of each war, and in this application a fair allowance must always be made for revolutionary changes in the scope of the conditions of warfare which every great war is likely to bring about. In the present war experience showed that the contraband lists of the Declaration of London were not sufficiently elastic, and various changes have been made in the lists of contraband articles in accordance with the gradual appreciation of the different commodities required for military purposes under the new war conditions.[4]

Proclamation of August 4, 1914.

On August 4, 1914, the British Government issued a Proclamation[5] containing lists of absolute and conditional contraband which were identical with those in Articles 22 and 24 of the Declaration of London, except that aircraft were transferred from the conditional to

[1] Moore, Dig. vii. 664. [2] 9 A. J. (1915), 446.
[3] Cf. Pratt, xix, xxvi; Bonfils, 1007; Hansemann, 46–8; Moseley, 9; Bentwich in 9 A. J. (1915), 38.
[4] Cf. Bentwich, ibid. 41. [5] M. E. L. 108; infra, App. C, p. 285.

the absolute list. In the Declaration of London Order in Council, 1914, of August 20,[1] it was provided that the lists comprised in the Proclamation of August 4 should be substituted for those of the Declaration. Decrees to the same effect were also issued by France and Russia.[2] By a Proclamation of September 21,[3] unwrought copper, lead, glycerine, ferrochrome, iron ore, rubber, and hides and skins, raw or rough tanned (but not including dressed leather), were added to the list of conditional contraband.

Proclamation of September 21, 1914.

Proclamation of October 29, 1914.

On October 29 these lists were withdrawn and a Proclamation[4] was published in which a very extensive increase was made in the list of absolute contraband. Under this head were then comprised iron, nickel, copper, lead, aluminium, motor vehicles of all kinds and their component parts, motor tyres, rubber, mineral oils and motor spirit (except lubricating oils), sulphuric acid, range finders, and barbed wire and implements for fixing and cutting the same. At the same time the Declaration of London Order in Council No. 2, 1914,[5] was published, which annulled and replaced the earlier Order in Council of August 20, and expressly excluded from the adoption of the Declaration the lists of contraband and non-contraband contained in that document. Identical lists were also subsequently adopted by France and Russia in the place of those contained in the Declaration.[6]

Proclamation of December 23, 1914.

These lists were in turn withdrawn by the British Government on December 23, and fresh lists were again published.[7] Further important alterations were made

[1] M. E. L. 143; infra, App. B, p. 282.
[2] M. E. L. Sup. No. 2, 78, n. (a).
[3] M. E. L. 111; infra, App. C, p. 287.
[4] M. E. L. Sup. No. 2, 52; infra, App. C, p. 288.
[5] M. E. L. Sup. No. 2, 78; infra, App. B, p. 284.
[6] M. E. L. Sup. No. 2, 78, n. (a); Sup. No. 3, 302, n. (a), 330.
[7] M. E. L. Sup. No. 3, 302; infra, App. C, p. 290.

in the absolute list, which then contained twenty-nine items, and the changes made appear to be due to the desire to bring this list into agreement with actual practice in the use of chemical ingredients and metals for warlike purposes. Thus item 4, which formerly contained sulphuric acid only, enumerated various ingredients of explosives, and both sulphur and glycerine were transferred there from the conditional list. The list of metals and ores was also considerably increased (items 13–15), while item 22—submarine sound signalling apparatus—was new. The conditional list was still almost the same as that in the Declaration, but hides and leather, as we have seen, were inserted in it, while barbed wire was transferred to the absolute list. The French and Russian Governments adopted similar lists.[1]

Proclamation of March 11, 1915.

On March 11, 1915,[2] the following articles were added to the list of absolute contraband:—Raw wool, wool tops and noils, and woollen and worsted yarns; tin, chloride of tin, tin ore; castor oil, paraffin wax, copper iodide, lubricants; hides of cattle, buffaloes, and horses; skins of calves, pigs, sheep, goats, and deer; leather, undressed or dressed, suitable for saddlery, harness, military boots, or military clothing; ammonia and its salts, whether simple or compound; ammonia liquor; urea, aniline, and their compounds. Tanning substances of all kinds (including extracts for use in tanning) were declared as conditional contraband; and it was also declared that the terms 'foodstuffs' and 'feeding stuffs for animals' in the list of conditional contraband should be deemed to include oleaginous seeds, nuts, and kernels; animal and vegetable oils and fats (other than linseed oil) suitable for use in the manufacture of margarine; and cakes and meals made from oleaginous seeds, nuts,

[1] M. E. L. Sup. No. 3, 302, n. (a); L. G. June 25, 1915.
[2] M. E. L. Sup. No. 3, 305; infra, App. C, p. 293.

and kernels. A notification to the same effect appeared in the French *Journal Officiel* of March 12.[1]

Proclamation of May 27, 1915.

By Proclamation of May 27, 1915,[2] toluol and mixtures of toluol, lathes and other machines, or machine-tools capable of being employed in the manufacture of munitions of war, and maps and plans of any place within the territory of any belligerent or within the area of military operations on a scale of four miles to one inch or on any larger scale, and reproductions of any scale by photography or otherwise of such maps or plans, were added to the list of absolute contraband. It was also provided that the words 'and all other metallic acetates' should be omitted after the words 'calcium acetate' in the list of ingredients of explosives contained in item 4 of the Proclamation of December 23, 1914, and that linseed oil should be added to the list of conditional contraband, and that the words 'other than linseed oil' should accordingly be deleted in the Proclamation of March 11, 1915. On August 21, 1915, the British and French Governments added raw cotton to the absolute list.[3]

German lists.

At the commencement of the war the German and Austro-Hungarian Governments declared that they would treat as absolute or conditional contraband the objects and materials enumerated in Articles 22 and 24 of the Declaration of London. By Ordinances of October 18, November 23, and December 14, however, Germany added lead (in plates, blocks, or pipes), copper, lumber (whether finished or unfinished), wood, coal-tar, sulphur, sulphuric acid (crude or refined), aluminium, and nickel to the list of conditional contraband. On April 18, 1915,

[1] M. E. L. Sup. No. 3, 305, n. (b). Russia and Italy have also adopted lists similar to those of Great Britain under the Proclamations of December 23, 1914, and March 11, 1915 (M. E. L. Sup. No. 4, 104, n. (a)).

[2] M. E. L. Sup. No. 4, 104; infra, App. C, p. 294.

[3] M. E. L. Sup. No. 4, 109; infra, App. C, p. 295. See now the Proclamation of October 14, 1915, further revising the list of contraband articles (L. G. Oct. 15, 1915; infra, App. C, p. 296.

the German Government issued a new Contraband Order,[1] professedly as a retaliation for the provisions in the British Orders which depart from the Declaration. The lists of absolute and conditional contraband do not differ materially from the British lists of December 23, as amended on March 11, but coal and coke are made absolute instead of conditional contraband, while motor tyres, which, as we have seen, are absolute contraband in the British list, are conditional in the German. Wool is also conditional contraband in the German list. The German Order, unlike the British, contains a 'free list', in which raw cotton is included, and which, with the omission of metallic ores, rubber, oil seeds and nuts, is practically the same as that comprised in Article 28 of the Declaration of London.

Destination of conditional contraband.

Both the British Orders in Council[2] adopting the Declaration of London left it to operate unchanged in connexion with the destination of absolute contraband. With regard to conditional contraband, however, the Order in Council of August 20 extended Article 34 by providing[3] that the destination referred to in Article 33 might be inferred from any sufficient evidence, and should further be presumed to exist 'if the goods are consigned to or for an agent of the Enemy State or to or for a merchant or other person under the control of the authorities of the Enemy State'. The later Order in Council merely stipulated[4] for an additional presumption of the hostile destination required by Article 33, 'if the goods are consigned to or for an agent of the Enemy State'.

Doctrine of continuous voyage applied.

Clause 5 of the earlier Order in Council restored the operation of the doctrine of continuous voyage for conditional contraband by providing that goods of that

[1] L. G. May 11, 1915; Hub. and King, 17–23.
[2] Of August 20 (M. E. L. 143; infra, App. B, p. 282) and October 29 (M. E. L. Sup. No. 2, 78; infra, App. B, p. 284).
[3] Clause 3.
[4] Clause 1 (ii).

character, if shown to have the destination referred to in Article 33, should be liable to capture 'to whatever port the vessel is bound and at whatever port the cargo is to be discharged'. This was cancelled in the Order in Council of October 29, and instead it is provided[1] that conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order', or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy. It is open, however, to the owners of the goods to prove that their ultimate destination was in fact innocent.[2] Otherwise the doctrine of continuous voyage remains inapplicable to conditional contraband under Article 35, unless 'it is shown to the satisfaction of one of his Majesty's Principal Secretaries of State that the enemy Government is drawing supplies for its armed forces from or through a neutral country', in which case the application of Article 35 may be entirely excluded by notice with respect to that country.[3]

Identical rules adopted by France and Russia.

A decree containing provisions of identical effect with the Order in Council of October 29 was issued by the President of the French Republic,[4] and stipulations in similar terms were also contained in Sections 3, 4, and 5 of the Russian Imperial Decree of December 8/21, 1914.[5]

German protests

After the publication of the Order in Council of August 20, 1914, the German Government addressed a memorandum to neutral powers, setting forth the view that the modifications and additions announced by Great Britain nullified the chief points of the Declaration of London and violated

[1] Clause 1 (iii). Cf. Bentwich in 9 A. J. (1915), 36–7, 41–2; and Garner, ibid. 382–3.
[2] Clause 1 (iv).
[3] Clause 2.
[4] M. E. L. Sup. No. 2, 78, n. (a).
[5] M. E. L. Sup. No. 3, 330; L. G. May 11, 1915.

existing international law.[1] Germany herself, however, from the commencement of the war seized and sank neutral vessels with cargoes destined for ports on the English east coast on the ground that they carried conditional contraband. But the presumption that such cargoes were intended for the British forces would not arise under the Declaration unless the port to which they were destined was a fortified place or a base for the operations of the enemy. In September, 1914, the German cruiser *Karlsruhe* sank the Dutch vessel *Maria*, which had sailed from California with a cargo of grain consigned to Dublin and Belfast. This deed the German Prize Court was finally driven to justify by the claim that, although the cargo was consigned to civilians, it might be requisitioned by the British Government.[2] On January 27, 1915, the American sailing ship *William P. Frye* was sunk by the *Prinz Eitel Friedrich* in the South Atlantic while on a voyage from Seattle to Queenstown with a cargo of wheat, the ultimate destination of which was believed to be Liverpool.[3] Similarly two Norwegian vessels were sunk—the *Semantha* by the *Kronprinz Wilhelm* while bound from Portland, Oregon, to Great Britain with wheat,[4] and the *Unita* by submarine while proceeding from Fredriksstad to Hull with a cargo of timber.[5]

and conduct.

The German Contraband Order of April 18, 1915,[6] adopts[7] the British rule that an enemy destination of conditional contraband will be presumed if the goods are consigned 'to order' or to a consignee whose name does not appear in the ship's papers or to a person who resides in enemy territory or in territory occupied by

German rules as to destination of conditional contraband.

[1] *The Times*, October 26, 1914. [2] Id. April 26 and August 31, 1915.
[3] Id. April 6, 1915. As to the special treaty obligations between Germany and the United States, Cf. supra, pp. 101–2; and see 9 A. J. (1915), 497–502.
[4] *The Times*, February 22, 1915. [5] Id. April 3, 1915.
[6] Hub and King, 26. [7] Clause 33 (b).

the enemy. Prima facie such goods are only liable to confiscation if in a vessel which is on the way to enemy territory or the enemy forces; but the doctrine of continuous voyage is to apply (*a*) if the case is governed by the premises of Clause 33 (b), or (*b*) if the vessel is bound for a neutral country as to which it has been established that it supplies the enemy Government with articles of the kind in question.[1]

Attitude of neutrals towards British policy.

The contraband policy adopted by Great Britain and her allies gave rise to some dissatisfaction in the United States and other neutral countries, which was directed, however, rather against the mode in which the law of contraband was administered and enforced than against the substantive rules of which it consisted.[2] On

United States Note of December 28, 1914.

December 28, 1914, the United States Government addressed a Note[3] to Great Britain, in which complaint was made because articles listed as absolute contraband consigned to neutral countries had been seized and detained on the ground that the countries to which they were destined had not prohibited the exportation of such articles. Complaint was also made that the British Government had seized and detained foodstuffs and other articles of conditional contraband without being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination as that term is used in international law. Any discussion of the propriety of including certain articles in the lists of absolute and conditional contraband was expressly omitted from the American Note.

Mr. Bryan's views.

In his letter to Mr. Stone Mr. Bryan recognized that the United States, as a belligerent, have always contended

[1] Clause 35 (Hub. and King, 27).

[2] Sweden complained of the inclusion of iron ores in the list of contraband, and for a time the British Government permitted the trade in iron ores from that country (Bentwich in 9 A. J. (1915), 38).

[3] *The Times*, January 1, 1915.

for a liberal list, according to their conception of the necessities of the case, and that they have placed 'all articles of which ammunition was manufactured', including copper, upon their contraband list. He also pointed out that the doctrine of continuous voyage had been not only asserted by American tribunals, but extended by them; and that they had held that the shipment of articles of contraband to a neutral port 'to order', from which, as a matter of fact, cargoes have been shipped to the enemy, is corroborative evidence that the cargo was really destined to an enemy instead of to a neutral port of delivery.[1]

British interim reply of January 7, 1915.

In the interim British reply of January 7, 1915,[2] Sir Edward Grey admitted, with regard to the seizure of foodstuffs, that such articles should not be detained and put into a prize court without a presumption that they are intended for the armed forces of the enemy or the enemy government. He also stated that it was the intention of the British Government to adhere to that rule, though they could not give an unlimited and unconditional undertaking in view of the departure by those against whom they were fighting from hitherto accepted rules of civilization and humanity, and the uncertainty as to the extent to which such rules might be violated by them in the future.

German Government assumes control of foodstuffs.

On January 25, 1915, the German Federal Council published a decree, whereby the German Government assumed the control of all foodstuffs in the country, and under Article 45 of which all grain and flour imported into Germany after January 31 was declared deliverable only to certain organizations under direct government control or to municipal authorities; but by a later decree of February 6 the earlier decree was repealed with regard to imported grain and flour. In the meantime

[1] 9 A. J. (1915), 446–7. [2] *The Times*, January 11, 1915.

the American steamer *Wilhelmina* left New York for Hamburg on January 23 with a cargo of provisions consigned to an American citizen in Germany. The shippers contended that the food was intended for civilians only, not for combatants, and said that if the vessel was seized they would file a protest with the American State Department. The *Wilhelmina* arrived at Falmouth on February 9 and was arrested. On February 16 representations were made to Sir Edward Grey by the United States Ambassador, and three days later Sir Edward Grey sent a memorandum[1] in reply, in which he referred to the German decree for the control of all supplies of grain and flour, and pointed out that imports were excepted from the decree only after the seizure of the *Wilhelmina*.

Seizure of the *Wilhelmina*.

Sir Edward Grey also referred to the sinking of the Dutch vessel *Maria* by the *Karlsruhe* in the previous September, and pointed out that the German Government had treated every town or port on the English east coast as a fortified place and base of operations, had subjected them to bombardment, and had seized neutral vessels with cargoes destined to them on the ground that they carried conditional contraband, which must have been intended for the British forces. Germany could not have it both ways. If Scarborough and Whitby were fortified towns and naval bases, so *a fortiori* was Hamburg, to which the *Wilhelmina* was bound; and on that ground her cargo was under a presumption of being destined for the German forces, and therefore contraband. He repeated, however, what he had already said in his full reply[2] to the American Note of December 28, that Great Britain had not so far declared foodstuffs to be absolute contraband. The British Government, he said, had not 'interfered with any neutral vessels on account

Justification of British action.

[1] *The Times*, February 20, 1915. [2] Id. February 18, 1915.

of their carrying foodstuffs, except on the basis of such foodstuffs being liable to capture if destined for the enemy's forces or Governments. In so acting it has been guided by the general principle, of late universally upheld by civilized nations, and observed in practice, that the civil populations of the countries at war are not to be exposed to the treatment rightly reserved for combatants.' But in view of the way in which this distinction had been repeatedly ignored by the German Government, Great Britain expected that neutrals would not challenge any interference with German trade that might be taken by way of reprisal, whether by declaring foodstuffs absolute contraband or otherwise.

Settlement of matter.

In a statement issued by the British Foreign Office on February 4,[1] it was intimated that there was no question of taking any proceedings against the *Wilhelmina* herself, and that the owners of the vessel would be indemnified for any delay caused to her and the shippers of the cargo compensated for any loss caused to them by the action of the British authorities, and the case was ultimately settled by an agreement on these lines between the British Government and the owners of the cargo.[2] Great Britain agreed to pay the owners the prices which would have been obtained in Hamburg for the cargo, and also damage and demurrage for the detention of the vessel, and all reasonable expenses incurred in connexion with the matter.

German 'blockade' of the British Isles.

At the beginning of February, 1915, the German Government issued a decree, ostensibly as an answer to Great Britain's exclusion of foodstuffs from Germany, declaring the waters round the British Isles a 'war area' from February 18, and threatening after that date to destroy every enemy merchant ship found in that area without its always being possible to avert the consequent

[1] Id. February 5, 1915. [2] Id. April 15, 1915.

peril to persons and cargoes and neutral shipping.[1] In reply to this 'substitution of indiscriminate destruction for regulated capture', as Mr. Asquith most appropriately described the German policy,[2] an Order in Council was published on March 11,[3] whereby it was declared to be the intention of the British Government to divert all ships trafficking with Germany, and to take them into port, though without confiscating either ship or cargo, save where they would otherwise be liable to confiscation. In this Order in Council the words 'blockade' and 'contraband' and other technical terms of international law were purposely omitted because, as the Prime Minister said, 'in dealing with an opponent who has openly repudiated all the principles both of law and humanity', Great Britain and her Allies were not going to allow their efforts 'to be strangled in a network of juridical niceties'.[4] The actual effect, however, of the Order in Council was to establish a rigorous blockade of Germany, and in the subsequent correspondence with the United States[5] Sir Edward Grey said: 'The Government of Great Britain have now frankly declared, in concert with the Government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports, by themselves stopping supplies going to or from Germany. For this end, the British fleet has instituted a blockade, effectively controlling by cruiser "cordon" all passage to and from Germany by sea.' But vessels and their cargoes are still only liable to confiscation when they come within the provisions of the law of contraband, as the blockade of Germany is not to be enforced by means of the usual penalty of confiscation for every attempted breach.

Order in Council of March 11, 1915.

[1] Proclamation of February 4, 1915 (Hub. and King, 143-8).
[2] In the House of Commons on March 1, 1915 (70 Hansard, 599).
[3] M. E. L. Sup. No. 3, 513; infra, App. E, p. 298.
[4] 70 Hansard, 600.
[5] *The Times*, March 18, 1915.

CHAPTER XV

THE PREVENTION OF CARRIAGE OF CONTRABAND

1. Visit and Search and Convoy

Necessity for belligerent right of visit and search.

A NEUTRAL government being, as we have seen, under no obligation to prevent its subjects from trading in contraband of war, it is essential to the maintenance of the right to seize the prohibited goods that a belligerent cruiser shall have the right to stop and search any neutral merchantman she may meet on the high seas or within her own or her enemy's territorial waters.[1] Henry VIII instructed the admiral of the fleet which sailed in the expedition to Guienne in 1512 that 'If any shippe or shippes of the flete mete any other shippes or vessels on the see or in porte or portes, making rebellion, resistance, or defence ayenst them, then it is lawful for them to assaulte and take theym with strong hand, to bring them holy and entirely to the said admiral without despoyllyng, vifelyng or enbeselyng of the goods, or doing harme to the parties ther to abyde the ordinance of the lawe, as the said admirall shall awarde'.[2] In 1591, of four Dutch ships brought before the Privy Council, three, which yielded without resistance, were ordered to be restored to their owners, their cargoes being stayed pending examination in the Admiralty Court; but the fourth, which had forcibly resisted search, was not restored.[3] After France had concluded peace with Spain

Exercised in sixteenth century.

[1] Cf. Reddie, Researches in Mar. Int. Law, i. 77–8.
[2] Rym. VI. i. 32.
[3] Monson's Tracts, i. 271–2; Marsden in 67 Naut. Mag. (1898),

in 1598 by the treaty of Vervins. Henry IV objected to the English searching French vessels for munitions of war on the ground that it would be made a pretext for spoliation and disturbance of commerce.[1] But it was too late to oppose the exercise of this indispensable belligerent right, which was universally recognized during the seventeenth century.[2]

Can only be exercised by public ships.

As the right of a belligerent to control the intercourse between neutrals and his enemy is an incident of war, which can be waged only by or under the authority of a state, its exercise is limited to vessels provided with commissions by the sovereign power.[3] Formerly it was the practice to commission private vessels to carry out visit and search for the purposes of the particular war.[4] But since the abolition of privateering in 1856 by the Declaration of Paris,[5] search is only permissible for the public ships of a state, that is to say, its duly authorized men-of-war. During the Franco-Prussian war of 1870, Prussia decreed the creation of a volunteer navy to consist of vessels fitted out by their owners for attack on French ships of war. The crews of such vessels were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but

Prussian volunteer navy in 1870.

445, 448; and in 24 E. H. R. (1909), 692–4. Resistance by neutral vessels appears to have been considered a ground for condemnation as early as 1343 (see the letter of Edward III in Rob. Col. Mar. 13, 15).

[1] Monson's Tracts, i. 275. By the French ordinance of 1584 all vessels, French, allied, and neutral, were held bound to submit to visitation and search by regularly commissioned ships of war (Reddie, i. 87–8).

[2] Cf. Kleen, Neut. ii. 246–8.

[3] Phillimore, iii. 533 (§ 330); Hall, I. L. 723.

[4] Cf. Westlake, I. L. ii. 177; Hall, I. L. 518–19; Reddie, i. 74–6. Under Charles I's proclamation of December 31, 1625 (Rym. VIII. i. 184; supra, p. 51), private ships, equally with public ships of war, were authorized to capture neutral vessels carrying contraband of war (cf. Twiss, War, 237, n. 7).

[5] Cf. Hol. Letts, 64–5.

not forming part of, or attached to, the navy in any way; the vessels were to sail under the flag of the North German navy. In answer to the French protest, Granville declared that as there were substantial differences between the proposed volunteer navy and the privateers which it was the object of the Declaration of Paris to suppress, he was unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered.[1]

Russian practice.

Russia incorporates a part of her merchant marine in her regular navy by commissioning in time of peace the captain and at least one other officer of each of the vessels so incorporated.

British practice.

In recent years liners have been subsidized by the British Government in return for a lien on their services as auxiliary cruisers in time of war; but in peace time they are not under the command of an officer in the Royal Navy.[2]

Conversion of merchant ships into men-of-war, 7 H. C. 1907.

The right to convert merchant ships into men-of-war is now definitely recognized and regulated by the Hague Convention VII of 1907, but at the London Conference of 1908–9 it was found impossible to agree as to whether such conversion might take place upon the high seas.[3] Capture by an unqualified cruiser is at once a ground for claiming restoration; and in 1904 the British Government successfully protested against seizures made by the *Smolensk* and *Petersburg*, two vessels of the Russian volunteer fleet, which could not have assumed the status of ships of war until after they had passed through the Dardanelles.[4]

[1] Hall, I. L. 520–1.

[2] Ibid. 522; Hol. Letts. 70.

[3] Pearce Higgins, 308–21. Cf. Art. 9 of the Manuel des lois de la guerre maritime adopted by the Institute of International Law at Oxford in 1913 (26 Ann. (1913), 644; 15 R. D. I. (1913), 679). In the war of 1914–15 no question appears to have been raised as to the conversion of merchant vessels on the high seas (Bentwich in 9 A. J. (1915), 26–7).

[4] Hall, I. L. 522–4; Smith and Sib. 40 sq.; Hol Letts. 148.

Penalty for resistance to visit and search.

It is open to the neutral merchantman to escape visit and search by taking to flight, although if she does so it is open to the belligerent cruiser to employ force to stop her; but the belligerent has no right to use force until he has first summoned the neutral to stop. Forcible resistance to visit and search subjects the neutral vessel to capture and condemnation, whether she is actually carrying contraband or not.[1] We have seen that this was the practice of England in the sixteenth century; the same rule was followed in Article 12 of the French ordinance of 1681, which declared 'That every vessel shall be good prize in case of resistance and combat'.[2] The same penalty resulted from an attempted rescue by the neutral crew after capture.[3] In such cases English and American courts confiscated the cargo as well,[4] but continental writers maintained that the vessel alone was liable to condemnation.[5] British practice, moreover, has gone so far as to condemn neutral goods found upon an armed *enemy* merchantman, on the ground that the owner thereby adheres to the belligerent and loses the benefit of his neutrality, since he must have contemplated active resistance to capture.[6] The courts of the United States, on the other hand, have held that in such a case

[1] The *Maria* (1799), 1 C. Rob. 340; 1 E. P. C. 152.

[2] Wheat. Hist. 318–19, 392 3; Kleen. Cont. 220. Art. 12 of an Order in Council of 1664 declared 'That when any ship, met withal by the Royal Navy or other ship commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize' (Ind. 905–6; and cf. the passage from the Black Book of the Admiralty cited, ibid. 905, n. 2).

[3] Kent, 398-9; the *Catharina Elizabeth* (1804), 5 C. Rob. 232; 1 E. P. C. 458.

[4] The *Maria* (1799), 1 C. Rob. 340; 1 E. P. C. 152; the *Nereide* (1815), 9 Cranch, 388; Scott, 884; Kent, 395.

[5] Dup. D. M. Ang. 324–5.

[6] The *Fanny* (1814), 1 Dods. 443; 2 E. P. C. 202. Resistance by an *unarmed* enemy ship will not in general affect neutral cargo on board, for the reason that resistance is always justifiable between enemies (see the *Catharina Elizabeth* (1804), 5 C. Rob. 232; 1 E. P. C. 458). In such a case the evidence, from the arming, of the original intention to resist is wanting.

the mere fact of the vessel being armed does not incriminate the property of neutrals.[1]

Public neutral vessels not liable to visit and search.

Although during the Napoleonic wars Great Britain asserted as against the United States the right to search the latter's ships of war for British seamen who had deserted their vessels, it is now universally recognized that neutral men-of-war and other public neutral vessels which sail in the service of armed forces, as transports, are exempt from visit and search; and possibly the same rule would be held to apply to public neutral vessels, such as mail-boats belonging to the state, which do not sail in the service of armed forces.[2]

Doctrine of convoy.

Origin in seventeenth century.

As an extension of this principle, Sweden claimed in 1653, during the war between Great Britain and Holland, that the belligerents ought to waive their right of visitation over Swedish merchantmen if the latter sailed under the convoy of a Swedish warship whose commander asserted the absence of contraband on board the convoyed vessels.[3] In 1655, Holland, then neutral, took up the same position[4] and she claimed the right again during the American war of independence in 1780; when the Netherlands themselves went to war with Great Britain in 1781 they directed their men-of-war and privateers to respect the right of convoy. Between 1780 and 1800 treaties were concluded in which Russia, Austria, Prussia, Denmark, Sweden, France, and the United States of America recognized this right, but

Maintained by parties to the Armed Neutralities.

Treaty stipulations.

[1] The *Nereide* (1815), 9 Cranch, 388; Scott, 884; Kent, 350–2.

[2] Manning, 455; Kent, 395–7; Wheat. Dana, 544–6; Opp. I. L. ii. 535; Gessner, 297; Perels, § 53 (p. 292).

[3] Tud. 905, n. 3; Hall, I. L. 723 5; Opp. I. L. ii. 535 6; Westlake, I. L. ii. 300; Bonfils, 1033.

[4] 'They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and their ships' (Thurloe, State Papers, iv. 203). Pufendorf, in his letter to Gröning (supra, p. 68), assumes the right of a belligerent to search convoyed neutral vessels for contraband of war.

Great Britain always refused to admit it.[1] The neutral powers, however, now claimed a right for the exemption of convoyed vessels from visit as authorized by custom, increased the strength of their convoys, and instructed the officers to resist the searching of the ships under their charge. This brought matters to a head. In January, 1798, a fleet of Swedish merchantmen sailing, under convoy of a frigate, with cargoes of naval stores to the Mediterranean ports in the possession of France, was stopped in the Channel by a small squadron under Commodore Lawford. The frigate made a show of resistance, but the British obtained possession of the greater part of the fleet during the night, and ultimately the frigate yielded to superior force without fighting an action. The merchantmen with their cargoes of tar, pitch, hemp, deals, and iron were proceeded against in the British Court of Admiralty for resistance to the right of visitation and search.[2] The case was suspended by diplomatic negotiations until June 11, 1799, when it was brought to adjudication, and Lord Stowell pronounced his famous judgement in the case of the *Maria*.[3]

Capture of Swedish convoy in 1798.

The *Maria*.

In the course of his judgement in that case he states the following principles of the law of nations which he takes to be incontrovertible :

'First, that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are ; and it is for the purpose of ascertaining these points that the

[1] Opp. I. L. ii. 536. [2] Wheat. Hist. 391.
[3] (1799), 1 C. Rob. 340 ; 1 E. P. C. 152.

necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The right is equally clear in practice, for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little personal harshness and vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process where force is employed, but a lawful force which cannot lawfully be resisted. For it is a wild conceit that wherever force is used it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature is in the state of war and conflict between two countries, where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other no such conflicting rights can possibly co-exist.

'Secondly, that the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. . . . Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed), by special covenant, that

the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality. . . . But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it.' It was true, he continued, that 'modern fancy, under the various denominations of philosophy and philanthropy', had thrown certain 'loose doctrines' upon the world, viz. that the certificate of the convoying officer should be accepted as conclusive evidence of the convoyed cargoes. But the system of which such doctrines are elements must, to be consistent, advocate 'the entire abolition of capture in war, that is, in other words, to change the nature of hostility as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner . . .

'Thirdly, that the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.' After an examination of authorities Lord Stowell concludes on this head: 'But I stand with confidence upon all fair principles of reason—upon the distinct authority of Vattel; upon the institutes of other great maritime countries, as well as those of our own country—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruiser is followed by the legal consequence of confiscation.'

In 1800 another Danish frigate, the *Freya*, with a convoy of six vessels, was stopped by an English squadron at the mouth of the Channel, and, after some resistance, was conducted with its convoy to the Downs, where the vessels were searched, but nothing of a contraband nature was discovered. A warm discussion ensued between the Danish and British Governments, which was finally determined by an arrangement concluded at Copenhagen on August 29, whereby Denmark agreed to suspend the granting of convoy till the question should be settled by a definite convention, while, in the meantime, the *Freya* and her convoys were released.[1] But, without awaiting the result of the negotiations between England and Denmark, the Emperor of Russia had addressed a circular to the kings of Prussia, Sweden, and Denmark, inviting them to conclude a convention for the revival of the principles of the Armed Neutrality of 1780. In December, 1800, a series of treaties was signed which formed a quadruple alliance between the four northern powers and constituted the Second Armed Neutrality. One of the principles adopted by the confederacy was that the declaration of the officers, commanding the public ships which shall accompany the convoy of one or more merchant vessels, that the ships of his convoy have no contraband articles on board, shall be deemed sufficient to prevent any search on board the convoying vessels or those under their convoy.[2]

Dispute with Denmark in 1800.

Armed Neutrality of 1800.

In 1801 Great Britain concluded a treaty with Russia, to which Denmark and Sweden subsequently acceded, whereby it was agreed that the searching convoyed vessels should be denied vateers, and only be allowed to public ships of war on ground for suspicion existed, and then subject to the presence, if

Anglo-Russian treaty of 1801.

[1] Wheat. Hist. 395–7; Halleck, ii. 293, n.; Woolsey, 371; Cob. Cases, ii. 481.

[2] Wheat. Hist. 397–9; Ath. Jones, 333.

required, of an officer of the neutral convoy. It was expressly provided, however, that the convoying ship was not, on any pretext whatever, to oppose by force the detention of any suspected vessel by the belligerent. Great Britain only concluded these conventions in return for concessions, and they all came to an end before the peace of 1815, when she reverted wholly to the earlier practice.[1] But many treaties stipulating the right of convoy were entered into between various powers during the nineteenth century, and it was recognized in the regulations contained in the Prussian Royal Decree of June 20, 1864, in Article 218 of the Italian Mercantile Marine Code, and in Article 30 of the United States Naval War Code.[2]

Practice of nineteenth century.

British policy in 1854.

In 1854, during the war with Russia, Great Britain expressly waived the right to search vessels under neutral convoy, owing to the difficulty that would otherwise have existed in maintaining naval co-operation with France, by whom the right of convoy was recognized.[3]

Discussion at Institute of International Law.

In 1887 a majority of the members of the Institute of International Law voted for a clause in the *Règlement des prises maritimes* which reaffirmed the principle of the Armed Neutrality and prohibited the search of neutral vessels convoyed by ships of war of their own state. But this provision was opposed by the English representatives.[4] The right of search, in despite of convoy, was still asserted in the Manual of Naval Prize Law, 1888,[5] and the British Memorandum for the Naval Conference of 1908–9 declared that 'a neutral vessel is not entitled to resist the exercise of the right of search by a belligerent warship on the ground that she is under the convoy of a warship of her own nationality.'[6] In

[1] Wheat. Hist. 403–5; Ath. Jones, 334–5; Cob. Cases, ii. 481.
[2] Cf. Ath. Jones, 335–7; Hub. and King, Introd. xi.
[3] P. P. Misc. No. 4 (1909), 25.
[4] § 16 (9 Ann. (1888), 221).
[5] See §§ 7, 148, 149.
[6] P. P. Misc. No. 4 (1909), 4.

1906 Sir John Macdonell put forward a suggestion at the Institute of International Law in favour of the exemption of convoyed neutral vessels from search.[1]

Inconvenience to neutrals of exercise of right of visit and search.

'There can be no doubt', said the British Government as neutral during the American civil war, 'that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object. This, however, is an evil to which war on the ocean is liable to expose neutral commerce.'[2] This evil is in no way lessened by the size of modern vessels and the complexity of their cargoes; at the present day the exercise of the right of visit and search is more likely than ever to be a cause of friction between belligerents and neutrals. But, unless the search is thorough, it is impossible for a belligerent to satisfy himself that cargoes and manifests correspond, that goods nominally consigned to neutral countries are not really destined for the enemy, and that contraband commodities are not being smuggled in by concealment or disguise. Under modern conditions searches at sea are practically futile. Whenever real ground for suspicion exists it is absolutely necessary to bring the suspected ship into port for examination, as was done with the *General* in the Boer war.[3] Otherwise, as stated in the British Interim Reply of January 7, 1915, to the American Note of December 28, 1914, the right of search itself 'would have to be completely abandoned'.[4] In the Great War of 1914–15 stricter measures of search were necessitated by the direction given to the United States port authorities to refrain from making public or

Difficulties under modern conditions.

[1] 21 Ann. (1906), 175, 178-9.

[2] Moore, Dig. vii. 699.

[3] Ibid. 741.

[4] *The Times*, January 11, 1915. Steam has made the voyage of a vessel independent of the weather, and to keep her at sea till the water is calm enough for a search would often mean longer detention than taking her into port. Cf. Garner in 9 A. J. (1915), 378–81.

giving out to any other than duly authorized officers of the government information regarding outward cargoes and the destination thereof until thirty days after the clearance of the vessels. But this secrecy order was subsequently rescinded.[1]

Immunity of postal correspondence.

We have already referred to the inviolability of neutral and enemy postal correspondence under Article 1 of Hague Convention XI of 1907.[2] The advent of submarine cables and wireless telegraphy has rendered an examination of the contents of neutral mail-bags much less useful to belligerents than it once was.[3] It will be noticed, however, that this particular provision does not confer inviolability on the mail-boats by which the postal correspondence is carried. But in recent wars it has been usual to grant special immunities to mail-boats, though sometimes only conditionally on receiving a guarantee against the carriage of hostile dispatches. In his proclamation of April, 1898, the President of the United States declared that the right of search should not interrupt the voyage of mail steamers except in cases of grave suspicion. During the Boer war the British Government issued instructions that such vessels should not be stopped and searched on suspicion only, and that if search was necessary it should be carried out as quickly as possible. Article 2 of Hague Convention XI of 1907 now provides that a neutral mailship may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.[4]

Position of mail-boats.

H. C. 1907, Art. 2.

Suggestions to limit area of visit and search.

From time to time the suggestion has been put forward that search should be confined to the actual theatre of the war, or to waters not too distant therefrom.[5] During

[1] Garner in 9 A. J. (1915), 380 and n.
[2] Supra, pp. 175–6.
[3] Cf. Kennedy in 24 L. Q. R. (1908), 74.
[4] Pearce Higgins, 396.
[5] Bare, Prob. 71–2, 157; Westlake, I. L. ii. 292–3, 324; Col. Paps.

the South African war Great Britain agreed to prevent the stopping and searching of neutral vessels at Aden or at any other point equally or more distant from the seat of war.[1] In the Russo-Japanese war the British Government complained of the extreme inconvenience to neutral commerce of the Russian search for contraband, not only in proximity to the scene of war, but all over the world, and especially at places at which neutral commerce could be most effectually intercepted.[2] But no claim appears to have been made for any definite restriction, and no such limitation was adopted in the Declaration of London.

The Declaration of London.

Article 63 of the Declaration provides that forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The Report explains that this punishment will not be entailed by a mere passive attempt at flight.[3] The treatment of the cargo is not so severe as under the former British practice. It is liable to confiscation only in so far as it consists of enemy goods or goods belonging to the master or owner of the vessel. For dealing with the cargo the vessel is to be treated as an enemy one, so that Article 3 of the Declaration of Paris will apply, and the onus will be on the neutrals interested, including those of the same nationality as that of the vessel captured, to establish the neutral character of their property.

It was intimated in the instructions to the British delegates[4] that owing to the force of changing circum-

520, 555; Kennedy in 24 L. Q. R. (1908), 74-5; 21 Ann. 177, 188; Bluntschli, §§ 814, 819.

[1] Moore, Dig. vii. 741.

[2] Cob. Cases, ii. 429.

[3] P. P. Misc. No. 4 (1909), 63; infra, App. A, p. 278.

[4] P. P. Misc. No. 4 (1905), 25. As Westlake points out (Col. Paps. 640, 664), the principal objection to convoy was the possible divergence of views between a belligerent and a convoying government as to the contraband character of a convoyed cargo. This would be removed by an agreement on the list of contraband articles.

Adopts the principle of convoy.

stances Great Britain was prepared to recognize the immunity of convoyed neutral vessels from visit and search. Article 61 of the Declaration accordingly provides that 'neutral vessels under national convoy are exempt from search'. The commander of the convoy must give in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes which could be obtained by search. Should the belligerent then have reason to suspect that the confidence of the commander of the convoy has been abused, he must communicate his suspicions to him. The latter officer then alone investigates the matter, and must record the result of his investigation in a report, a copy of which must be handed to the commander of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more of the vessels under his care, the protection of the convoy must be withdrawn from such vessels.[1] Thus the final decision rests with the officer in charge of the convoy, and any difference of opinion between him and the belligerent commander can only be settled through diplomatic channels; there can be no immediate resort to a prize court to determine the matter.

Article 12 of the Italian Decree of October 13, 1911, provided that ships escorted by a neutral war vessel should be exempt from visit. Naval commanders were to limit themselves in such cases to demanding, when they thought fit, from the commander of the convoying ship a written declaration of the nature and cargo of the convoys. If there was reason to believe that the confidence of the commander of the convoying vessel had been abused, those suspicions were to be communicated to him in order that he might proceed alone to make the

[1] Article 62.

necessary verifications and make a written report on the subject.[1]

Difficulties of applying the principle in practice.

There are obvious difficulties, however, in the way of transporting a number of merchantmen of different speeds together, and in the war of 1914–15 no practical use appears to have been made by any neutral power of the system of convoy adopted in the Declaration. As an alternative, and in order to avoid the difficulties of false manifests, it has been attempted to negotiate an arrangement with the United States of America whereby immunity of search would be secured for vessels which had obtained certificates as to the non-contraband character of their cargoes from British consular officials or the United States customs authorities. But so far no workable plan seems to have resulted, and the *Denver*, an American vessel laden with cotton for Bremen, was seized in spite of the fact that her master held a certificate from the British consul that she carried no contraband.[2]

Consular certificates.

2. Capture and Destruction of Neutral Prizes

Duty of captor to send vessel in for adjudication.

If any circumstances of suspicion are disclosed by the search of the vessel, the belligerent commander may take possession of her, secure her papers, and detain her master and crew. It is then the captor's duty to send her by means of a prize crew to the most accessible port of his own state for adjudication before a prize court, and he becomes responsible for her fair and safe custody.[3]

British practice recognized no right to destroy neutral prizes.

Great Britain has always maintained, in the case of a neutral ship, that if, owing to inability to spare a prize crew or for any other reason, the prize could not be brought in, she should be dismissed; and that no military necessity would justify her destruction. In the case of enemy ships the British practice allows a right to destroy

[1] Bare, T. I. War, 125.
[2] *The Times*, January 8, 1915; Garner in 9 A. J. (1915), 381, and nn.
[3] Kent, 401–2.

in exceptional circumstances, since the mere fact of firm possession transfers proprietary rights to the captor's state. But in doubtful cases, and where the vessel concerned is clearly neutral, British captains were directed to release their prize if they could not send her in for adjudication. It was recognized that neutral property does not pass to the captor until a properly constituted court has decided that its seizure is good in international law. When an English captain, even in circumstances of the gravest importance to his own state, destroyed a neutral prize before adjudication, he was ordered to make full restitution to the neutral owner in damages, even though the vessel, if brought before the court in the regular way, would have been condemned. Short of making the captor criminally punishable, the British decisions went as far as it was possible to go in prohibiting and penalizing the practice of destroying neutral prizes.[1]

But other states allowed such destruction.

The practice of other states, however, did not follow the British rule. During the Franco-Prussian war the French regulations recognized the right to destroy neutral prizes under exceptional circumstances, and similar instructions were issued by the United States in 1898.[2] The Russian prize regulations were even more stringent. Article 40 of the instructions of 1901, without drawing any distinction between enemy and neutral property, empowered officers to destroy their prizes at sea under such exceptional circumstances as the bad condition or

[1] The *Actæon* (1815), 2 Dods. 48; 2 E. P. C. 209; the *Felicity* (1819), 2 Dods. 381; 2 E. P. C. 233; the *Leucade* (1855), Spinks, 217; 2 E. P. C. 473; Hol. N. P. L. § 303; Lawr. War, 255–9; Hall, I. L. 739. The *Actæon* and *Felicity* were both cases of the destruction of a vessel belonging to a subject of the enemy trading under a licence granted by the British Government, and therefore, provided he traded in strict conformity with the conditions of his licence and produced it when required, treated on the same footing as the subject of a neutral state.

[2] Opp. I. L. ii. 548.

small value of the prize, risk of recapture, distance from a Russian port, or danger to the imperial cruiser or to the success of her operations. It was expressly provided that an officer 'incurred no responsibility whatever' for so acting if the captured vessel was really liable to confiscation and the special circumstances imperatively demanded her destruction. In pursuance of these instructions, Russian cruisers, during the Russo-Japanese war, sank eight neutral vessels, of which five were found by her own courts not to be liable to condemnation. The Japanese regulations also allowed the destruction of neutral prizes in certain cases, but no case of a Japanese captor sinking a neutral prize appears to have been reported.[1]

Discussion at Institute of International Law

The *Règlement international des prises maritimes* of the Institute of International Law, which, in 1882, was drafted so as to make no distinction between enemy and neutral vessels, was altered in 1887 so that the right to destroy was limited to enemy vessels.[2] The right of belligerents to sink neutral merchant ships was considered by the Fourth Committee at the Second Hague Conference. Although no agreement was reached, it appears from the discussion of the subject that the divergence in practice was due to the difference in the geographical and strategic situation of states, and that the subject itself was closely connected with the question of the free access of prizes to neutral ports, which was at the time under consideration by the Fourth Committee.[3] As a result of the deliberations of this committee it was provided by Hague Convention XIII of 1907 that a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions; and she must leave as soon as the circum-

and at Second Hague Conference.

Admission of prizes to neutral ports.

13 H. C. 1907.

[1] Tak. R. J. 334.

[2] 9 Ann. 200–1.

[3] Cf. Pearce Higgins, 89–92; Hall, I. L. 454.

stances justifying her entry are at an end. Failing this the neutral power must release her, as it must also do if the prize should enter in the absence of these special circumstances.[1]

But the Convention proceeds to enact in Article 23 that 'a neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.' No obligation is imposed upon neutral states to admit prizes into their ports, but they are left free to do so if they wish, while it is sought to establish that their neutrality will not be compromised thereby.[2] M. Renault explains that the object of this Article is 'to render rarer or to prevent the destruction of prizes'. As, however, the delegates were unable to agree upon the actual prohibition of the latter practice, Great Britain and Japan, who throughout opposed Article 23, reserved it on signing the Convention; for, except as part of a compromise, its adoption would be an abandonment of the British position that neutral prizes must either be taken into the captor's ports or released.[3] Article 48 of the Declaration of London now provides that a captured neutral vessel 'must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture'.

The Declaration of London.

Outside Great Britain the *consensus gentium* is in favour of the right to destroy neutral prize in cases of necessity.[4] An examination of the views expressed in the memoranda of the powers invited to the London Conference[5] shows that all except Spain, Holland, Great Britain and Japan were prepared to allow destruction

[1] Articles 21 and 22.
[2] Cf. Article 26.
[3] Cf. Pearce Higgins, 478 9; Hall, I. L. 614–15.
[4] Westlake, Col. Paps. 641, 661; Hol. Letts. 161–70.
[5] P. Misc. No. 5 (1909), pp. 102.

under various conditions. The Declaration proceeds on the plan of adopting as a fundamental principle the right of the neutral to a trial before a prize court, but admitting that in exceptional emergencies, and subject to certain conditions, the rule of taking the vessel in for adjudication may be set aside.[1] In the case of a vessel liable to condemnation,[2] destruction is allowed if observance of the general rule 'would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time'.[1] But all persons on board must previously be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of adjudicating on the validity of the capture must be taken on board the warship.[3]

Allows destruction of neutral prizes

The captor is bound at the outset to satisfy the prize court that the alleged necessity really existed. If he fails, he is precluded from raising the question whether the capture itself was valid, and must compensate the parties interested in the sunken vessel and the goods she was carrying.[4] Should the decision on the question of necessity be in the captor's favour, the court must then proceed to try the further question whether the seizure was justified by international law. If this point is decided in the negative, the captor will have to pay compensation to the parties interested in place of the restitution to which they would have been entitled

Captor must ... for str...

[1] Article 48.

... e, when she has ... resis... or w... mor... than ... her cargo is contraban... f. ... 21.

Compromettre la sécur... as ... po... out in the House of Commons on Ma... 28, ... La... 11... the English translation of these word... is ... n... ...ni... accurate ... the whole Conference ... the 11... ...are... P. M... No. ... 1909), 56) that 'it was ...derstood t... ... *compromettre la ...urité* was synonymous ...th *mettre ...* ... *navire* might be translated into English ... : *involve da...* ...fra, Ap... 2.

[2] Article 49. [3] Article 50. [4] Artic...

the vessel not been destroyed.[1] If innocent neutral goods have been destroyed with the ship, their owner is entitled to compensation in any event.[2]

Article 9 of the Italian Decree of October 13, 1911, provided that, if the observance of the direction to take the captured ship or goods into port might compromise the safety of the capturing vessel or the success of the warlike operations in which she was engaged, the commander should have the faculty of destroying the prize, after having provided for the safety of the persons, papers, and documents on board and of everything else which might be material to arriving at a decision as to the legality of the prize.[3]

Practice of breaking bulk.

In order to remove the great inconvenience to neutral commerce resulting from the detention of vessels carrying contraband, a large number of treaties established the practice between certain nations of allowing a neutral vessel to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever contraband goods she had on board, provided they were not greater in quantity than the captor could conveniently accommodate.[4] This rule was also followed by the Confederate States during the American civil war; and some writers, such as Bluntschli,[5] Calvo,[6] and Hautefeuille,[7] have endeavoured to elevate the practice into a neutral right, existing even in the absence of treaty. Ortolan, however, is more cautious,[8] while Kleen condemns the

[1] Article 52. [2] Article 53. [3] Barc. T. I. War, 125.

[4] Kleen, Cont. 202–6; Neut. i. 448–51; Field, Dft. 562–3; Taylor, I. L. 745–6; Hall, I. L. 664–5; Ath. Jones, 387–9. Art. 7 of the treaty concluded at London on December 1, 1674, between England and Holland, provided that if a part only of the lading should consist of contraband and the master of the ship should be willing to deliver them to the captor, the ship should not be taken into port, but be allowed to proceed on her course with the rest of her cargo (Chal. i. 181; Dum. VII. i. 282).

[5] D. I. § 810 (p. 472). [6] D. I. § 2779.

[7] Neut. Tit. xiii, chap. i, sec. 1, § 1 (vol. iii. 216).

[8] Règles int. ii. 195.

practice as prejudicial to neutral interests.[1] Although Great Britain has been a party to some of the treaties which make this concession to the neutral carrier, she has, as a general rule, objected to the practice of 'breaking bulk' and has insisted upon the vessel being brought before a prize court in every case.[2]

Opposed by Great Britain.

The very fact that special conventions have been required to establish this practice between the respective parties proves that the neutral carrier is not endowed by the general law of nations with any such right to proceed as against the captor. Moreover, the practice is attended with considerable difficulty. 'As the captor must still take the cargo into port and submit it to adjudication,' observes Dana,[3] 'and as the neutral carrier cannot bind the owner of the supposed contraband not to claim it in court,[4] the captor is entitled, for his protection, to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law.' In the face of these difficulties he is inclined to think that even the treaties could only apply to cases in which 'there is a capacity in the neutral vessel to insure the captor against a claim to the goods'.

Dana's views.

In the scheme, however, for a *Règlement des prises maritimes* adopted by the Institute of International Law at Turin in 1882, and reaffirmed at the session at Heidel-

Adopted by Institute of International Law.

[1] Cont. 205 and n.
[2] Hol. N. P. L. § 81; Opp. I. L. ii. 513.
[3] Wheat. Dana, n. 230 (p. 665).
[4] Where the alleged contraband is the property of the owner of the ship, a voluntary surrender on his part would not affect the rights of others, and if such surrender was accepted by the captor, no further difficulty would arise.

berg in 1887. it is provided that 'le navire arrêté pour cause de contrebande de guerre peut continuer sa route, si sa cargaison ne se compose pas exclusivement, ou en majeure partie, de contrebande de guerre, et que le patron soit prêt à livrer celle-ci au navire du belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du commandant du croiseur'.[1] At the Naval Conference of 1908–9 Austria-Hungary proposed that a neutral vessel carrying contraband should be given the right to proceed on her way without further molestation if the master was ready to hand the contraband over to the captor on the spot, while she required a subsequent decision of a prize court either to validate the transaction or to decree compensation if the captor acted wrongfully.[2] In this form, however, the proposal did not meet with general support, and the matter was finally settled by Article 44 of the Declaration of London, which provides that a vessel not herself liable to condemnation on account of the proportion of contraband on board may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship. But, as is clear from the Report, this can only be done by mutual consent. There is no obligation, under this article, on either the master to deliver or the captor to accept the goods, and in ordinary cases either party can insist on the vessel being taken in for adjudication in the usual way.

And by the Declaration of London.

Captor may destroy goods handed over.

The captor is given unconditional permission to destroy the contraband goods thus handed over to him; but he must enter their delivery on the logbook of the vessel stopped, and the master must give him duly certified copies of all relevant papers. The case will then have to be referred to a prize court, and it is assumed that compensation would have to be paid under Article 64 if,

[1] § 33 (9 Ann. 1888), 225). [2] P. P. Misc. No. 4 (1909), 97.

after the goods had been destroyed, it was held that there was no justification for their seizure.[1]

When captor may compel the goods to be handed over.

By virtue of Article 54, where the vessel herself is not liable to condemnation and the circumstances are such that to take her into port for adjudication would involve danger to the safety of the capturing ship or to the success of the operations in which she is engaged at the time, the captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board the vessel. He must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers, so that the legality of his action may subsequently be tested before a prize court. When the goods have been handed over or destroyed and the formalities duly carried out, the master must be allowed to continue his voyage. Prior to any decision respecting the validity of the prize, the captor must establish, as in the case of the destruction of the vessel, that he only acted in the face of an exceptional necessity of the nature above mentioned. If he fails to do this, he must compensate the parties interested, and no examination is to be made of the question whether the capture was valid or not. He must also, of course, pay compensation when the capture is subsequently held to be invalid, although the circumstances justified the destruction. The action authorized by this Article is a distinct innovation in the law of contraband, but it is only a logical consequence of the admission of the right to destroy neutral vessels under Article 49.[2]

[1] Bentwich says that the articles handed over under Article 44 are properly regarded as the absolute property of the captor, and that 'where the handing over of the contraband is voluntarily done by the master of the neutral vessel, it will not be necessary for the captor to justify his action' (Decl. 83, 102). But he is clearly wrong: see P. P. Misc. No. 4 (1909), 52, 97; infra, App. A, p. 271; and cf. Dec. I. U. 1294–5.

[2] Cf. P. P. Misc. No. 4 (1909), 99.

Article 7 of the Italian Decree of October 13, 1911, provided that if the contraband articles constituted a small part of the cargo, the naval commanders could, if they thought fit, receive such articles in deposit, making an entry to that effect in the ship's log or, failing that, issuing a declaration to that effect, and then permit the vessel freely to continue her voyage.[1]

German practice in the war of 1914–15.

In the present war of 1914–15 Germany has taken repeated advantage of the provisions of the Declaration of London which permit the destruction of neutral prizes. In September, 1914, the *Karlsruhe* sank the Dutch vessel *Maria*, bound from California with a cargo of wheat consigned to Dublin and Belfast. Subsequently the *Kronprinz Wilhelm* sank the Norwegian ship *Semantha*, also bound for the United Kingdom with a cargo of grain.[2] In January, 1915, the captain of the *Prinz Eitel Friedrich* ordered the destruction of a cargo of 5,200 tons of wheat carried by the American sailing vessel *William P. Frye*; but as this was not done fast enough to please him, he sank the ship, in spite of the treaty of 1828.[3]

3. Prize Courts

Procedure in early times.

In very early times the admiral of a fleet of belligerent cruisers determined summarily by an inspection of the ship's papers, and an examination of the persons on board the captured ship, whether the vessel with her cargo should be confiscated as prize, or be allowed to pursue her voyage. There is little or no evidence that the admiralty court was, before the sixteenth century, of any considerable use as a prize tribunal. Previously to 1585 the only remedy for one whose ship or goods had been wrongly seized was to petition the king or council for redress; whereupon the admiral, or his judge,

[1] Barc. T. I. War, 124. [2] *The Times*, February 22, 1915.
[3] Id. March 12 and August 6, 1915; supra, pp. 101–2.

or special commissioners, were directed to issue process and determine the matter. By Order in Council in 1585 it was decreed that thenceforth all prizes should be brought in for adjudication.[1] Eventually it became the recognized customary rule that in time of war the admiralty of maritime belligerents should be obliged to set up tribunals for the purpose of deciding upon the validity of the captures made by their cruisers.[2] These tribunals are called Prize Courts.

Establishment of prize courts.

'It is the duty of the judge', said Lord Stowell in the *Maria*,[3] referring to the character of the jurisdiction of his court, 'to administer that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country; but the law itself has no locality. The person who sits here is to determine this question exactly as he would determine the same question if sitting at Stockholm; asserting no pretension on the part of Great Britain that he would not allow to Sweden.' Not many years later, however, Lord Stowell had to admit that the King in Council possessed legislative powers over the prize court and might issue orders and instructions which it was bound to obey and enforce. This situation he could only reconcile with his former position by saying that the court would assume that the Orders of the King in Council were in accord with established international law.[4]

Nature of the law they administer.

[1] Twiss, Cont. Voy. 6; Marsden in 67 Naut. Mag. (1898), 388; and in 24 E. H. R. (1909), 675, 681.

[2] Opp. I. L. ii. 239.

[3] (1799), 1 C. Rob. 340; 1 E. P. C. 152; and cf. the *Flad Oyen* (1799), 1 C. Rob. 135; 1 E. P. C. 78; and Reddie, i. 21–2; and the Report of the British Commissioners of January 18, 1753 (Martens, C. C. ii. 50, 67–8; Baty, P. L. 119, 131).

[4] The *Fox and others* (1811), Edw. 311; 2 E. P. C. 61.

Strictly national in its ultimate source.

In principle a prize court is not an international but a national court and the law it administers is municipal. The sources of that law may be the customs which prevail among civilized nations, but the judge refers to these, not because such nations have commanded him so to do, but because he has been authorized so to do by the state of which he is the judge. If his state should pass a statute contrary to the general customs of civilized nations, he would be bound to follow it.[1] All modern authorities emphasize this fact, and it was for this reason that it was sought at the Second Hague Conference in 1907 to come to an agreement for the establishment of an International Prize Court to which neutrals might appeal from the national prize courts of the belligerents.[2] But no power whose interests are largely bound up with commerce overseas can consent to the erection of such a court until the main principles and fundamental rules by which its decisions will be guided have been settled beyond dispute.[3]

Proposed International Prize Court.

Evidence in prize cases.

Prior to the American civil war it was considered to be an established rule of prize procedure that in the decision of a case the evidence, whether to acquit or

[1] Maine, I. L. 96; Westlake, I. L. ii. 317–18; Opp. I. L. ii. 240; Moore, Dig. vii. 648–51; Gray, Nature and Sources of Law, 122–3; Westlake in 22 L. Q. R. 24; Col. Paps. 516–17; the *Zamora* (1915), 31 T. L. R. 513. Under Elizabeth, and long afterwards, the judge of the English Admiralty Court decided in accordance with the directions received from the Privy Council, to which he frequently referred (Monson's Tracts, i. 274). In order to be binding on neutral states, the decision of the prize court of the captor must be in accordance with the recognized principles of international law (cf. P. P. Russia, No. 1 (1905), 9–10; and Borchard in 9 A. J. (1915), 139, 141).

[2] Westlake, Col. Paps. 550–1; Hol. Letts. 171, 183–4.

[3] Cf. Lawr. Prin. 50; Westlake, Col. Paps. 551–2. The scheme adopted by the Conference of 1907 laid down that the international court should apply in the first place any rule 'provided for by a convention in force between the capturing belligerent and the Power which, or a subject of which, is a party to the suit, and, in default of such, the rules of international law. If no generally recognized rule exists, the court decides according to the general principles of justice and equity' (12 H. C. 1907, Art. 7; cf. Hol. Letts. 172, 174, 177–9).

condemn the ship, must come, in the first instance, from the ship's papers and the primary depositions of the master and crew; the captors were not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any extrinsic evidence in opposition. It was only if the papers and depositions obtained from the ship were unsatisfactory that any further evidence could be adduced. In that case it was not the captor who adduced it, but the claimant, who was allowed by indulgence to excuse himself, and on whom the burden of proof then rested.[1] During the American civil war, however, it was found impossible to adhere strictly to this rule in cases connected with the application of the doctrine of continuous voyage where it was necessary to prove the actual intention of the exporter.[2] Russia contended in 1904 that the owners of the captured cargo must prove that no part of it might eventually come to the hands of the enemy's forces.[3] 'The principle that the burden of proof should always be imposed upon the captor', said Sir Edward Grey,[4] 'has usually been admitted as a theory. In practice, however, it has almost always been otherwise, and any student of the prize court decisions of the past or even of modern wars will find that goods seldom escape condemnation unless their owner was in a position to prove that their destination was innocent.' By the Prize Court Rules, 1914, the former British practice as to what evidence may be tendered has been entirely changed.[5]

Former Anglo-American practice.

Russian practice in 1904.

Present practice.

[1] The *Haabet* (1805), 6 C. Rob. 54; 1 E.P.C. 524; the *Aline and Fanny* (1856), Spinks, 322; 10 Moore, P.C. 491; 2 E.P.C. 537; Twiss, Cont. Voy. 8, 10, 18; Story, 17–19, 53; Baty, P. L. 46–8, 50–1, 72; Report of British Commissioners of January 18, 1753 (Martens, C. C. ii. 48–9; Baty, P. L. 117–18).

[2] Twiss, Cont. Voy. 18–22.

[3] Moore, Dig. vii. 691.

[4] In his reply to the United States Note of December 28, 1914 (*The Times*, February 18, 1915; cf. Bentwich, Decl. 71; and in 9 A. J. (1915), 383).

[5] Tiverton, 91; Jurist in 40 L. M. and R. (1914), 71–2.

Compensation for wrongful seizure.

In order to protect innocent traders as much as possible, it has always been the practice of British prize courts to award compensation to the neutral merchant by condemning the captor in damages and costs when the latter failed to make out any case against a prize brought in for carrying contraband and there were no good grounds for the seizure.[1] But no such definite obligation to compensate injured neutrals was generally recognized on the Continent,[2] with the result that the only means of obtaining redress for unjustifiable captures was by a resort to diplomatic pressure. Similar pressure was also necessary to secure compensation when, as happened several times during the South African and Russo-Japanese wars, the prize was released by order of the executive government without being brought before a prize court.

Where vessel not brought in for adjudication.

Among the questions arising out of the law of contraband submitted by the British Government to the powers invited to the Naval Conference were the rules with regard to compensation where vessels have been seized but have been found in fact to be carrying only innocent cargo. Observations on the subject were made in the Memoranda of all the powers, except the United States, from which it appeared that when a capture was in every respect unjustifiable, compensation ought to be paid to the injured parties. Article 64 of the Declaration accordingly provides that if the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgement being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

Decreed by Declaration of London.

[1] The *Nancy* (1800), 3 C. Rob. 122; the *Margaret* (1810), 1 Act. 333; 2 E. P. C. 113; Opp. I. L. ii. 507; Report of British Commissioners of January 18, 1753 (Martens, C. C. ii. 49; Baty, P. L. 118).

[2] Kleen, Neut. ii. 715–20; Desp. D. I. 1156–60.

To give full effect to this provision, Sec. 21 of the Naval Prize Bill introduced into the House of Commons in 1910[1] provided that where a ship had been taken as a prize, a prize court might award compensation in respect of the capture notwithstanding that the ship had been released, whether before or after the institution of any proceedings in the court in relation to the ship. The British Prize Court Rules now contain provisions, and create the necessary procedure, for securing compensation to neutral ships detained and not brought into court.[2]

British Prize Court Rules.

On July 16, 1915, the American Ambassador in London notified Sir Edward Grey that the United States could not recognize the validity of proceedings taken in British prize courts under restraints imposed by the municipal law of Great Britain in derogation of the rights of American citizens. In his reply of July 31 Sir Edward Grey pointed out that under American as well as English prize law prize courts are in the first instance subject to the instructions of their own sovereign. He referred at length to the judgement of Lord Stowell in the *Fox*,[3] recently adopted by Sir Samuel Evans, P., in the *Zamora*,[4] and he concluded by making an offer that questions of alleged variance between the decisions of British prize courts and international law should be subjected to review by an international tribunal.[5]

[1] Bent. Decl. 174; supra, p. 16, n. 5.
[2] Order v, rule 2.
[3] Supra, p. 215, n. 4.
[4] Supra, p. 216, n. 1.
[5] *The Times*, August 4, 1915. Cf. Baldwin in 9 A. J. (1915), 297–304; the institution of an Anglo-American prize tribunal to deal with cases arising out of the war of 1914–15 was also suggested by Sir John Macdonell in the *Nation*.

CHAPTER XVI

THE PENALTY FOR CARRIAGE OF CONTRABAND

1. In the Case of the Owner of the Contraband Goods

Punishment by the neutral sovereign.

As we have already seen,[1] some of the earlier conventions that recognized the distinction between contraband and non-contraband goods, such as the treaty of neutrality of 1522 between Francis I and the Archduchess Margaret[2] and Henry IV's letters of neutrality of 1596 to Charles of Lorraine,[3] expressly stipulated that the neutral sovereign should himself punish those of his subjects who supplied the enemy with objects of the forbidden class. The treaty of 1370 between England and Flanders provided that in addition to such punishment the noxious goods should be forfeited to the injured belligerent.[4] Similar provisions were also contained in some of the treaties concluded during the seventeenth century. Thus Article 13 of the convention of July 31, 1667, between Great Britain and Holland,[5] declared that those who should wittingly and willingly act, commit,

[1] Supra, p. 48.

[2] Dum. IV. i. 380.

[3] Dum. V. i. 527.

[4] Et, se autres armures ou aucune autre chose se trouvra estre fait au contraire des poinz avant touches, par aucuns du paiis de Flandres ou autres subges dudit conte, la punissement de leurs corps et bons sera et appartiendra audit monsieur de Flandres. Et la fourfaiture de bons, marchandises, vitailles, armures et artilleries des ennemis, ou ainsi amene as ennemis, dont monsieur de Flandres aura la cognoissance, appartiendra au roi dessusdit: lesquelles fourfaitures seront baillez et delivrees a une persone, illucques depute de par le roi, aians poissance, de par lui, de les recevoir, selon la fourme du eaucion ponr y garder son droit et profit (Rym. III. ii. 172; Nys, D. I. iii. 630; Westlake, I. L. ii. 198).

[5] Chal. i. 133; Dum. VII. i. 44.

attempt or advise contrary to its provisions should be judged enemies of both parties and should be punished as traitors there where the offence should be committed, and further that the contraband articles should be 'confiscate and forfeited to that party where the persons offending shall be'. By the treaty concluded three years later (July 11, 1670) between Charles II and Christian V of Denmark,[1] the two kings mutually undertook not to suffer any provisions of war, as soldiers, arms, engines, guns, ships or other necessaries of war to be furnished by their subjects to the enemies of the other; but if the subjects of either prince should presume to act contrary thereunto, then that king whose subjects should have so done should be obliged to proceed against them with the highest severity as against seditious persons and breakers of the league.

Confiscation of the prohibited goods the general rule.

In the absence of any such special convention, however, it had become the general practice by the sixteenth century for a belligerent to confiscate as prize of war any prohibited merchandise that he might intercept on its way to his enemy.[2] England and Holland almost invariably followed this rule; but the French ordinance of 1543, by which Francis I forbade his allies and confederates to transport munitions of war to his enemies, only allowed such munitions to be retained subject to the payment of a fair price to be fixed by the admiral or his lieutenant. A similar provision was made in the ordinance of 1584.[3] Wilhelmus Mathiae, the author of the *Libellus de bello iusto et licito*, published at Antwerp in 1514, was of opinion that if there was simply a desire to trade with the enemy on the part of neutral merchants, a belligerent was only justified in intercepting the

[1] Chal. i. 79; Dum. VII. i. 133 (Art. 3).
[2] Kleen, Cont. 198-9; Owen, War, 158-9.
[3] Nys, G. M. 37; Desp. D. I. 1261; supra, p. 34, n. 4.

conveyance of the goods. Confiscation should not follow unless there was an actual intention to assist the enemy.[1]

Recognized by Gentilis

No such distinction was made by Gentilis, who recognizes a liability to confiscation in every case and speaks of the punishment suffered by the owner of the contraband goods in their loss.[2]

and Grotius.

Grotius also assumes the liability of the contraband goods to forfeiture, except in the case of articles *ancipitis usus* when the neutral carrier has no knowledge of the need of the captor to intercept them and of the justice of his cause.[3]

Zouch.

A similar assumption of the general liability of articles of contraband to confiscation is made by Zouch, writing in the middle of the seventeenth century;[4] and this penalty was expressly adopted as the rule of the French practice by the Marine Ordinance of Louis XIV of 1681

Molloy.

and the *Règlement* of July 23, 1704.[5] Molloy, who, in 1682, published an English translation of the *De Iure Maritimo et Navali* of Loccenius, says that when the prohibited goods are seized, 'whether they give the captor a right of property, or a right by retention to compel that neuter nation to give caution for the future, by hostages or pledges, not to supply the enemy, may be a question. . . . Most certain, if a neuter nation hath had notice of the war, and caution given them (as is usual) not to supply the enemy with contraband goods, as they call them, if such be the case, the prize is become absolutely the captors.'[6]

Treaty stipulations.

That it was the general practice to confiscate the contraband goods is recognized by the provisions of the treaties of the latter half of the seventeenth century, the special object of many of which

[1] Nys, Orig. 120.
[2] Hisp. Adv. bk. i. chap. 20; De jure belli, bk. i. chap. 22.
[3] De jure belli et pacis, bk. iii, chap. i, § 5 (cf. supra, p. 112).
[4] Iuris et iudicii fecialis, pt. ii, chap. viii. §§ 7–9.
[5] Kleen, Cont. 199; Wheat. Hist. 134.
[6] Bk. I, chap. i, § 25 (pp. 20–1).

was to secure immunity for the vessel and the innocent part of the cargo. Thus the treaty of May 10, 1655, between Louis XIV and the Hanse towns,[1] stipulated in Article 2, 's'il se trouvait desdites contrebandes sur des vaisseaux desdits habitans chargez à cueuillette en un ou plusieurs lieux, elles seront confisquées *purement et simplement*'. In Article 26 of the treaty of commerce concluded at Utrecht in 1713 between Great Britain and France,[2] it was provided that the contraband goods 'shall not be sold, exchanged, or otherwise alienated in any manner whatever, until a regular proceeding, according to the laws and customs, against the prohibited goods, and until they shall have been condemned by the respective judges of the admiralty'.

Heineccius, who wrote his treatise *De Navibus ob rectaram vetitarum Mercium Commissis* in 1721, assumes without question the liability of the contraband cargo to confiscation.[3] Bynkershoek, whose *Quaestiones Iuris Publici* was published in 1737, says definitely that contraband goods are subject to condemnation: 'Quicquid non licet (*sc.* amicis ad hostes nostros advehere) si amicus deprehendat, optimo iure publicatur, et eo solo absolvitur poena mittentis amici.'[4] Vattel, writing in 1758, adds his authority to the same opinion in a closely reasoned paragraph. 'In order to prevent the transport of contraband goods to the enemy, must one limit oneself', he says, 'to detaining or seizing them on payment of their value to the owner, or is it allowable to confiscate them? But simply to stop such goods would generally prove an ineffectual relief, especially at sea, where it is impossible to cut off all means of approach to the enemy's ports. The expedient is therefore adopted of confiscating every article of contraband that can be captured, in order that

Heineccius.

Bynkershoek.

Vattel.

[1] Dum. VI. ii. 103.
[2] Dum. VIII. i. 349; Chal. i. 406.
[3] Chap. ii. §§ 3-6.
[4] Bk. i, chap. 10 (p. 76).

the fear of loss may operate as a check upon the avidity for gain, and deter the neutral merchant from supplying the enemy with these things. . . . Such appears to be the generally established custom of Europe at the present time after several variations, as may be seen . . . from the ordinances of the kings of France of 1543 and 1584, which only allowed the French to seize the contraband goods and keep them on paying their value.' He then proceeds to demonstrate that the practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights.[1]

De Martens.

Some thirty years later George Frederic de Martens states this rule to be the established law of Europe.[2]

Confiscation applies equally to absolute and conditional contraband.

In strictness, therefore, all contraband goods are subject to confiscation by the law of nations, whether they come under that category through their own nature or through a special destination to warlike use. Those nations which in early times sought exemption from forfeiture never claimed it upon grounds peculiar to any particular description of contraband, but for general reasons, embracing all cases of contraband whatsoever.[3]

Pre-emption of foodstuffs by Elizabeth.

In consequence, however, of the protests made by neutrals against the seizure of corn cargoes alleged to be destined for Spain, Elizabeth, towards the close of her reign, adopted the practice of buying such corn and using it for the supply of her ships. The vessel by which it was carried and the unprohibited goods were restored; but in a case in 15 *a* no freight was paid, since, as the queen said, she might have condemned the goods.[4]

Exercise of general right of pre-emption in the seventeenth century.

In the seventeenth century it was not unusual for belligerents, if powerful at sea, to assert and exercise a right of pre-emption over a variety of articles, if intercepted on the

[1] Droit des Gens, bk. III, chap. vii, § 113.
[2] Précis, bk. VIII, chap. vii, § 319 (vol. ii. 267).
[3] Wheat. Atlay, 662.
[4] Marsden in 21 E. H. R. (1909), 694.

ocean, without necessarily considering them to be contraband. The destination of such things was not always, though usually, for the enemy, and they were not always, but more often, things of peaceful as well as warlike use.[1]

British practice of pre-emption.

Towards the end of the eighteenth century Great Britain adopted a mitigation of the strict belligerent right of forfeiture in favour of naval stores and provisions, when the native products of the exporting country, by subjecting goods of that character destined to the enemy to pre-emption only, which meant purchase of the merchandise at its market price, together with a reasonable profit, usually calculated at 10 per cent. on the amount, and payment of freight to the neutral carrier.[2] 'In the practice of this court', said Lord Stowell,[3] 'there is a relaxation which allows the carrying of these articles (*sc.* pitch and tar), being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition that it may be brought in, not for confiscation, but for pre-emption—no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility.' To entitle a party to the benefit of this rule a perfect bona fides on his part was required. Thus, where the destination

[1] Cf. Kleen, Neut. ii. 704-15.

[2] The *Sarah Christina* (1799), 1 C. Rob. 237; 1 E. P. C. 125; the *Maria* (1799), 1 C. Rob. 340; 1 E. P. C. 152; the *Haabet* (1800), 2 C. Rob. 174; 1 E. P. C. 212; Hall, I. L. 663; Kleen, Neut. ii. 704-15; Kennedy in 24 L. Q. R. (1908), 69; Moseley, Cont. 11-19, 91-6.

[3] In the *Sarah Christina*, supra (1 C. Rob. at p. 241; 1 E. P. C. at p. 126).

was dissembled, confiscation was held to be the clear and necessary consequence.[1]

In some cases there was a tendency to assert a more extensive right of pre-emption, such as had been practised in the seventeenth century, with respect to cargoes to which it would have been difficult to attach any taint of contraband. The right of pre-emption, it was said, is confined to a certain class of articles which it would be to the disadvantage of a belligerent to allow to be transported to the enemy, but which a mitigation of the former law does not permit to be confiscated as contraband. But the claim was limited to neutral goods bound for an enemy's port. 'I have never understood', said Lord Stowell,[2] 'that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound for enemy's ports, or suspected on just grounds to have a concealed destination of that kind.' Subsequently it became the general British practice to exercise pre-emption, instead of confiscation, in respect of conditional contraband and also in respect of such absolute contraband as is in an unmanufactured condition and the produce of the country exporting it; but no express claim was made to pre-empt goods not liable to seizure as contraband of war.[3]

Treaty stipulations.

In the treaty of commerce of 1794 between Great Britain and the United States[4] the right of pre-emption was agreed upon in order to escape 'the difficulty of agreeing on the precise cases in which alone provisions and other articles, not generally contraband, may be regarded as such'. On that basis compensation was

[1] The *Edward* (1801), 4 C. Rob. 68; 1 E. P. C. 350.

[2] In the *Haat t*, supra, p. 225, n. 2. Cf. Moore, Dig. vii. 676–7; Tud. 994; and Eemedy in 24 L. Q. R. (1908), 69.

[3] Phillimore, iii. §§ 268–70; Hol. N. P. L. 24 (§ 84). Lushington, in his edition of the Prize Manual (1866), stated that the penalty for carrying contraband goods is their confiscation (§ 187), and contained no instructions on the subject of pre-emption.

[4] Supra, p. 122.

granted to American owners of vessels and cargoes seized under the Orders in Council of 1793 and 1795 by the mixed commission appointed under Article 7 of the treaty.[1] Pre-emption was also stipulated for in respect of certain commodities in the treaty of July 25, 1803, between Great Britain and Sweden.[2]

Certain treaties between the United States and Prussia at the end of the eighteenth and the beginning of the nineteenth centuries, as we have previously seen,[3] imposed temporary detention or pre-emption as the only penalty for the carriage of contraband. Article 13 of the treaties of 1785 and 1799, which the treaty of 1828 declared to be still in force, provided that 'in the case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination.'[4]

[1] Kent, 356 7; Taylor, I. L. 736, 747.
[2] Kleen, Cont. 96, 123, n. 2, 201, n. [3] Supra, chap. ix, pp. 101 2.
[4] Taylor, I. L. 745; Manning, 377 8; Scott, 265; Kleen, Cont. 199, n. 1, Desp. D. I. 1273; Bonfils, 1015 16; Hall, and King, 150 1.

Klüber's doctrine

These treaties with Prussia, which formed a unique exception to the contemporary European practice, were regarded by Klüber as embodying the established law of the international code of Europe. He asserted, but without assigning any reason, that confiscation of contraband cannot be justified on principle. He arrived at this conclusion without any process of argument, and merely stated in a note that the principle was recognized by the American treaty of 1785; while he admitted that most of the treaties then in existence permitted such confiscation.[1] Those continental jurists who, like Heffter,[2] Calvo,[3] and Kleen,[4] refused to recognize any class of conditional contraband, naturally looked upon the British practice of pre-emption as an intensification rather than as a modification of the rights of a belligerent, since they start with assuming that it is only used with respect to non-contraband goods. But the fact that pre-emption has sometimes been applied in circumstances when the articles seized could not rightly be regarded as contraband does not prevent its application to merchandise that is really contraband, which in such a case must be considered to be lightly dealt with.

Opposition of continental jurists to British practice.

Heffter.

Heffter seems to admit that pre-emption may be permitted on payment not merely of ordinary mercantile profit, but of such profit as would probably have been realized if the voyage had been completed.

Ortolan.

Ortolan understands the theory of the British practice, but is debarred by his views as to the proper definition of contraband from recognizing any occasions on which it could be exercised.[5]

Bluntschli.

Bluntschli would make the full

[1] Droit des gens mod. §§ 288 9. 'In the absence of treaties', he says, 'the natural right of nations, which establishes complete liberty of commerce, is in force, and all merchandise ought to be presumed free'. Lebeau (Code des prises, i. Introd. xix.) and Joulfroy (Droit maritime, 3) also contended that the whole law of contraband rested upon convention; and cf. Bontils, 1012.

[2] D. I. 394 5 (§ 151).

[3] D. I. §§ 2750 5.

[4] Cont. 200–2.

[5] Regles int. ii. 202 9.

penalty of confiscation dependent upon the motive of the neutral trader. 'Contrebande de guerre', he says, 'ne peut être confisquée que lorsque les neutres prêtent secours et assistance à l'adversaire, c'est-à-dire lorsqu'ils agissent en ennemis: la saisie ne pourra avoir lieu lorsque les neutres font simplement du négoce.' To use his own example, if coal is found on its way to a port where a belligerent fleet is at anchor, it may be detained on compensation being made to the owner; but it cannot be confiscated unless the intention of delivering it to the enemy's fleet can be proved. He is silent as to any different rule being applied to munitions of war, and does not state where the authority for this doctrine is to be found.[1] The rules adopted by the Institute of International Law in 1896, as we have already seen,[2] while recognizing five categories of absolute contraband, for which the penalty of confiscation was prescribed, and condemning the doctrine of conditional contraband, reserved to a belligerent the right to seize, on payment of an equitable indemnity, 'those articles which, being on their way to a port of his adversary, would serve equally for warlike and peaceful purposes'. The Institute also laid down the principle that carriage of contraband goods commenced before the outbreak of war and without necessary knowledge of its imminence was not punishable.[3] It is only equitable that if a vessel sailed before the outbreak of war and was seized before she could acquire knowledge of it, confiscation of the noxious articles should not take place.[4]

Rule adopted by Institute of International Law.

Goods shipped before or in ignorance of outbreak of war.

[1] Droit int. cod. §§ 806 and 815; and cf. Kleen, Cont. 39, n.

[2] Supra, p. 130; 15 Ann. (1896), 230 f.

[3] § 10 (15 Ann. (1896), 233).

[4] In *Jurgen* v. *Logan* (1667, 1 Stair, 477; Tod. 989) it was held that goods should not be treated as contraband, even though destined to a hostile port, if they were innocently shipped on board a vessel which sailed in bona fide ignorance of the war. Cf. Opp. I. L. ii. 512; Kleen, Cont. 202, n.; Neut. i. 436-7; Desp. D. I. 1273, 1295-6; Bonfils, 1012, and n. (2).

The Declaration of London.

With reference to the penalty, the British Memorandum for the Naval Conference of 1908–9 made no distinction between absolute and conditional contraband; it simply said that 'the contraband is liable to condemnation as prize'. The Memoranda of the other powers contained provisions to the same effect, except that Austria-Hungary was of opinion that confiscation went further than was necessary to protect belligerent interests. In the observations on the *Base de discussion* it was stated that, whatever the kind of contraband, confiscation is unanimously recognized as the penalty now applicable.[1] The Declaration of London accordingly enacts, in Article 39, that 'contraband goods are liable to condemnation'.

Makes no provision for pre-emption.

It makes no provision for pre-emption in the circumstances formerly allowed by Great Britain; but, as Dr. Lawrence points out,[2] there is nothing to prevent a state from giving such compensation if it pleases. Great Britain is freely exercising this milder right in the present war of 1914–15, and has paid for certain cargoes which she might have confiscated according to the strict letter of the law.[3]

Except in case of ignorance of outbreak of hostilities.

Article 43 of the Declaration provides that if a vessel is encountered at sea while unaware of the outbreak of hostilities, or if after knowing thereof the master has had no opportunity of discharging the contraband, the latter can only be condemned on payment of compensation. Under the Declaration a vessel is deemed to be aware of the existence of a state of war if she left a neutral port subsequently to the notification to the power to which such port belongs of the outbreak of hostilities, provided such notification was made in sufficient time, or if she left an enemy port after the outbreak of hostilities. Hague Convention III of 1907[4] makes it compulsory for

[1] P. P. Misc. No. 5 (1909), 70–3. [2] Prin. 723.
[3] *The Times*, October 30 and December 30, 1914.
[4] Pearce Higgins, 198–9.

a belligerent to issue a declaration of war and without delay to give notice of the state of war to neutral powers. Until this is done knowledge of hostilities is not imputable to such powers or their subjects, unless it is established beyond all doubt that they are in fact aware of the state of war. Great Britain has acted strictly in accordance with the terms of Article 43 in the present war.[1] The Declaration applies the same principle where the vessel is unaware of a special declaration of contraband which applies to her cargo, or where the master, after hearing of it, has had no opportunity of discharging the noxious goods. Germany does not appear to have followed this rule,[2] although she announced her adherence to the provisions of the Declaration of London.

Loss usually falls on belligerent consignee of goods.

At the present day contracts are so made that the risk of loss through the confiscation of the contraband goods is borne, as a general rule, by the belligerent state which orders them. Thus, in the Russo-Japanese war Russia had to pay for all deliveries of coal captured by the Japanese.[3]

2. In the Case of the Owners of the Vessel and the Remainder of the Cargo

Confiscation under ancient practice.

By the ancient law of Europe the penalty for engaging in contraband trade generally involved the forfeiture, not only of the contraband goods themselves, but also of the ship and any other articles, however innocent their nature, found on board at the same time.[4] In 1588 Elizabeth, as we have seen,[5] threatened to instruct the commanders of her ships lying upon the Spanish coast to 'impeach' all Spain-bound vessels laden with grain

[1] *The Times*, January 5, 1915; Bentwich in 9 A. J. (1915), 42.
[2] *The Times*, November 28, 1914. [3] Hansemann, 46, n. 1.
[4] Manning, 381–2; Kent, 362; Taylor, I. L. 744; Nys, Orig. 227; Kleen, Cont. 206–11; Neut. i. 443–8.
[5] Supra, p. 36.

or any other kind of victual, if the French king should not comply with her request to prevent the export of corn from France to Spanish ports. In 1591 the Privy Council directed the restoration of unresisting vessels and the innocent part of their cargo; but Dr. Caesar, the judge of the Admiralty, complained of the interference by the Council and intimates plainly that, if the cases had been left to his decision, both ships and cargoes would, in accordance with 'the civill and maritime law, the truest and most indifferent judge between all nations', have been condemned: and the Council, in directing the restitution of the ships, state that it was made only by the queen's grace and not of right. In these cases and in another in 1599 the restored vessels suffered the loss of freight and expenses.[1]

Rheden. 'Nec in tertio casu,' wrote Rheden,[2] 'si merces prohibitas inferat magister, confiscari poterunt merces reliquae non illicitae nec contrabandae. . . . Hoc tamen certum est, cum illicitis mercibus navim etiam in commissum cadere, nam illicita vectura navem vehentem quoque comprehendit.' Gentilis says that the question of the infection of contraband was debated in his days, but was not determined, and he himself does not give a definite opinion on the subject.[3] Grotius does not particularly discuss the case of a ship carrying contraband, but he appears to have clearly distinguished between what is lawful and what is not and to have regarded knowledge of the illegality of the transport as the criterion of liability.[4]

Gentilis.

Grotius.

Zouch. Zouch, writing in the middle of the seventeenth century, although he does not actually state the usage of his own country at the time, was evidently of opinion that

[1] Monson's Tracts, i. 274–5; Cheyney in 20 E. H. R. (1905), 663–4; Marsden in 67 Naut. Mag. (1898), 445, 452.

[2] Disp. Inr. de Facto illicito, 16.

[3] Disp. Adv. bk. i. chap. 20.

[4] Cf. Kleen, Cont. 213.

a vessel carrying prohibited goods was liable to condemnation.[1] He says that the distinction was made by some in his time between the case where the innocent and the illicit goods which formed part of the same cargo belonged to the same owner and that where they belonged to different owners, and that in the former case they said that all should be confiscated, in the latter only the property of the owners of the illicit goods.[2] Sir Robert Wiseman declared in 1672 that the ship that carried contraband should be condemned, but that the innocent part of the cargo should be free.[3] 'If a privateer take a ship laden wholly with counterband goods,' wrote Molloy ten years later,[4] 'both ship and goods may be subjected and made prize. But if part be prohibited goods, and the other part is not prohibited, but such as according to the necessity of the war shall be so deemed, the same may draw a consequential condemnation of ships, as well as lading. If part of the lading is prohibited, and the other part is merely luxurious and for pleasure, only the goods prohibited become prize, and the ships and the remainder become free, and not subject to infection.'

Wiseman.

Molloy.

Grotius mentions a case in 1625 of certain Hamburghers who went to Spain in a ship laden for the most part with munitions of war: this part of the cargo, he says, was claimed by the English, but the rest of the lading was paid for.[5] Confiscation of the ship was expressly provided for in Article 20 of the treaty of 1625 between England and Holland,[6] and in Charles I's proclamation of March 4, 1627.[7] In 1648 the Dutch proclaimed that they would

Practice of seventeenth century.

[1] Iuris et iud. fec. pt. ii, sec. viii, § 6. [2] Ibid. § 13.
[3] Twiss, War, 291. [4] De Iure Maritimo, bk. i, chap. iii, § 12 (p. 48).
[5] De iure belli et pacis, bk. iii, chap. i, § 5, n.
[6] Dum. V. ii. 480.
[7] 'And therefore, if any person whatsoever, after three months from the publication of these presents, shall . . . be taken sailing towards the places aforesaid, having on board any of the things afore-

forfeit not only the contraband goods, but also the ship that carried them.[1] During the seventeenth century, however, a relaxation of the former practice in favour of the vessel and the non-contraband part of the cargo becomes apparent in treaties, as, for example, in the convention of 1650 between Spain and Holland.[2]

Treaty stipulations.

In the treaty concluded by Louis XIV with the Hanse towns in 1655[3] the terms are very special, and point distinctly to the principle on which the exception in favour of the ship was introduced, when her owner might be supposed to be a stranger to the transaction. Article 2 provided: 'sans que les autres marchandises ni le vaisseau le puissent être et celui qui les aura chargées sera tenu à tous les dépens, dommages et interests soufferts pour raison de ce par les interessez aux vaisseaux . . . et après le jugement rendu, le vaisseau pourra partir librement avec le reste de sa charge'. Similarly Article 34 of the treaty of April 27, 1662, between France and Holland,[4] stipulated that the ship should not 'be in any manner seized or confiscate' on account of the carriage of contraband goods. The provisions of this Article were incorporated in the conventions of 1667 and 1668 between England and Holland,[5] and a similar provision was made in the treaty of 1674 with Holland[6] and in that of 1667 with Spain.[7] The Marine Ordinance of Louis XIV of 1681 and the Règlement of July 23, 1704, while, as we have seen,[8] subjecting the contraband articles to confiscation, released the ship and the innocent part of the cargo.

Article 26 of the treaty of commerce concluded at

said, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods so taken for lawful prize, and cause them to be ordered as duly forfeited' (Twiss, War, 239; Rym. VIII. i. 184).

[1] Wheat. Hist. 136; Ath. Jones, 378.

[2] Dum. VI. i. 570.

[3] Dum. VI. ii. 103.

[4] Dum. VI. ii. 415.

[5] Chal. i. 156, 185.

[6] Chal. i. 181 (Art. 7).

[7] Chal. ii. 18 (Art. 23).

[8] Supra, p. 222; Wheat. Hist. 134.

Utrecht in 1713 between Great Britain and France,[1] after mentioning that the contraband goods were to be condemned, expressly excepted 'the vessel itself and the other merchandise found on board, which by the present treaty are to be considered free, and without their being detained under the pretext that they are laden with prohibited goods, and still less confiscated as lawful prize'. The same clause was inserted in the treaty of February 6, 1778, between France and the United States;[2] but in the French ordinance[3] of July 26 of the same year it was expressly stated that after the contraband articles had been taken out and confiscated, the ship and the remainder of the cargo should be free, 'unless the said articles of contraband compose three-quarters of the value of the cargo: in which case the ship and cargo shall be confiscated altogether'. Freedom of the vessel was again provided for in the treaty of 1789 between Denmark and Genoa.[4]

Heineccius, writing in 1721, states that by the then established usage of nations the ship was involved in the confiscation of the contraband cargo, unless the contraband was put on board without the knowledge or consent of her owner. He quotes an ordinance of the States General of 1648, and of the King of Denmark of 1659, to the purpose of confiscating the ship, and he deduces his exception in the case of ignorance from the Roman law. He adds that this customary law had frequently been changed between nations by compact exempting the vessel from condemnation, and he quotes to this effect the treaties of 1648 and 1650 between Holland and Spain, and of 1655 between France and the Hanse towns. He concludes: 'Sed quemadmodum eius modi

Heineccius.

[1] Dum. VIII. i. 349; Chal. i. 406.
[2] Martens, Rec. ii. 593 (Art. 13).
[3] Martens, Rec. iii. 19 (Art. 1). [4] Martens, Rec iv. 443 (Art. 6).

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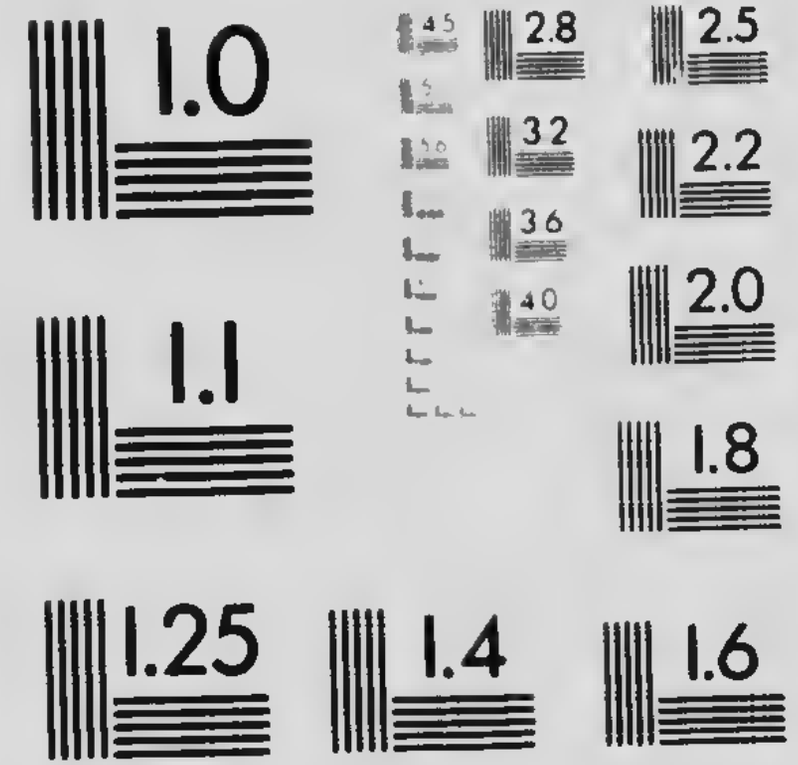

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pacta ad exceptionem pertinent : ita facile patet, regulam istis non tolli, adeoque certi iuris esse, ob merces illicitas naves etiam in commissum cadere.' [1]

Bynkershoek.

Bynkershoek (1737), speaking with reference to the ordinances and treaties of Holland made between the peace of Westphalia and that of Utrecht, holds that, so far as these were to be considered as evidence of the law of nations, the contraband articles only were liable to confiscation. 'Such', he says, 'are the rules laid down by our own laws and treaties, and if we are to infer from them what the law of nations is, it will follow that ships and lawful goods are never to be condemned on account of contraband merchandise carried on board the same vessel. But it is not from thence that the law of nations is to be deduced. Reason, as we have said before, is the supreme law of nations (*Iuris Gentium magistra, Ratio*), and she does not permit that we should understand these things altogether generally and without distinction.' He then goes on to make a number of distinctions drawn from the analogy of the Roman fiscal law by which he acquits or condemns the vessel according to the fact of the owner's ignorance or knowledge of the shipment of the contraband. If the captain is also owner of the ship, and knows that he is taking contraband goods on board, his vessel may justly be confiscated ; and if the owners of the vessel consent to take unlawful goods on board, knowing their character, their vessel may be confiscated ; but the owners of the vessel are not to suffer if ignorant of the illegality of their cargo.[2]

[1] De navibus, chap. ii. §§ 3-6. Heineccius disapproved of the confiscation of any article that was not either in itself unlawful or the property of a person who was acting illegally. The Danish ordinance he quotes does not support his position, as, although its list of contraband is very extensive, it expressly exempts the vehicle in which it is carried from confiscation (Robinson, Col. Mar. 185).

[2] Quaest. iur. pub. bk. i. chap. 12 (p. 95). Bynkershoek is the first open theoretical defender of the extension of the penalty of confiscation

Hübner (1759) says that a ship carrying arms to a belligerent may be confiscated, together with her cargo, if this cargo belongs to the proprietors either of the ship or of the contraband.[1] In the case of the *Med Guds Hielpe*,[2] decided in 1745, which was the case of a vessel whose whole cargo consisted of pitch and tar designed for the use of the French, the neutral ship was condemned as well as the cargo. In paragraph 42 of the Prussian *Exposition des Motifs* of 1752 it was admitted that when a vessel was captured and taken in for adjudication for carrying contraband of war, the owners of any innocent merchandise on board are not entitled to compensation.[3] Hübner.

As a result of the provisions contained in the various treaties of the seventeenth and eighteenth centuries and of the practice consequent thereon, it became the general rule to confine confiscation, in ordinary cases, to the contraband goods alone and to the freight due upon them to the neutral carrier, who suffered no further penalty except the loss of time caused by the detention and payment of the captor's expenses.[4] 'I do not know', said Lord Stowell in the course of his judgement in the *Ringende Jacob*,[5] 'that under the present practice of the law of nations a contraband cargo can affect the ship. By the ancient law of Europe such a consequence would have ensued. . . . But in the modern practice of the Courts Ultimately confiscation confined as a general rule to the contraband goods.

beyond the actual contraband goods. He would also confiscate innocent goods, if they have the same proprietor as the vessel, and the owner of the latter knew of the illegality of the transport.

[1] De la saisie, ii, chap. iv, § 4.

[2] Pratt, 191; 1 E. P. C. 1.

[3] Martens, C. C. ii. 33.

[4] The *Neutralitet* (1801), 3 C. Rob. 294; 1 E. P. C. 309; the *Ringende Jacob* (1798), 1 C. Rob. 89; 1 E. P. C. 60; the *Sarah Christina* (1799), 1 C. Rob. 237; 1 E. P. C. 125.

[5] Supra. Lord Stowell was of opinion, however, that the ancient practice 'was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent' (the *Neutralitet*, supra; and cf. the *Minerva* (1801), 3 C. Rob. 229; 1 E. P. C. 301).

of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances.'

Neutral carrier loses his freight and has to pay the captor's expenses.

We have seen that freight was refused to the vessels restored by the order of the Privy Council under Elizabeth,[1] and Bynkershoek lays down the same rule for the case of a vessel carrying articles of contraband which are seized by a belligerent.[2] This was also treated as the general practice in the Report of the British Commissioners of January 18, 1753, in the case of the Silesian Loan. 'Si c'était comme contrebande,' they said, 'les vaisseaux ne pouvaient prétendre ni fret ni dépens; et les sentences étaient même favorables, en restituant les navires sur la simple présomption, que les propriétaires des navires pouvaient n'avoir pas été instruits de la nature des cargaisons ou de leurs vrais propriétaires.'[3]

A curious regulation occurred in the Russian ordinance for privateers of 1787,[4] which declared in Article 12 that if the captain of a neutral vessel should of his own accord give information that he had articles of contraband on board, he should receive, from the persons who took possession, double the amount of freight which he was to have received from the enemy. This was obviously mentioned as a deviation from the general rule and was intended as a gratuitous premium to reward the neutral captain for betraying his trust.[5]

Forfeiture of freight and condemnation in the captor's

[1] Supra, p. 232. [2] Quaest. Iur. Pub. bk. i, chap. 10 (pp. 82-3.)
[3] Martens, C. C. ii. 54; Baty, P. L. 121.
[4] Martens, Rec. iv. 341. [5] Cf. Manning, 381.

expenses is the regular penalty enforced by British prize courts, even when the master is ignorant of the contraband character of the goods carried.[1] In the *Imina*[2] the captor's expenses were decreed although the cargo was not condemned, because it was absolutely incumbent on the captor to bring the case to adjudication. In another case the claimant was condemned in the captor's expenses because he had given the master liberty to choose a guilty destination.[3]

Except under special circumstances.

'I do not say', Lord Stowell observed in the *America*,[4] 'that if an owner makes out a clear case that he has been duped by the fraud of the master, the court would in all cases press the rule to the utmost rigour against him.' Freight and expenses were also allowed to the claimant in another case where the contraband articles were but in a small quantity amongst a variety of other articles.[5] It is also the British practice for the Crown to pay all freight, charges, and expenses where, as in the case of conditional contraband, the milder right of pre-emption is exercised.[6] In the *Catherine and Anna*[7] it was held that premiums of insurance on a ship paid by a captor for his own security were not chargeable against the owner on a decree for restitution of such ship on payment of the captor's expenses.

Interest of owner of contraband in vessel condemned.

But although the proprietor of a neutral vessel might carry the contraband goods of another neutral with no other penalty than the loss of freight and expenses, a vessel carrying contraband was still liable to condemna-

[1] The *Jesus* (1756–61), Bur. 164; 1 E. P. C. 6; the *Sarah Christina* (1799), 1 C. Rob. 237; 1 E. P. C. 125; the *Oster Risoer* (1802), 4 C. Rob. 199; 1 E. P. C. 382.
[2] (1800), 3 C. Rob. 167; 1 E. P. C. 289.
[3] The *Twende Brodre* (1801), 4 C. Rob. 33; 1 E. P. C. 332.
[4] (1800), 3 C. Rob. 36; 1 E. P. C. 127, n. (a).
[5] The *Neptunus* (1800), 3 C. Rob. 108; 1 E. P. C. 264.
[6] The *Vryheid* (1778). Hay and Marr. 188; 1 E. P. C. 13.
[7] (1801), 4 C. Rob. 39; 1 E. P. C. 336.

tion, according to British prize law, if she belonged to the owner of the contraband cargo, on the principle that 'where a man is concerned in an illegal transaction the whole of his property embarked in that transaction is liable to confiscation'. If the proprietor of the contraband was only part owner of the ship, his particular share in her was forfeited.[1] In the case of the *Jonge Margaretha*[2] the vessel was not condemned, although she belonged to the owner of the contraband, because the court held that the claimant acted without dissimulation and might have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he relied. A similarly owned ship was also restored in another case on account of the special terms of an order of the government, which directed all other goods to be restored; Lord Stowell was very careful to point out in his judgement that he did not decide the case on the general principle of contraband.[3]

Vessel also condemned where the carriage of the contraband was prohibited by treaty.

If a neutral vessel was bound by a treaty of her own country to abstain from carrying the articles on board, she was condemned, although the cargo did not belong to her owner.[4] The same result followed if her owner was privy to the carriage of the contraband goods,[5] or if

[1] The *Ringende Jacob* (1798), 1 C. Rob. 89; 1 E. P. C. 60; the *Neutralitet* (1801), 3 C. Rob. 294; 1 E. P. C. 309; the *Jonge Tobias* (1799), 1 C. Rob. 329; 1 E. P. C. 146; Phillimore, iii. 462; Twiss, War, 292. The same effect will be produced by the contraband articles, although unclaimed, if they appear by the evidence to belong to the part owner of the vessel (the *Floreat Commercium* (1800), 3 C. Rob. 178).

[2] (1799), 1 C. Rob. 189; 1 E. P. C. 100.

[3] The *Neptunus* (1807), 6 C. Rob. 403; 1 E. P. C. 595.

[4] The *Neutralitet* (1801), 3 C. Rob. 295; 1 E. P. C. 309; Cob. Cases, ii. 430; Wheat. Atlay, 678; Kleen, Cont. 208–9, 218.

[5] The *Jonge Tobias* (1799), 1 C. Rob. 329; 1 E. P. C. 146; Hall, I. L. 666; Opp. I. L. ii. 509; Kleen, Cont. 208. In the *Bermuda* (1865, 3 Wall. 514; Moore, Dig. vii. 714) it was held that mere consent to the transportation of contraband will not always or usually be taken to be a violation of good faith; but the belligerent is entitled

there was a resort to fraudulent devices, such as false or simulated papers or a false destination, for the purpose of defeating the right of search or deceiving the searching officers.[1] In the *Neutralitet*[2] Lord Stowell explains that the relaxation which had taken place in the former rule under which the carrying of contraband in ordinary cases affected the ship was introduced on the supposition that freights of noxious or doubtful articles might be taken on board without the personal knowledge of the owner. It was a relaxation, 'the benefit of which', as he said in the *Franklin*,[3] 'can only be claimed by fair cases'.

And where her owner knew of the carriage; and in cases of fraud.

Spoliation or destruction of papers also *per se* inferred condemnation, since it raised a presumption that it was done for the purpose of fraudulently suppressing evidence.[4] By the maritime law of other countries such spoliation created an absolute presumption *iuris et de iure* of guilt.[5] But unless the case was one of grave suspicion, it was the practice of the British courts to allow further proof, the legal consequences of such an act depending, for the most part, upon the circumstances of each case. In a very serious case, however, the fact of spoliation might exclude further proof and be sufficient in itself to infer guilt.[6] In any event, as Lord Stowell graphically put

Effect of spoliation of papers.

to require of neutrals a frank and bona fide conduct. The mere presence of a contraband article on board without proof or indication that the owners knew the vessel was carrying contraband would justify only the seizure of the article; but if a substantial part of the cargo was contraband, there would be a presumption that the cargo was to aid a belligerent (the *Atlantic* (1901), 37 Ct. Cl. 17; Moore, Dig. vii. 744–5; the *Juno* (1901), 38 Ct. Cl. 465; Moore, Dig. vii. 745).

[1] The *Holz* (1794), cited in the *Ringende Jacob* (1798), 1 C. Rob. 91; 1 E. P. C. 62; the *Edward* (1801), 4 C. Rob. 68; 1 E. P. C. 360; the *Richmond* (1804), 5 C. Rob. 325; the *Ranger* (1805), 6 C. Rob. 126; Moseley, 97–9.

[2] (1801), 3 C. Rob. 295; E. P. C. 309.

[3] (1801), 3 C. Rob. at p. 223; 1 E. P. C. at p. 299.

[4] The *Hunter* (1815), 1 Dods. 480; 2 E. P. C. 208.

[5] Kent, 401.

[6] The *Johanna Emilie* (1854), Spinks, 12; 2 E. P. C. 252.

it,[1] 'a case that escapes with such a brand upon it is only saved so as by fire'. It has been the general practice of the American prize courts to follow the rules laid down in Great Britain for the release or condemnation of a vessel seized in the act of carrying contraband.[2] In the case of the *Pizarro*[3] the Supreme Court of the United States held that the spoliation of papers is not of itself sufficient ground for condemnation, and that it is a circumstance open to explanation; for it might arise from accident, necessity, or superior force.

British practice as to the non-contraband part of the cargo.

The principle which, according to the British practice, governs the treatment of innocent merchandise found on board a ship engaged in the transport of contraband is identical with that applied to the vessel. 'The law of nations, in my opinion,' said Lord Stowell, 'is that to escape the contagion of contraband the innocent articles must be the property of a different owner.'[4] The master is allowed his freight on the goods restored. In the case of the *Neptunus*[5] the inoffensive goods were restored, although the property of the owner of the contraband, on account of the special terms of an order of the government which directed the restitution of all other goods. Where contraband goods were carried with simulated papers or in disregard of express stipulations by treaty, and in all cases of fraud in the owner of the ship or his agent, the penalty of confiscation included, besides the ship, any interest her owner might

[1] In his judgement in the *Hunter*, supra, 1 Dods. 487; 2 E. P. C. 209.

[2] Kent, 362–3; Opp. I. L. ii. 507; Ath. Jones, 385–6; Kleen, Cont. 209. The United States Naval Code of 1900, abrogated in 1904, provided that the vessel should be subject to seizure and detention unless treaty stipulations decided otherwise (Bonfils, 1014).

[3] (1816), 2 Wheat. 227.

[4] The *Staadt Embden* (1798), 1 C. Rob. 26; 1 E. P. C. 37; the *St. Jacob* (1759), Burr. 160; 1 E. P. C. 6; the *Jesus* (1756–61), Burr. 164; 1 E. P. C. 6; the *Oster Risoer* (1802), 4 C. Rob. 199; 1 E. P. C. 382.

[5] (1807), 6 C. Rob. 403; 1 E. P. C. 595.

have in the non-contraband part of the cargo.[1] The rest of the cargo, if innocent, cannot be seized after the contraband part of the lading has been disposed of.[2]

Treaty stipulations.

Some treaties stipulated for the confiscation of the contraband alone in those cases only where the master handed over that part of the cargo voluntarily, or at least without fraud or resistance, and extended the penalty to the ship and the whole of the cargo if he attempted to escape, resisted, or made use of deceit. Under the Swedish regulation of April 12, 1808, the innocent part of the cargo was unconditionally allowed to go free.[3]

Opinions of continental jurists.

Most of the continental jurists, such as Heffter,[4] Bluntschli,[5] Klüber,[6] Ortolan,[7] Hautefeuille,[8] Marquardsen,[9] Gessner,[10] Kleen,[11] and Despagnet,[12] are opposed in principle to the confiscation of non-contraband goods, being of opinion that there is no justification for inflicting a greater punishment on the owner of the contraband who happens to have other property on the same vessel than on such an owner whose other property happens to be in a different place. They similarly fail to see any justification for the extension of the penalty beyond the contraband goods where there are circumstances of fraud or the carria[illegible] violation of treaty stipulations. Continental j[illegible] attacked the French rule under which, as we ha[illegible] seen,[13] the vessel and the rest of the cargo were liable to confiscation if the contraband

[1] Lushington, Manual, § 189; Kent, 362–3.
[2] The *Immanuel* (1799), 2 C. Rob. 186; Tud. 948.
[3] Kleen, Cont. 210; cf. supra, p. 210.
[4] D. I. 393, n. 6 (§ 161).
[5] Droit int. cod. §§ 806, 810.
[6] Droit des gens, § 289 (pp. 365–6).
[7] Règles Int. ii. 186–90.
[8] Droits et devoirs, tit. xiii, chap. i, sec. 1, § 1 (vol. iii. 217–26).
[9] Der Trentfall, 48. [10] Droit des neutres, 127–8.
[11] Cont. 217–21; Neut. i. 448.
[12] D. I. 1273–4.
[13] Supra, p. 235; Twiss, War, 292–3.

amounted to three-fourths in value of the whole cargo. There was a certain amount of theoretical opinion, however, in favour of the condemnation of the vessel when it could be shown that her owner was aware of the illegal traffic in which she was engaged.[1]

Discussion at Institute of International Law.

The discussion of the subject at the Institute of International Law in 1874 showed a considerable difference of opinion with regard to the treatment of the vessel carrying contraband of war.[2] The *Règlement international des prises maritimes*, adopted at Heidelberg in 1887, provided:[3] 'Le navire transportant ne sera condamné que: (1) s'il fait résistance; (2) s'il transporte des troupes à l'ennemi; (3) si la cargaison transportée à destination de l'ennemi se compose principalement d'approvisionnements pour les navires de guerre ou pour les troupes de l'ennemi.' In the *Avant-projet de Règlement international sur la contrebande de guerre*, prepared by Kleen in 1893, it was proposed to limit confiscation strictly to the prohibited articles.[4] The German jurist Perels, however, with the English members, was opposed to this,[5] and after the consideration of the *contre-projet* which he introduced the committee adopted the following proposition at Cambridge in 1895:[6] 'La confiscation s'étend au navire: (1) si l'armateur ou le capitaine a eu connaissance de la nature et de la destination du transport; (2) en cas de résistance à l'arrêt, à la visite, à la recherche ou à la saisie des objets de contrebande de guerre. Elle ne peut avoir lieu qu'en cas de flagrant délit.' But this provision was omitted in the *Règlement* finally adopted by the Institute at Venice in 1896;[7]

[1] Dup. D. M. Ang. 265; Kleen, Cont. 209; Bonfils, 1014–15; Beckenkamp, 14–16. [2] 7 R. D. I. (1875), 608; Beckenkamp, 16.
[3] § 117 (9 Ann. (1888), 242).
[4] § 18 (13 Ann. (1894), 107, 114).
[5] 14 Ann. (1895), 62; Hansemann, 61–2.
[6] § 9 (14 Ann. (1895), 193). [7] 15 Ann. (1896), 230–3.

and in the following year § 117 of the *Règlement* voted in 1887 was modified so that the vessel should only be condemned: '(1) s'il fait résistance; (2) s'il transporte illégalement des agents, des militaires ou des dépêches pour un belligérant'.[1]

Continental practice.

The mode of determining the liability of the vessel by the proportion between the noxious goods and the rest of the cargo was the general practice of continental powers.[2] It was renewed in the French Instructions of 1854 and 1870, and the same rule was laid down in the French Memorandum submitted to the Naval Conference of London.[3] Article 215 of the Italian Mercantile Code authorized in every case the confiscation of a vessel whose cargo consisted in whole or in part of contraband of war, but released the innocent goods.[4] In the case of the *Doelwijk*,[5] however, it was held that the condemnation of the vessel did not follow when her owner was not aware of the use to which she was to be put. This was a case of the doctrine of continuous voyage, and it had previously been held in America that where goods destined ultimately for a belligerent port were 'being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connexion on the part of her owners with the ulterior destination of the goods', the ship, although liable to seizure in order that the goods might be confiscated, was not liable to condemnation as prize.[6] A similar course was followed by Lord Stowell in the *Ebenezer*[7] on the express ground that 'the owner of the

France.

Italy.

Position of vessel in case of doctrine of continuous voyage.

[1] 16 Ann. (1897), 46, 311.
[2] Cob. Cases, ii. 431.
[3] P. P. Misc. No. 5 (1909), 71.
[4] Raikes, Italy, 179; Bonfils, 1014; 7 R. D. I. 652, 654–6.
[5] Supra, p. 159.
[6] The *Bermuda* (1865), 3 Wall. 514; the *Springbok* (1866), 5 Wall. 1; Moore, Dig. vii. 720.
[7] (1806), 6 C. Rob. 250; a case of the Rule of the War of 1756 (supra, pp. 145–7).

ship might not be conusant of the intention under which the original destination was continued'.

Historicus's opinion.

'The situation of the ship', wrote Historicus,[1] 'will clearly depend on the conduct and privity of the owner or master to the illegal destination of the goods which he assists in transporting. If he knowingly assists in accomplishing a section of an unlawful adventure, there can be no reason why he should not suffer for it, just as he would in an ordinary case of contraband. It would, however, be clearly unjust that a shipowner who takes on board an ostensibly innocent cargo with an apparently neutral consignment, should suffer for the unavowed and concealed intentions of the freighter, who in reality contemplates an unlawful destination. In such a case it would be the duty of the Prize Court to indemnify the shipowner for the inconvenience he sustains by allowance of freight and expenses.'

Germany.

The Prussian *Allgemeine Landrecht* limited the penalty of confiscation to the prohibited articles; but the Prize Regulations of June 20, 1864, declared the ship also to be good prize, if all her cargo should consist of contraband, if she should resist visit, or if her papers were false and wanting and these irregularities were not satisfactorily explained.[2] According to the German Memorandum for the London Conference, besides the case of resistance to visit and search, the vessel carrying contraband was subject to confiscation if her owner, or the charterer of the whole vessel, or her captain, knew or ought to have known of the presence of the contraband on board and that it formed in value, weight, or bulk more than a fourth of the whole cargo.[3]

Austria-Hungary.

The Austrian decree of March 3, 1864, contained

[1] Add. Letts. 43; cf. Westlake in 15 L. Q. R. 26; Col. Paps. 463–4.

[2] Kleen, Cont. 210.

[3] P. P. Misc. No. 5 (1909), 70.

a provision similar to that of the Russian regulation of the same year; but during the war of 1866 Austria declared to be good prize vessels carrying contraband which formed a considerable proportion of their cargo.[1] The Austro-Hungarian Memorandum did not refer to the treatment of the ship,[2] but as it took the view that the protection of belligerent interests does not require confiscation even of the contraband goods, it may be assumed that the condemnation of the ship for the mere carriage of contraband would also have been deemed unjustifiable.

Russia.

The Russian regulation of March 27, 1895, declared the ship liable to confiscation when the cargo consisted of (*a*) firearms and munitions or explosives in any quantity; or (*b*) other articles of contraband in a quantity exceeding in volume or weight one-half the total lading.[3] During the Crimean war Russia confiscated the ship as well as the cargo in every case of carriage of contraband, and, according to her declaration of 1904, 'neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated'.[4] The Russian Memorandum declared that the vessel should be liable to confiscation if the contraband formed in bulk, weight, or value more than one-fourth of the whole cargo, and also when the contraband was less in quantity if its presence on board, owing to its nature, must clearly not be unknown to the captain; otherwise the vessel carrying contraband in quantity less than one-fourth of the cargo would be liable to a fine of five times the value of the contraband, and should only be detained until the contraband had been delivered and the fine paid. The contraband cargo

[1] Kleen, Cont. 210, n.; Bonfils, 1014.
[2] P. P. Misc. No. 5 (1909), 70–1; supra, p. 230.
[3] Wheat. Lawr. (1857), 573, n.; Ath. Jones, 379; Owen, War, 188.
[4] Bonfils, 1014.

might be handed over to the captor either at the place of capture, or in a port to which the ship might be conducted, if the captor considered it indispensable.[1]

Spain. As a compromise between the rival systems, it was suggested in the Spanish Memorandum that if the captain or owner knew or could have known of the presence of the contraband on board, the ship should be answerable to the captor for a ransom equivalent to three times the value of the contraband and five times the amount of the freight. If the ransom was not paid the captor could in any case proceed to measures of execution only against

Japan. the ship and so long as she remained in his hands.[2] Japan followed the Anglo-American practice in looking chiefly to the question of ownership in deciding as to the condemnation of the ship. The vessel was also to be confiscated, (1) when fraudulent methods were to be employed in the carriage of the contraband goods, and (2) when such carriage was the principal object of the

Holland. voyage. According to the Dutch Memorandum, apart from the case of resistance to visit, the vessel was only to be condemned if an important part of the cargo consisted of contraband; and not even then if the captain could not have known the true character of the cargo.[3]

From the various conflicting views expressed in the Memoranda of the powers represented at the Naval Conference, it was suggested as a *Base de discussion* that the condemnation of the vessel should depend upon the greater or less importance of the contraband in relation to the expedition, or upon a real or presumed complicity. When the latter was held to be a reason for condemnation, it would be presumed from fraudulent circumstances.[4] The discussion of this part of the subject gave rise to prolonged debates, and it was only with considerable

[1] P. P. Misc. No. 5 (1909), 72–3.
[2] Ibid. 71.
[3] Ibid. 72.
[4] Ibid. 73.

difficulty that a solution of the matter was reached.[1] It was finally decided that to justify the condemnation of the ship the contraband must bear a certain proportion to the total cargo; the standard adopted was the mean between those proposed.

The Declaration of London adopts the 'proportion' rule in the case of the vessel.

Article 40 of the Declaration accordingly provides that the vessel may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo. Where the contraband element falls short of this amount and the vessel is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.[2] This rule which, as we have seen,[3] was the regular practice of the British prize courts, was adopted by the Conference as constituting a sufficient penalty without the addition of a special fine, as had been suggested by some of the delegates.[4] The Declaration contains no express provision for the forfeiture of freight, but it is obvious that the captor would not think of paying freight for articles condemned under Article 39. This is assumed in the Report, where it is observed that simple confiscation of the contraband goods would often involve no loss for the master, 'the freight of this contraband having been paid in advance'.[5] As in the case of the contraband merchandise, the vessel will not be liable to condemnation, or to the costs and expenses referred to in Article 41, if she is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, or if the master, after becoming acquainted with these facts, has had no opportunity of discharging the prohibited articles.[6]

Captor's costs and expenses.

Forfeiture of freight.

Immunity in case of ignorance of outbreak of war.

[1] Ibid. 140–1, 154–6, 287–9. [2] Article 41. [3] Supra, pp. 238–9.
[4] P. P. Misc. No. 4 (1909), 51, 96–7; infra, p. 269. [5] Infra, p. 269.
[6] Article 43; cf. supra, p. 230, and the case of the *Katwyk* (1915), 31 T. L. R. 448.

Effect of fraud or destruction of papers.

The Declaration fails to condemn a ship for sailing with false or simulated papers, or on account of their spoliation or destruction; but in the commentary on Article 64 in the Report the cases of the ship's papers having been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers, or in which there were found on board two sets of papers or false or forged papers, are given as instances of what would justify a refusal of compensation where the capture itself was not upheld.[1] It may also be presumed that in such a case the ship would be condemned to pay the captor's costs and expenses, although Article 41 only expressly mentions the case where a 'vessel carrying contraband' is released.

Treatment of non-contraband part of cargo.

According to the German, British, and Japanese Memoranda any other merchandise on board belonging to the owner of the contraband is subject to condemnation with the latter. The British Memorandum added that no compensation would be paid for loss arising from the detention of innocent goods which are restored to their owner because they do not belong to the proprietor of the contraband. The French Memorandum embodied the peculiar rule of that country whereby the whole of the cargo was condemned when three-fourths in value of it consisted of contraband. The Italian Memorandum simply adopted the provision of the Italian Mercantile Code under which the inoffensive part of the cargo was allowed to go free; and the Spanish Memorandum also declared that such merchandise is free whether or not it belongs to the owner of the contraband. A similar provision was made in the Russian Memorandum, which added that no compensation would be paid on the restoration of the goods.[2]

The Declaration of London settles the matter by

[1] P. P. Misc. No 4 (1909), 65; infra, p. 281.
[2] P. P. Misc. No. 5 (1909), 70–3.

adopting the Anglo-American rule of similar ownership, and Article 42 therefore provides that goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation. According to the Report, this is to be regarded as an additional punishment of the owner of the contraband. From the commentary on Article 64 it is clear that where the non-contraband goods are restored their owner will not receive compensation for any loss arising through their temporary detention. 'Innocent goods on board a vessel which has been captured suffer', says the Report,[1] 'all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel, whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation.' By virtue of Article 53, however, if neutral goods not liable to condemnation have been destroyed with a vessel sunk under Article 49, the owner of such goods is in any case entitled to compensation.

The Declaration of London adopts the Anglo-American rule of similar ownership.

No compensation for detention of innocent goods.

Unless destroyed with vessel.

3. Capture on the Return Voyage

Charles I's proclamation of 1627 declared not only the ship and the contraband cargo on board to be good prize, but also the ship with all the goods found on board on the return voyage from Spain, if the goods had been bought with the proceeds of a contraband cargo on the outward voyage.[2] Zouch was also of opinion that going and returning should fall under one and the same rule; though he admits that some distinguish the two by reference to the intention and purpose of the person giving the order. That is to say, if the right of capture has been granted in order to reward those who prevent the carriage of contraband goods, only those are entitled

Practice in the seventeenth century.

[1] P. P. Misc. No. 4 (1909), 65; infra, App. A, p. 281.
[2] Twiss, War, 239; 25 E. H. R. (1910), 252; supra, p. 108.

to the booty who effect the capture before the goods reach the enemy; but if the object is that the loss may deter others from attempting the carriage, then even the goods of those who have completed the conveyance may be captured as they return.[1]

Eventually established that as a general rule the offence is deposited with the cargo.

Eventually, however, it became established that, as a general rule, when the hostile destination has been reached and the forbidden merchandise delivered—in technical language, 'deposited'—the liability also is deposited; the vessel, although previously affected by her contents, cannot now be captured, nor can the belligerent touch the proceeds of sale of the contraband cargo on the return voyage.[2] As Lord Stowell declared in the *Imina*,[3] 'the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations you cannot generally take the proceeds in the return voyage'. But the Anglo-American practice recognizes an exception to this rule where the outward voyage has been prosecuted under circumstances aggravated by false or simulated papers or other fraud.[4] A contraband

Exception recognized in Anglo-American practice in case of fraud.

[1] Inr. et iud. fec. bk. ii, sec. viii, § 11. In the case of *Jurgan* v. *Logan* (1667, 1 Stairs, 477) the Lords of Session were of different opinions whether ships could be seized on the return voyage. In 1672 Sir Robert Wiseman declared that the ship was not liable upon return after the delivery of the contraband goods (Twiss, War, 291).

[2] Kleen, Neut. i. 437–40; Desp. D. I. 1275, 1292. In the case of the *Allanton* (Ath. Jones, 83–7) the Russian Prize Court at Vladivostock claimed the unrestricted right to condemn a vessel which was alleged to have deposited contraband on her outward voyage and was returning with an innocent cargo. But this was reversed by the Supreme Court at Petrograd, which expressly held that the fact that contraband had been carried on a previous voyage did not affect a subsequent lawful one. A quarter of a century before, during war between Peru and Chile in 1879, the German vessel *Luxor*, after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao in Peru, and condemned by the Peruvian Prize Courts for carrying contraband. But upon the German protest the vessel was released (Opp. I. L. ii. 507; Hansemann, 44).

[3] (1800), 3 C. Rob. at p. 168; 1 E. P. C. at p. 290.

[4] Opp. I. L. ii. 507; Cob. Cases, ii. 429; *Carrington* v. *Merchants' Insurance Co.* (1834), 8 Peters, 495; Scott, 769.

cargo, for example, having been taken to Batavia with fraudulent papers and a fraudulent destination to Tranquebar, the return cargo was condemned on the ground that in distant voyages 'the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque et ad mala*'.[1] In a case in which contraband was carried, by means of false documents and suppression, to the Isle of France, whence the vessel went in ballast to Batavia, and subsequently sailed to various ports with more than one cargo before capture took place, it was held that 'it is by no means necessary that the cargo should have been purchased by the proceeds of the contraband' carried on the outward voyage.[2]

Opposition to the Anglo-American practice.

In 1806 Madison declared that the rule 'that a vessel on a return voyage is liable to capture by the circumstance of her having on the outward voyage conveyed contraband articles to an enemy's port' is an interpolation in the law of nations.[3] Wheaton also disputes the right to inflict the penalty when the offence no longer continues, arguing that if the offence is to be held to survive after the termination of the actual delictum, it should logically be held to survive indefinitely, and not only for the return voyage.[4] Halleck defends the doctrine of the English cases;[5] but Hall calls it 'undoubtedly severe', and says that it 'does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes'.[6] The same rule would seem to apply by analogy to cases where the

[1] The *Nancy* (1800), 3 C. Rob. at p. 126.
[2] The *Margaret* (1810), 1 Act. 333; 2 E. P. C. 113.
[3] Moore, Dig. vii. 748.
[4] Int. Law (Atlay's ed. 1904), 679, n. (e).
[5] Int. Law, ii. 247–8.
[6] I. L. 673; cf. Kent, 363, and n. 2; Taylor, I. L. 743–4; Manning, 390; Cob. Cases, ii. 429; Westlake, I. L. ii. 292.

contraband articles have been deposited at an intermediate port on the outward voyage and before it terminated.[1] The British rule is also opposed by the continental writers.[2]

The Manual of Naval Prize Law required that a commander should detain a vessel returning after having carried contraband with false or simulated papers;[3] and the liability of such a vessel to condemnation was not denied in the British Memorandum submitted to the London Conference.[4] The Spanish Memorandum, however, declared that when once the contraband has been unloaded the responsibilities resulting under international law from its transport are annulled; in the *Base de discussion* drawn up by the British Government as a basis for the deliberations of the Conference it was stated that the principle appeared to be generally accepted that a vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.[5] Article 38 of the Declaration accordingly disallowed capture on the return voyage under any circumstances whatever.

The London Conference.

Capture on return voyage entirely excluded in the Declaration of London.

But in the war of 1914–15 Great Britain and her allies have adhered to the former British practice. The Order in Council of August 20, 1914,[6] provided that a neutral vessel which succeeded in carrying contraband to the enemy with false papers might be detained for having carried such contraband if she was encountered before she completed her return voyage. In the later Order in Council of October 29[7] this has been altered into the

But restored in war of 1914–15.

[1] Cf. Moore, Dig. vii. 745.
[2] Cf. Hansemann, 47–8.
[3] § 80 (pp. 23–4).
[4] P. P. Misc. No. 5 (1909), 71.
[5] Ibid. 73; Hansemann, 59.
[6] M. E. L. 144; Stat. R. and O. No. 1260; infra, App. B, p. 282.
[7] M. E. L. Sup. No. 2, 79; Stat. R. and O. No. 1614; infra, App. B, p. 284. As to the adoption of the rule by France, Russia, and Italy, see M. E. L. Sup. No. 2, 78, n. (a); L. G. May 11, 1915 (Russian decree of December 8/21, 1914, sec. 2; L. G. July 6, 1915 (Italian royal decree of June 3, 1915, art. 2).

provision that 'a neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage'. Article 40 of the German Prize Regulation of April 18, 1915,[1] provides that a vessel cannot be held up on the ground of the transport of contraband which occurred previously and is now completed. Should the vessel, however, have carried contraband to the enemy in contravention of the statements made in the ship's papers, she is then liable to be held up and confiscated until the termination of the war.

L. G. May 11, 1915; Hub. and King, 29–30.

APPENDIX A

THE DECLARATION OF LONDON

WITH THE GENERAL REPORT OF THE DRAFTING COMMITTEE

Chapter II

CONTRABAND OF WAR

This chapter is one of the most, if not the most, important of the Declaration. It deals with a matter which has sometimes given rise to serious disputes between belligerents and neutrals. Therefore regulations to establish exactly the rights and duties of each have often been urgently called for. Peaceful trade may be grateful for the precision with which a subject of the highest importance to its interests is now for the first time treated.

The notion of contraband of war connotes two elements: it concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral Government,—no; if they are destined for an enemy Government,—yes. The trade in certain articles is by no means generally forbidden during war: it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law.

Articles 22 and 24 enumerate the articles which may be contraband of war, and which are so in fact when they have a certain destination laid down in Articles 30 and 33. The traditional distinction between *absolute* and *conditional* contraband is maintained: Articles 22 and 30 refer to the former, and Articles 24 and 33 to the latter.

Article 22

The following articles may, without notice,[1] *be treated as contraband of war, under the name of absolute contraband:—*

1. *Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.*

[1] In view of the difficulty of finding an exact equivalent in English for the expression *de plein droit*, it has been decided to translate it

2. *Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.*
3. *Powder and explosives specially prepared for use in war.*
4. *Gun-mountings, limber-boxes, limbers, military wagons, field forges and their distinctive component parts.*
5. *Clothing and equipment of a distinctively military character.*
6. *All kinds of harness of a distinctively military character.*
7. *Saddle, draught, and pack animals suitable for use in war.*
8. *Articles of camp equipment, and their distinctive component parts.*
9. *Armour plates.*
10. *Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.*
11. *Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.*

This list is that drawn up at the second Peace Conference by the committee charged with the special study of the question of contraband. It was the result of mutual concessions, and it has not seemed wise to reopen discussion on this subject for the purpose either of cutting out or of adding articles.

The words *de plein droit* (without notice) imply that the provision becomes operative by the mere fact of the war, and that no declaration by the belligerents is necessary. Trade is already warned in time of peace.

Article 23

Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

Certain discoveries or inventions might make the list in Article 22 insufficient. An addition may be made to it on condition that it concerns articles *exclusively used for war.* This addition must be notified to the other Powers, which will take the necessary measures to inform their subjects of it. In theory the notification may be made in time of peace or of war. The former case will doubtless rarely occur, because a State which made such a notification might be suspected of meditating a war ; it would, nevertheless, have

by the words ' without notice ', which represent the meaning attached to it by the draftsman of the present General Report (see p. 257).

the advantage of informing trade beforehand. There was no reason for making it impossible.

The right given to a Power to make an addition to the list by a mere declaration has been thought too wide. It should be noticed that this right does not involve the dangers supposed. In the first place it is understood that the declaration is only operative for the Power which makes it, in the sense that the article added will only be contraband for it, as a belligerent; other States may, of course, also make a similar declaration. The addition may only refer to articles *exclusively used for war*; at present, it would be hard to mention any such articles which are not included in the list. The future is left free. If a Power claimed to add to the list of absolute contraband articles not exclusively used for war, it might expose itself to diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the International Prize Court. Suppose that the Court holds that the article mentioned in the declaration of absolute contraband is wrongly placed there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Confiscation may then be justified if the capture was made in the conditions laid down for this kind of contraband (Articles 33–35) which differ from those enforced for absolute contraband (Article 30).

It had been suggested that, in the interest of neutral trade, a period should elapse between the notification and its enforcement. But that would be very damaging to the belligerent, whose object is precisely to protect himself, since, during that period the trade in articles which he thinks dangerous would be free and the effect of his measure a failure. Account has been taken, in another form, of the considerations of equity which have been adduced (see Article 43).

Article 24

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice,[1] *be treated as contraband of war, under the name of conditional contraband:—*

1. *Foodstuffs.*
2. *Forage and grain, suitable for feeding animals.*
3. *Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.*
4. *Gold and silver in coin or bullion; paper money.*
5. *Vehicles of all kinds available for use in war, and their component parts.*

[1] See note to Article 22.

6. *Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.*
7. *Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones.*
8. *Balloons and flying machines and their distinctive component parts; together with accessories and articles recognizable as intended for use in connexion with balloons and flying machines.*
9. *Fuel; lubricants.*
10. *Powder and explosives not specially prepared for use in war.*
11. *Barbed wire and implements for fixing and cutting the same.*
12. *Horseshoes and shoeing materials.*
13. *Harness and saddlery.*
14. *Field glasses, telescopes, chronometers, and all kinds of nautical instruments*

On the expression *de plein droit* (without notice) the same remark must be made as with regard to Article 22. The articles enumerated are only conditional contraband if they have the destination specified in Article 33.

Foodstuffs include products necessary or useful for sustaining man, whether solid or liquid.

Paper money only includes inconvertible paper money, i.e. banknotes which may or not be legal tender. Bills of exchange and cheques are excluded.

Engines and boilers are included in 6.

Railway material includes fixtures (such as rails, sleepers, turntables, parts of bridges) and rolling stock (such as locomotives, carriages, and trucks).

Article 25

Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 *and* 24, *may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article* 23.

This provision corresponds, as regards conditional contraband, to that in Article 23 as regards absolute contraband.

Article 26

If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 *and* 24, *such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article* 23.

A belligerent may not wish to use the right to treat as contraband of war all the articles included in the above lists. It may suit him to add to conditional contraband an article included in absolute contraband or to declare free, so far as he is concerned, the trade in some article included in one class or the other. It is desirable that he should make known his intention on this subject, and he will probably do so in order to have the credit of the measure. If he does not do so, but confines himself to giving instructions to his cruisers, the vessels searched will be agreeably surprised if the searcher does not reproach them with carrying what they themselves consider contraband. Nothing can prevent a Power from making such a declaration in time of peace. See what is said as regards Article 23.

Article 27

Articles which are not susceptible of use in war may not be declared contraband of war.

The existence of a so-called *free* list (Article 28) makes it useful thus to put on record that articles which cannot be used for purposes of war may not be declared contraband of war. It might have been thought that articles not included in that list might at least be declared conditional contraband.

Article 28

The following may not be declared contraband of war :—

1. *Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.*
2. *Oil seeds and nuts ; copra.*
3. *Rubber, resins, gums, and laes ; hops.*
4. *Raw hides and horns, bones, and ivory.*
5. *Natural and artificial manures, including nitrates and phosphates for agricultural purposes.*
6. *Metallic ores.*
7. *Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.*
8. *Chinaware and glass.*
9. *Paper and paper-making materials.*
10. *Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.*
11. *Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.*
12. *Agricultural, mining, textile, and printing machinery.*
13. *Precious and semi-precious stones, pearls, mother-of-pearl, and coral.*
14. *Clocks and watches, other than chronometers.*

15. *Fashion and fancy goods.*
16. *Feathers of all kinds, hairs, and bristles.*
17. *Articles of household furniture and decoration; office furniture and requisites.*

To lessen the drawbacks of war as regards neutral trade it has been thought useful to draw up this so-called *free list*, but this does not mean, as has been explained above, that all articles outside it might be declared contraband of war.

The *ores* here referred to are the product of mines from which metals are derived.

There was a demand that *dyestuffs* should be included in 10, but this seemed too general, for there are materials from which colours are derived, such as coal, which also have other uses. Products only used for making colours enjoy the exemption.

'Articles de Paris,' an expression the meaning of which is universally understood, come under 15.

16 refers the hair of certain animals, such as pigs and wild boars.

Carpets and mats come under household furniture and ornaments 17.

Article 29

Likewise the following may not be treated as contraband of war:—

1. *Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity, and, subject to the payment of compensation, be requisitioned, if their destination is that specified in Article* 30.
2. *Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.*

The articles enumerated in Article 29 are also excluded from treatment as contraband, but for reasons different from those which have led to the inclusion of the list in Article 28.

Motives of humanity have exempted articles exclusively used to aid the sick and wounded, which, of course, include drugs and different medicines. This does not refer to hospital-ships, which enjoy special immunity under the convention of The Hague of the 18th October, 1907, but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. The cruiser has, however, the right, in case of urgent necessity, to requisition such articles for the needs of her crew or of the fleet to which she belongs, but they can only be requisitioned on payment of compensation. It must, however, be observed that this right of requisition may

not be exercised in all cases. The articles in question must have the destination specified in Article 30, that is to say, an enemy destination. Otherwise, the ordinary law regains its sway; a belligerent could not have the right of requisition as regards neutral vessels on the high seas.

Articles intended to the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated,—for instance, arms intended for the defence of the vessel against pirates, or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here includes all persons in the service of the vessel in general.

Destination of Contraband.—As has been said, the second element in the notion of contraband is *destination*. Great difficulties have arisen on this subject, which find expression in the *theory of continuous voyage*, so often attacked or adduced without a clear comprehension of its exact meaning. Cases must simply be considered on their merits so as to see how they can be settled without unnecessarily annoying neutrals or sacrificing the legitimate rights of belligerents.

In order to effect a compromise between conflicting theories and practices, absolute and conditional contraband have been differently treated in this connexion.

Articles 30 to 32 refer to absolute, and Articles 33 to 36 to conditional contraband.

Article 30

Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.

The articles included in the list in Article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by Article 30. The journey made by the goods is regarded as a whole.

Article 31

Proof of the destination specified in Article 30 is complete in the following cases :—

1. *When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.*
2. *When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.*

As has been said, the obligation of proving that the contraband goods really have the destination specified in Article 30 rests with the captor. In certain cases proof of the destination specified in Article 31 is *conclusive*, that is to say, the proof may not be rebutted.

First Case.—The goods are *documented* for discharge in an enemy port, that is to say, according to the ship's papers referring to those goods, they are to be discharged there. In this case there is a real admission of enemy destination on the part of the interested parties themselves.

Second Case.—The vessel is to touch at enemy ports only ; or she is to touch at an enemy port before reaching the neutral port for which the goods are documented, so that although these goods, according to the papers referring to them, are to be discharged in a neutral port, the vessel carrying them is to touch at an enemy port before reaching that neutral port. They will be liable to capture, and the possibility of proving that their neutral destination is real and in accordance with the intentions of the parties interested is not admitted. The fact that, before reaching that destination, the vessel will touch at an enemy port, would occasion too great a risk for the belligerent whose cruiser searches the vessel. Even without assuming that there is intentional fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would get a good price, and for the local authorities to requisition the goods.

The same case arises where the vessel, before reaching the neutral port, is to join the armed forces of the enemy.

For the sake of simplicity, the provision only speaks of an *enemy port*, but it is understood that a *port occupied by the enemy* must be regarded as an enemy port, as follows from the general rule in Article 30.

Article 32

Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her

papers and unable to give adequate reasons to justify such deviation.

The papers, therefore, are conclusive proof of the course of the vessel unless she is encountered in circumstances which show that their statements are not to be trusted. See also the explanations given as regards Article 35.

Article 33

Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

The rules for conditional contraband differ from those laid down for absolute contraband in two respects: (1) there is no question of destination for the enemy in general, but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first, and Article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If, from the circumstances, the peaceful purpose is clear, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, as, for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no room for doubt. But what is the solution when the articles are destined for the civil government departments of the enemy State? It may be money sent to a government department, for use in the payment of its official salaries, or rails sent to a department of public works. In these cases there is *enemy destination* which renders the goods liable in the first place to capture, and in the second to condemnation. The reasons for this are at once legal and practical. The State is one, although it necessarily acts through different departments. If a civil department may freely receive foodstuffs or money, that department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased. Further, the receipts of a civil department may be considered of greater use to the military administration and directly assigned to the latter. Money or foodstuffs really destined for a civil department may thus come to be used directly for the needs of the army. This

possibility, which is always present, shows why destination for the departments of the enemy State is assimilated to that for its armed forces.

It is the *departments of the State* which are dependent on the central power that are in question, and not all the departments which may exist in the enemy State; local and municipal bodies, for instance, are not included, and articles destined for their use would not be contraband.

War may be waged in such circumstances that destination for the use of a civil department cannot be suspect, and consequently cannot make goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not, in fact, affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of the civil government of a colony would not be held to be contraband of war, because the considerations adduced above do not apply to their case; the resources of the civil government cannot be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other.

Article 34

The destination referred to in Article 33 *is presumed to exist if the goods are consigned to enemy authorities, or to a trader*[1] *established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.*

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this Article may be rebutted.

Contraband articles will not usually be directly addressed to the military authorities or to the government departments of the enemy State. Their true destination will be more or less concealed, and the captor must prove it in order to justify their capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom, or place for which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy Government with articles of the kind in question. It may be a fortified place belonging to the enemy or a place used as a base, whether of operations or of supply, for the armed forces of the enemy.

[1] Cf. supra, p. 170, n. 3.

This general presumption may not be applied to the merchant vessel herself on her way to a fortified place, though she may in herself be conditional contraband, but only if her destination for the use of the armed forces or government departments of the enemy State is directly proved.

In the absence of the above presumptions, the destination is presumed to be innocent. That is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus set up in the interest of the captor or against him may be rebutted. The national tribunals, in the first place, and, in the second, the International Court, will exercise their judgement.

Article 35

Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture when it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they can no longer be contraband, and no examination will be made as to whether they are to be forwarded to the enemy by sea or land from that neutral port. It is here that the case of absolute contraband is essentially different.

The ship's papers furnish complete proof as to the voyage on which the vessel is engaged and as to the place where the cargo is to be discharged; but this would not be so if the vessel were encountered clearly out of the course which she should follow according to her papers, and unable to give adequate reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed, and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose

all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way, a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not according to his judgement. To resume, the ship's papers are proof, unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

It does not follow that, because a single entry in the ship's papers is shown to be false, their evidence loses its value as a whole. The entries which cannot be proved false retain their value.

Article 36

Notwithstanding the provisions of Article 35, *conditional contraband, if shown to have the destination referred to in Article* 33, *is liable to capture in cases where the enemy country has no seaboard.*

The case contemplated is certainly rare, but has nevertheless arisen in recent wars. In the case of absolute contraband, there is no difficulty, since destination for the enemy may always be proved, whatever the route by which the goods are sent (Article 30). For conditional contraband the case is different, and an exception must be made to the general rule laid down in Article 35, paragraph 1, so as to allow the captor to prove that the suspected goods really have the special destination referred to in Article 33 without the possibility of being confronted by the objection that they were to be discharged in a neutral port.

Article 37

A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

The vessel may be captured for contraband during the whole of her voyage, provided that she is in waters where an act of war is lawful. The fact that she intends to touch at a port of call before reaching the enemy destination does not prevent capture, provided that destination in her par-

ticular case is proved in conformity with the rules laid down in Articles 30 to 32 for absolute, and in Articles 33 to 35 for conditional contraband, subject to the exception provided for in Article 36.

Article 38

A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

A vessel is liable to capture for carrying contraband, but not for having done so.

Article 39

Contraband goods are liable to condemnation.

This presents no difficulty.

Article 40.

A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

It was universally admitted that in certain cases the condemnation of the contraband is not enough, and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three-quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods occupying space, or of weight, sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that, in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.

Article 41

If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

It is not just that, on the one hand, the carriage of more than a certain proportion of contraband should involve the condemnation of the vessel, while if the contraband forms less than this proportion, it alone is confiscated. This often involves no loss for the master, the freight of this contraband having been paid in advance. Does this not encourage trade in contraband, and ought not a certain penalty to be imposed for the carriage of a proportion of contraband less than that required to entail condemnation? A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various sorts were brought forward against this proposal, although the principle of the infliction of some kind of pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and of the custody of the vessel and of her cargo during the proceedings are to be paid by the vessel. The expenses of the custody of the vessel include in this case the keep of the captured vessel's crew. It should be added that the loss to a vessel by being taken to a prize port and kept there is the most serious deterrent as regards the carriage of contraband.

Article 42

Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

The owner of the contraband is punished in the first place by the condemnation of his contraband property; and in the second by that of the goods, even if innocent, which he may possess on board the same vessel.

Article 43

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. *The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of*

the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband, provided such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

This provision is intended to spare neutrals who might in fact be carrying contraband, but against whom no charge could be made. This may arise in two cases. The first is that in which they are unaware of the outbreak of hostilities ; the second is that in which, though aware of this, they do not know of the declaration of contraband made by a belligerent, in accordance with Articles 23 and 25, which is, as it happens, the one applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband ; on the other hand, the cruiser cannot be obliged to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need. These opposing interests are reconciled by making condemnation conditional on the payment of compensation (see the convention of the 18th October, 1907, on the rules for enemy merchant vessels on the outbreak of hostilities, which expresses a similar idea).

Article 44

A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

A neutral vessel is stopped for carrying contraband. She is not liable to condemnation, because the contraband does not reach the proportion specified in Article 40. She can, nevertheless, be taken to a prize port for judgement to be passed on the contraband. This right of the captor appears too wide in certain cases, if the importance of the contraband, possibly slight (for instance, a case of guns or revolvers),

is compared with the heavy loss incurred by the vessel by being thus turned out of her course and detained during the time taken up by the proceedings. The question has, therefore, been asked whether the right of the neutral vessel to continue her voyage might not be admitted if the contraband articles were handed over to the captor, who, on his part, might only refuse to receive them for sufficient reasons, for instance, the rough state of the sea, which would make transhipment difficult or impossible, well-founded suspicions as to the amount of contraband which the merchant vessel is really carrying, the difficulty of stowing the articles on board the warship, &c. This proposal did not gain sufficient support. It was alleged to be impossible to impose such an obligation on the cruiser, for which this handing over of goods would almost always have drawbacks. If, by chance, it has none, the cruiser will not refuse it, because she herself will gain by not being turned out of her course by having to take the vessel to a port. The idea of an obligation having thus been excluded, it was decided to provide for the voluntary handing over of the contraband, which, it is hoped, will be carried out whenever possible, to the great advantage of both parties. The formalities provided for are very simple and need no explanation.

There must be a judgement of a prize court as regards the goods thus handed over. For this purpose the captor must be furnished with the necessary papers. It may be supposed that there might be doubt as to the character of certain articles which the cruiser claims as contraband; the master of the merchant vessel contests this claim, but prefers to deliver them up so as to be at liberty to continue his voyage. This is merely a capture which has to be confirmed by the prize court.

The contraband delivered up by the merchant vessel may hamper the cruiser, which must be left free to destroy it at the moment of handing over or later.

Chapter IV

DESTRUCTION OF NEUTRAL PRIZES

The destruction of neutral prizes was a subject comprised in the programme of the second Peace Conference, and on that occasion no settlement was reached. It reappeared in the programme of the present Conference, and this time agreement has been found possible. Such a result, which bears witness to the sincere desire of all parties to arrive at an understanding, is a matter for congratulation. It has been

shown once more that conflicting hard-and-fast rules do not always correspond to things as they are, and that if there be readiness to descend to particulars, and to arrive at the precise way in which the rules have been applied, it will often be found that the actual practice is very much the same, although the doctrines professed appear to be entirely in conflict. To enable two parties to agree, it is first of all necessary that they should understand each other, and this frequently is not the case. Thus it has been found that those who declared for the right to destroy neutral prizes never claimed to use this right wantonly or at every opportunity, but only by way of exception; while, on the other hand, those who maintained the principle that destruction is forbidden, admitted that the principle must give way in certain exceptional cases. It therefore became a question of reaching an understanding with regard to those exceptional cases to which, according to both views, the right to destroy should be confined. But this was not all: there was need for some guarantee against abuse in the exercise of this right; the possibility of arbitrary action in determining these exceptional cases must be limited by throwing some real responsibility upon the captor. It was at this stage that a new idea was introduced into the discussion, thanks to which it was possible to arrive at an agreement. The possibility of intervention by a court of justice will make the captor reflect before he acts, and at the same time secure reparation in cases where there was no reason for the destruction.

Such is the general spirit of the provisions of this chapter.

Article 48

A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the prize.

The general principle is very simple. A neutral vessel which has been seized may not be destroyed by the captor; so much may be admitted by every one, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize crew will be put on board or not, according to circumstances.

Article 49

As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 *would involve*

danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

The first condition necessary to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. If the captor cannot even hope to obtain the condemnation of the vessel, how can he lay claim to the right to destroy her?

The second condition is that the observance of the general principle would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time. This is what was finally agreed upon after various solutions had been tried. It was understood that the phrase *compromettre la sécurité* was synonymous with *mettre en danger le navire*, and might be translated into English by: *involve danger*. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterwards.

Article 50

Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

This provision lays down the precautions to be taken in the interests of the persons on board and of the administration of justice.

Article 51

A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity, of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.

This claim gives a guarantee against the arbitrary destruction of prizes by throwing a real responsibility upon the captor who has carried out the destruction. The result is that before any decision is given respecting the validity of the prize, the captor must prove that the situation he was in was really one which fell under the head of the exceptional cases contemplated. This must be proved in proceedings to which the neutral is a party, and if the latter is not satisfied with the decision of the national prize court he may take his

case to the International Court. Proof to the above effect is, therefore, a condition precedent which the captor must fulfil. If he fails to do this, he must compensate the parties interested in the vessel and the cargo, and the question whether the capture was valid or not will not be gone into. In this way a real sanction is provided in respect of the obligation not to destroy a prize except in particular cases, the sanction taking the form of a fine inflicted on the captor. If, on the other hand, this proof is given, the prize procedure follows the usual course: if the prize is declared valid, no compensation is due; if it is declared void, the parties interested have a right to be compensated. Resort to the International Court can only be made after the decision of the prize court has been given on the whole matter, and not immediately after the preliminary question has been decided.

Article 52

If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

Article 53

If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Supposing a vessel which has been destroyed carried neutral goods not liable to condemnation: the owner of such goods has, in every case, a right to compensation, that is, without there being occasion to distinguish between cases where the destruction was or was not justified. This is equitable and a further guarantee against arbitrary destruction.

Article 54

The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, *justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed and the formalities duly carried out, the master must be allowed to continue his voyage.*

The provisions of Articles 51 *and* 52 *respecting the obligations of a captor who has destroyed a neutral vessel are applicable.*

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in

Article 40. The captain may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of Article 44, agree to the handing over of the contraband if offered by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to hand over the contraband, and the cruiser is not in a position to take the vessel into a national port. Is the cruiser obliged to let the neutral vessel go with the contraband on board? To require this seemed going too far, at least in certain exceptional circumstances. These circumstances are in fact the same as would have justified the destruction of the vessel, had she been liable to condemnation. In such a case, the cruiser may demand the handing over, or proceed to the destruction, of the goods liable to condemnation. The reasons for which the right to destroy the vessel has been recognized may justify the destruction of the contraband goods, the more so as the considerations of humanity which can be adduced against the destruction of a vessel do not in this case apply. Against arbitrary demands by the cruiser there are the same guarantees as those which made it possible to recognize the right to destroy the vessel. The captor must, as a preliminary, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods handed over or destroyed, and the question whether they were contraband or not will not be gone into.

The Article prescribes certain formalities which are necessary to establish the facts of the case and to enable the prize court to adjudicate.

Of course, when once the goods have been handed over or destroyed, and the formalities carried out, the vessel which has been stopped must be left free to continue her voyage.

Chapter VII

CONVOY

The practice of convoy has, in the past, occasionally given rise to grave difficulties and even to conflict. It is, therefore, satisfactory to be able to record the agreement which has been reached upon the subject.

Article 61

Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information

as to the character of the vessels and their cargoes, which could be obtained by search.

The principle laid down is simple: a neutral vessel under the convoy of a warship of her own nationality is exempt from search. The reason for this rule is that the belligerent cruiser ought to be able to find in the assurances of the commander of the convoy as good a guarantee as would be afforded by the exercise of the right of search itself; in fact, she cannot call in question the assurances given by the official representative of a neutral Government, without displaying a lack of international courtesy. If neutral Governments allow belligerents to search vessels sailing under their flag, it is because they do not wish to be responsible for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation is altered when a neutral Government consents to undertake that responsibility; the right of search has no longer the same importance.

But it follows from the explanation of the rule respecting convoy that the neutral Government undertakes to afford the belligerents every guarantee that the vessels convoyed shall not take advantage of the protection accorded to them in order to do anything inconsistent with their neutrality, as, for example, to carry contraband, render unneutral service to the belligerent, or attempt to break blockade. There is need, therefore, that a genuine supervision should be exercised from the outset over the vessels which are to be convoyed; and that supervision must be continued throughout the voyage. The Government must act with vigilance so as to prevent all abuse of the right of convoy, and must give to the officer who is put in command of a convoy precise instructions to this effect.

A belligerent cruiser encounters a convoy; she communicates with the commander of the convoy, who must, at her request, give in writing all relevant information about the vessels under his protection. A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it pledges to a greater extent the responsibility of the commander. The object of such a declaration is to make search unnecessary by the mere fact of giving to the cruiser the information which the search itself would have applied.

Article 62

If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in

a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

In the majority of cases the cruiser will be satisfied with the declaration which the commander of the convoy will have given to her, but she may have serious grounds for believing that the confidence of the commander has been abused, as for example, that a ship under convoy of which the papers are apparently in order and exhibit nothing suspicious is, in fact, carrying contraband cleverly concealed. The cruiser may, in such a case, communicate her suspicions to the commander of the convoy, and an investigation may be considered necessary. If so, it will be made by the commander of the convoy, since it is he alone who exercises authority over the vessels placed under his protection. It appeared, nevertheless, that much difficulty might often be avoided if the belligerent were allowed to be present at this investigation; otherwise he might still suspect, if not the good faith, at least the vigilance and perspicacity of the person who conducted the search. But it was not thought that an obligation to allow the officer of the cruiser to be present at the investigation should be imposed upon the commander of the convoy. He must act as he thinks best; if he agrees to the presence of an officer of the cruiser, it will be as an act of courtesy or good policy. He must in every case draw up a report of the investigation and give a copy to the officer of the cruiser.

Differences of opinion may occur between the two officers, particularly in relation to conditional contraband. The character of a port to which a cargo of corn is destined may be disputed. Is it an ordinary commercial port? or is it a port which serves as a base of supply for the armed forces? The situation which arises out of the mere fact of the convoy must in such a case be respected. The officer of the cruiser can do no more than make his protest, and the difficulty must be settled through the diplomatic channel.

The situation is altogether different if a vessel under convoy is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection was granted has not been fulfilled. Besides deceiving her own Government, she has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel encountered in the ordinary way and searched by a belligerent cruiser. She cannot complain at being exposed to such rigorous treatment, since there is in her case an aggravation of the offence committed by a carrier of contraband.

Chapter VIII

RESISTANCE TO SEARCH

The subject treated in this chapter was not mentioned in the programme submitted by the British Government in February 1908, but it is intimately connected with several of the questions in that programme, and thus attracted the attention of the Conference in the course of its deliberations; and it was thought necessary to frame a rule upon it, the drafting of which presented little difficulty.

A belligerent cruiser encounters a merchant vessel and summons her to stop in order that she may be searched. The vessel summoned does not stop, but tries to avoid the search by flight. The cruiser may employ force to stop her, and the merchant vessel, if she is damaged or sunk, has no right to complain, seeing that she has failed to comply with an obligation imposed upon her by the law of nations.

If the vessel is stopped, and it is shown that it was only in order to escape the inconvenience of being searched that recourse was had to flight, and that beyond this she had done nothing contrary to neutrality, she will not be punished for her attempt at flight. If, on the other hand, it is established that the vessel has contraband on board, or that she has in some way or other failed to comply with her duty as a neutral, she will suffer the consequences of her infraction of neutrality, but in this case, as in the last, she will not undergo any punishment for her attempt at flight. Expression was given to the contrary view, namely, that a ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was suggested that the prospect of having the escaping vessel condemned as good prize would influence the captain of the cruiser to do his best to spare her. But in the end this view did not prevail.

Article 63

Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

The situation is different if forcible resistance is made to any legitimate action by the cruiser. The vessel commits an act of hostility and must, from that moment, be treated as an enemy vessel; she will therefore be subject to condemnation, although the search may not have shown that

anything contrary to neutrality had been done. So far no difficulty seems to arise.

What must be decided with regard to the cargo? The rule which appeared to be the best is that according to which the cargo will be treated like the cargo on board an enemy vessel. This assimilation involves the following consequences: a neutral vessel which has offered resistance becomes an enemy vessel and the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with Article 3 of the Declaration of Paris, but enemy goods will be condemned, since the rule that *the flag covers the goods* cannot be adduced, because the captured vessel on board which they are found is considered to be an enemy vessel. It will be noticed that the right to claim the goods is open to all neutrals, even to those whose nationality is that of the captured vessel; it would seem to be an excess of severity to make such persons suffer for the action of the master. There is, however, an exception as regards the goods which belong to the owner of the vessel; it seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. *A fortiori* the same rule applies to the goods belonging to the master.

Chapter IX

COMPENSATION

This chapter is of very general application, inasmuch as the provisions which it contains are operative in all the numerous cases in which a cruiser may capture a vessel or goods.

Article 64

If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgement being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

A cruiser has captured a neutral vessel, on the ground, for example, of carriage of contraband or breach of blockade. The prize court releases the vessel, declaring the capture to be void. This decision alone is evidently not enough to indemnify the parties interested for the loss incurred in consequence of the capture, and this loss may have been considerable, since the vessel has been during a period, which may often be a very long one, prevented from engaging in her ordinary trade. May these parties claim to be com-

pensated for this injury? Reason requires that the affirmative answer should be given, if the injury has been undeserved, that is to say, if the capture was not brought about by some fault of the parties. It may, indeed, happen that there was good reason for the capture, because the master of the vessel searched did not produce evidence which ought in the ordinary course to have been available, and which was only furnished at a later stage. In such a case it would be unjust that compensation should be awarded. On the other hand, if the cruiser has really been at fault, if the vessel has been captured when there were not good reasons for doing so, it is just that compensation should be granted.

It may also happen that a vessel which has been captured and taken into a port is released by the action of the executive without the intervention of a prize court. The existing practice, under such circumstances, is not uniform. In some countries the prize court has no jurisdiction unless there is a question of validating a capture, and cannot adjudicate on a claim for compensation based upon the ground that the capture would have been held unjustifiable; in other countries the prize court would have jurisdiction to entertain a claim of this kind. On this point, therefore, there is a difference which is not altogether equitable, and it is desirable to lay down a rule which will produce the same result in all countries. It is reasonable that every capture effected without good reasons should give to the parties interested a right to compensation, without its being necessary to draw any distinction between the cases in which the capture has or has not been followed by a decision of a prize court; and this argument is all the more forcible when the capture may have so little justification that the vessel is released by the action of the executive. A provision in general terms has therefore been adopted, which is capable of covering all cases of capture.

It should be observed that in the text no reference is made to the question whether the national tribunals are competent to adjudicate on a claim for compensation. In cases where proceedings are taken against the property captured, no doubt upon this point can be entertained. In the course of the proceedings taken to determine the validity of a capture the parties interested have the opportunity of making good their right to compensation, and, if the national tribunal does not give them satisfaction, they can apply to the International Prize Court. If, on the other hand, the action of the belligerent has been confined to the capture, it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation, and, if so, what are those tribunals; the International Court

has not, according to the convention of The Hague, any jurisdiction in such a case. From an international point of view, the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered, or on the absence of any tribunal having jurisdiction to entertain it.

The question was raised as to whether it was necessary to draw a distinction between the direct and the indirect losses suffered by vessels or goods. The best course appeared to be to leave the prize court free to estimate the amount of compensation due, which will vary according to the circumstances and cannot be laid down in advance in rules going into minute details.

For the sake of simplicity, mention has only been made of the vessel, but what has been said applies of course to cargo captured and afterwards released. Innocent goods on board a vessel which has been captured suffer, in the same way, all the inconvenience which attends the capture of the vessel; but if there was good cause for capturing the vessel, whether the capture has subsequently been held to be valid or not, the owners of the cargo have no right to compensation.

It is perhaps useful to indicate certain cases in which the capture of a vessel would be justified, whatever might be the ultimate decision of the prize court. Notably, there is the case where some or all of the ship's papers have been thrown overboard, suppressed, or intentionally destroyed on the initiative of the master or one of the crew or passengers. There is in such case an element which will justify any suspicion and afford an excuse for capturing the vessel, subject to the master's ability to account for his action before the prize court. Even if the court should accept the explanation given and should not find any reason for condemnation, the parties interested cannot hope to recover compensation.

An analogous case would be that in which there were found on board two sets of papers, or false or forged papers, if this irregularity were connected with circumstances calculated to contribute to the capture of the vessel.

It appeared sufficient that these cases in which there would be a reasonable excuse for the capture should be mentioned in the present Report, and should not be made the object of express provisions, since, otherwise, the mention of these two particular cases might have led to the supposition that they were the only cases in which a capture could be justified.

APPENDIX B

THE ORDERS IN COUNCIL ADOPTING THE PROVISIONS OF THE DECLARATION OF LONDON

(1) Order in Council adopting, during the present Hostilities, the Provisions of the Convention known as the 'Declaration of London' with Additions and Modifications (Statutory Rules and Orders, 1914, No. 1260).

At the Court at Buckingham Palace, the 20th day of August, 1914.

Present,

The King's Most Excellent Majesty in Council.

Whereas during the present hostilities the Naval Forces of His Majesty will co-operate with the French and Russian Naval Forces, and

Whereas it is desirable that the naval operations of the allied forces so far as they affect neutral ships and commerce should be conducted on similar principles, and

Whereas the Governments of France and Russia have informed His Majesty's Government that during the present hostilities it is their intention to act in accordance with the provisions of the Convention known as the Declaration of London, signed on the 26th day of February, 1909, so far as may be practicable.

Now, therefore, His Majesty, by and with the advice of His Privy Council, is pleased to order, and it is hereby ordered, that during the present hostilities the Convention known as the Declaration of London shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty :—

The additions and modifications are as follows :—

1. The lists of absolute and conditional contraband contained in the Proclamation dated August 4th, 1914, shall be substituted for the lists contained in Articles 22 and 24 of the said Declaration.

2. A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having

carried such contraband if she is encountered before she has completed her return voyage.

3. The destination referred to in Article 33 may be inferred from any sufficient evidence, and (in addition to the presumption laid down in Article 34) shall be presumed to exist if the goods are consigned to or for an agent of the Enemy State or to or for a merchant or other person under the control of the authorities of the Enemy State.

4. The existence of a blockade shall be presumed to be known :—

(*a*) to all ships which sailed from or touched at an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade,

(*b*) to all ships which sailed from or touched at a British or allied port after the publication of the declaration of blockade.

5. Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture to whatever port the vessel is bound and at whatever port the cargo is to be discharged.

6. The General Report of the Drafting Committee on the said Declaration presented to the Naval Conference and adopted by the Conference at the eleventh plenary meeting on February 25th, 1909, shall be considered by all Prize Courts as an authoritative statement of the meaning and intention of the said Declaration, and such Courts shall construe and interpret the provisions of the said Declaration by the light of the commentary given therein.

And the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty, and each of His Majesty's Principal Secretaries of State, the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, all other Judges of His Majesty's Prize Courts, and all Governors, Officers and Authorities whom it may concern, are to give the necessary directions herein as to them may respectively appertain.

Almeric FitzRoy.

(2) THE DECLARATION OF LONDON ORDER IN COUNCIL, No. 2, 1914 (STATUTORY RULES AND ORDERS, 1914, No. 1614).

At the Court at Buckingham Palace, the 29th day of October, 1914.

PRESENT,

The King's Most Excellent Majesty in Council.

Whereas by an Order in Council dated the 20th day of August, 1914, His Majesty was pleased to declare that during the present hostilities the Convention known as the Declaration of London should, subject to certain additions and modifications therein specified, be adopted and put in force by His Majesty's Government; and

Whereas the said additions and modifications were rendered necessary by the special conditions of the present war; and

Whereas it is desirable and possible now to re-enact the said Order in Council with amendments in order to minimize, so far as possible, the interference with innocent neutral trade occasioned by the war:

Now, therefore, His Majesty, by and with the advice of His Privy Council, is pleased to order, and it is hereby ordered, as follows:—

1. During the present hostilities the provisions of the Convention known as the Declaration of London shall, subject to the exclusion of the lists of contraband and non-contraband, and to the modifications hereinafter set out, be adopted and put in force by His Majesty's Government.

The modifications are as follows:—

(i) A neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage.

(ii) The destination referred to in Article 33 of the said Declaration shall (in addition to the presumptions laid down in Article 34) be presumed to exist if the goods are consigned to or for an agent of the enemy State.

(iii) Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order', or if the ship's papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy.

(iv) In the cases covered by the preceding paragraph (iii) it shall lie upon the owners of the goods to prove that their destination was innocent.

2. Where it is shown to the satisfaction of one of His Majesty's Principal Secretaries of State that the enemy Government is drawing supplies for its armed forces from or through a neutral country, he may direct that in respect of ships bound for a port in that country, Article 35 of the said Declaration shall not apply. Such direction shall be notified in the *London Gazette* and shall operate until the same is withdrawn. So long as such direction is in force, a vessel which is carrying conditional contraband to a port in that country shall not be immune from capture.

3. The Order in Council of the 20th August, 1914, directing the adoption and enforcement during the present hostilities of the Convention known as the Declaration of London, subject to the additions and modifications therein specified, is hereby repealed.

4. This Order may be cited as 'the Declaration of London Order in Council, No. 2, 1914'.

And the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty, and each of His Majesty's Principal Secretaries of State, the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, all other Judges of His Majesty's Prize Courts, and all Governors, Officers, and Authorities whom it may concern, are to give the necessary directions herein as to them may respectively appertain.

Almeric FitzRoy.

APPENDIX C

THE CONTRABAND PROCLAMATIONS

(1) Proclamation, dated August 4, 1914, Specifying the Articles to be treated as Contraband of War (Statutory Rules and Orders, 1914, No. 1250).

By the King.

A Proclamation specifying the Articles to be treated as Contraband of War.

George R.I.

Whereas a state of War exists between Us on the one hand and the German Empire on the other:

And whereas it is necessary to specify the Articles which it is Our intention to treat as Contraband of War:

Now, therefore, We do hereby Declare, by and with the advice of Our Privy Council, that during the continuance of

the War or until we do give further public notice the articles enumerated in Schedule I hereto will be treated as absolute contraband, and the articles enumerated in Schedule II hereto will be treated as conditional contraband :—

Schedule I

The following articles will be treated as absolute contraband :—

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.
4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddle, draught, and pack animals suitable for use in war.
8. Articles of camp equipment, and their distinctive component parts.
9. Armour plates.
10. Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
11. Aeroplanes, airships, balloons, and aircraft of all kinds, and their component parts, together with accessories and articles recognizable as intended for use in connexion with balloons and aircraft.
12. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.

Schedule II

The following articles will be treated as conditional contraband :—

1. Food-stuffs.
2. Forage and grain, suitable for feeding animals.
3. Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
4. Gold and silver in coin or bullion ; paper money.
5. Vehicles of all kinds available for use in war, and their component parts.
6. Vessels, craft and boats of all kinds ; floating docks, parts of docks, and their component parts.

7. Railway material, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.
8. Fuel; lubricants.
9. Powder and explosives not specially prepared for use in war.
10. Barbed wire, and implements for fixing and cutting the same.
11. Horse-shoes and shoeing materials.
12. Harness and saddlery.
13. Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

Given at Our Court at Buckingham Palace, this Fourth day of August, in the year of our Lord One thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God save the King.

(2) PROCLAMATION, DATED SEPTEMBER 21, 1914, SPECIFYING CERTAIN ADDITIONAL ARTICLES TO BE TREATED AS CONTRABAND OF WAR (STATUTORY RULES AND ORDERS, 1914, No. 1410).

BY THE KING.

A Proclamation specifying certain additional Articles which are to be treated as Contraband of War.

George R.I.

Whereas on the fourth day of August last We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as Contraband of War during the War between Us and the German Emperor:

And whereas on the twelfth day of August last We did by Our Royal Proclamation of that date extend Our Proclamation aforementioned to the War between Us and the Emperor of Austria, King of Hungary:

And whereas by an Order in Council of the twentieth day of August, 1914, it was ordered that during the present hostilities the Convention known as the Declaration of London should, subject to certain additions and modifications therein specified, be adopted and put in force as if the same had been ratified by Us:

And whereas it is desirable to add to the list of articles to be treated as Contraband of War during the present War:

And whereas it is expedient to introduce certain further modifications in the Declaration of London as adopted and put in force:

Now, therefore, We do hereby Declare, by and with the advice of Our Privy Council, that during the continuance of the War, or until We do give further public notice, the articles enumerated in the Schedule hereto will, notwithstanding anything contained in Article 28 of the Declaration of London, be treated as conditional Contraband.

Schedule.

Copper, unwrought.	Magnetic Iron Ore.
Lead, pig, sheet, or pipe.	Rubber.
Glycerine.	Hides and Skins, raw or rough tanned (but not including dressed leather).
Ferrochrome.	
Haematite Iron Ore.	

Given at Our Court at Buckingham Palace, this Twenty-first day of September, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God save the King.

(3) Proclamation, dated October 29, 1914, Revising the List of Contraband of War (Statutory Rules and Orders, 1914, No. 1613).

By the King.

A Proclamation Revising the List of Contraband of War.

George R.I.

Whereas on the fourth day of August, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband of war during the war between Us and the German Emperor; and

Whereas on the twelfth day of August, 1914, We did by Our Royal Proclamation of that date extend Our Proclamation aforementioned to the war between Us and the Emperor of Austria, King of Hungary; and

Whereas on the twenty-first day of September, 1914, We did by Our Royal Proclamation of that date make certain additions to the list of articles to be treated as contraband of war; and

Whereas it is expedient to consolidate the said lists and to make certain additions thereto:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that the lists of contraband contained in the schedules to Our Royal Proclamations of the fourth day of August and the twenty-first day of September aforementioned are hereby withdrawn, and that in lieu

thereof during the continuance of the war or until We do give further public notice the articles enumerated in Schedule I hereto will be treated as absolute contraband, and the articles enumerated in Schedule II hereto will be treated as conditional contraband.

Schedule I

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.
4. Sulphuric acid.
5. Gun mountings, limber boxes, limbers, military wagons, field forges and their distinctive component parts.
6. Range-finders and their distinctive component parts.
7. Clothing and equipment of a distinctively military character.
8. Saddle, draught, and pack animals suitable for use in war.
9. All kinds of harness of a distinctively military character.
10. Articles of camp equipment and their distinctive component parts.
11. Armour plates.
12. Haematite iron ore and haematite pig iron.
13. Iron pyrites.
14. Nickel ore and nickel.
15. Ferrochrome and chrome ore.
16. Copper, unwrought.
17. Lead, pig, sheet, or pipe.
18. Aluminium.
19. Ferro-silica.
20. Barbed wire, and implements for fixing and cutting the same.
21. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.
22. Aeroplanes, airships, balloons, and aircraft of all kinds, and their component parts, together with accessories and articles recognizable as intended for use in connexion with balloons and aircraft.
23. Motor vehicles of all kinds and their component parts.
24. Motor tyres; rubber.
25. Mineral oils and motor spirit, except lubricating oils.
26. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.

Schedule II

1. Foodstuffs.
2. Forage and feeding stuffs for animals.
3. Clothing, fabrics for clothing, and boots and shoes suitable for use in war.
4. Gold and silver in coin or bullion; paper money.
5. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.
6. Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.
7. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.
8. Fuel, other than mineral oils. Lubricants.
9. Powder and explosives not specially prepared for use in war.
10. Sulphur.
11. Glycerine.
12. Horseshoes and shoeing materials.
13. Harness and saddlery.
14. Hides of all kinds, dry or wet; pigskins, raw or dressed; leather, undressed or dressed, suitable for saddlery, harness, or military boots.
15. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

Given at Our Court at Buckingham Palace, this Twenty-ninth day of October, in the year of our Lord one thousand nine hundred and fourteen, and in the fifth year of Our Reign.

God save the King.

(4) PROCLAMATION, DATED DECEMBER 23, 1914, REVISING THE LIST OF CONTRABAND OF WAR (STATUTORY RULES AND ORDERS, 1914, No. 1775).

BY THE KING.

A Proclamation revising the List of Articles to be treated as Contraband of War.

George R.I.

Whereas on the fourth day of August, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband of war during the war between Us and the German Emperor; and

Whereas on the twelfth day of August, 1914, We did by Our Royal Proclamation of that date extend Our Proclamation aforementioned to the war between Us and the Emperor of Austria, King of Hungary; and

Whereas on the twenty-first day of September, 1914, We did by Our Royal Proclamation of that date make certain additions to the list of articles to be treated as contraband of war; and

Whereas on the twenty-ninth day of October, 1914, We did by Our Royal Proclamation of that date withdraw the said lists of contraband, and substitute therefor the lists contained in the schedules to the said Proclamation; and

Whereas it is expedient to make certain alterations in and additions to the said lists:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that the lists of contraband contained in the schedules to Our Royal Proclamation of the twenty-ninth day of October aforementioned are hereby withdrawn, and that in lieu thereof during the continuance of the war or until We do give further public notice the articles enumerated in Schedule I hereto will be treated as absolute contraband, and the articles enumerated in Schedule II hereto will be treated as conditional contraband.

Schedule I

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.
4. Ingredients of explosives, viz. nitric acid, sulphuric acid, glycerine, acetone, calcium acetate and all other metallic acetates, sulphur, potassium nitrate, the fractions of the distillation products of coal tar between benzol and cresol inclusive, aniline, methylaniline, dimethylaniline, ammonium perchlorate, sodium perchlorate, sodium chlorate, barium chlorate, ammonium nitrate, cyanamide, potassium chlorate, calcium nitrate, mercury.
5. Resinous products, camphor, and turpentine (oil and spirit).
6. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
7. Range-finders and their distinctive component parts.
8. Clothing and equipment of a distinctively military character.
9. Saddle, draught, and pack animals suitable for use in war.
10. All kinds of harness of a distinctively military character.
11. Articles of camp equipment and their distinctive component parts.
12. Armour plates.

13. Ferro alloys, including ferro-tungsten, ferro-molybdenum, ferro-manganese, ferro-vanadium, ferro-chrome.

14. The following metals :—Tungsten, molybdenum, vanadium, nickel, selenium, cobalt, haematite pig-iron, manganese.

15. The following ores :—Wolframite, scheelite, molybdenite, manganese ore, nickel ore, chrome ore, haematite iron ore, zinc ore, lead ore, bauxite.

16. Aluminium, alumina, and salts of aluminium.

17. Antimony, together with the sulphides and oxides of antimony.

18. Copper, unwrought and part wrought, and copper wire.

19. Lead, pig, sheet, or pipe.

20. Barbed wire, and implements for fixing and cutting the same.

21. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

22. Submarine sound signalling apparatus.

23. Aeroplanes, airships, balloons, and aircraft of all kinds, and their component parts, together with accessories and articles recognizable as intended for use in connexion with balloons and aircraft.

24. Motor vehicles of all kinds and their component parts.

25. Tyres for motor vehicles and for cycles, together with articles or materials especially adapted for use in the manufacture or repair of tyres.

26. Rubber (including raw, waste, and reclaimed rubber) and goods made wholly of rubber.

27. Iron pyrites.

28. Mineral oils and motor spirit, except lubricating oils.

29. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.

Schedule II

1. Foodstuffs.

2. Forage and feeding stuffs for animals.

3. Clothing, fabrics for clothing, and boots and shoes suitable for use in war.

4. Gold and silver in coin or bullion ; paper money.

5. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.

6. Vessels, craft, and boats of all kinds ; floating docks, parts of docks, and their component parts.

7. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.

8. Fuel, other than mineral oils. Lubricants.

9. Powder and explosives not specially prepared for use in war.

10. Horseshoes and shoeing materials.

11. Harness and saddlery.

12. Hides of all kinds, dry or wet; pigskins, raw or dressed; leather, undressed or dressed, suitable for saddlery, harness, or military boots.

13. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

Given at Our Court at Buckingham Palace, this Twenty-third day of December, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God save the King.

(5) PROCLAMATION, DATED MARCH 11, 1915, SPECIFYING CERTAIN ADDITIONAL ARTICLES TO BE TREATED AS CONTRABAND OF WAR (STATUTORY RULES AND ORDERS, 1915, No. 205).

BY THE KING.

A Proclamation adding to the List of Articles to be treated as Contraband of War.

George R.I.

Whereas on the twenty-third day of December, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband during the continuance of hostilities or until We did give further public notice, and

Whereas it is expedient to make certain additions to the lists contained in the said Proclamation:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that during the continuance of the war or until we do give further public notice the following articles will be treated as absolute contraband in addition to those set out in the said Royal Proclamation aforementioned:—

Raw wool, tops and noils and woollen and worsted yarns.

Tin, chlorides of tin, tin ore.

Castor oil.

Paraffin wax.

Copper iodide.

Lubricants.

Hides of cattle, buffaloes, and horses; skins of calves, pigs, sheep, goats, and deer; leather, undressed or dressed, suitable for saddlery, harness, military boots, or military clothing.

Ammonia and its salts whether simple or compound; ammonia liquor; urea, aniline, and their compounds.

And We do hereby further declare that the following articles will be treated as conditional contraband in addition to those set out in Our Royal Proclamation aforementioned:—

Tanning substances of all kinds (including extracts for use in tanning).

And We do hereby further declare that the terms 'foodstuffs' and 'feeding stuffs for animals' in the list of conditional contraband contained in Our Royal Proclamation aforementioned shall be deemed to include oleaginous seeds, nuts and kernels; animal and vegetable oils and fats (other than linseed oil) suitable for use in the manufacture of margarine; and cakes and meals made from oleaginous seeds, nuts and kernels.

Given at Our Court at Buckingham Palace, this Eleventh day of March, in the year of our Lord one thousand nine hundred and fifteen, and in the Fifth year of Our Reign.

God save the King.

(6) Proclamation, dated May 27, 1915, making certain further Additions to and Amendments in the List of Articles to be treated as Contraband of War (Statutory Rules and Orders, 1915, No. 507).

By the King.

A Proclamation making certain further Additions to and Amendments in the List of Articles to be treated as Contraband of War.

George R.I.

Whereas on the twenty-third day of December, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband during the continuance of hostilities or until We did give further public notice; and

Whereas on the eleventh day of March, 1915, We did by Our Royal Proclamation of that date make certain additions to the list of articles to be treated as contraband of war; and

Whereas it is expedient to make certain further additions to and amendments in the said list:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that during the continuance of the war, or until We do give further public notice, the following

articles will be treated as absolute contraband in addition to those set out in Our Royal Proclamations aforementioned :—

Toluol, and mixtures of toluol, whether derived from coal-tar, petroleum, or any other source ;

Lathes and other machines or machine-tools capable of being employed in the manufacture of munitions of war ;

Maps and plans of any place within the territory of any belligerent, or within the area of military operations, on a scale of four miles to one inch or on any larger scale, and reproductions on any scale by photography or otherwise of such maps or plans.

And We do hereby further declare that item 4 of Schedule I of Our Royal Proclamation of the twenty-third day of December aforementioned shall be amended as from this date by the omission of the words 'and all other metallic acetates' after the words 'calcium acetate'.

And We do hereby further declare that in Our Royal Proclamation of the eleventh day of March aforementioned the words 'other than linseed oil' shall be deleted and that the following article will as from this date be treated as conditional contraband :—

Linseed oil.

Given at Our Court at Buckingham Palace, this Twenty-seventh day of May, in the year of our Lord one thousand nine hundred and fifteen, and in the Sixth year of Our Reign.

God save the King.

(7) PROCLAMATION, DATED AUGUST 20, 1915, SPECIFYING VARIOUS FORMS OF COTTON TO BE TREATED AS ABSOLUTE CONTRABAND (STATUTORY RULES AND ORDERS, 1915, No. 801).

BY THE KING.

A Proclamation adding to the List of Articles to be treated as Contraband of War.

George R.I.

Whereas on the 23rd day of December, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband during the continuance of hostilities or until We did give further notice ; and

Whereas on the 11th day of March and on the 27th day of May, 1915, We did, by Our Royal Proclamations of those dates, make certain additions to the list of articles to be treated as contraband of war ; and

Whereas it is expedient to make certain further additions to the said lists:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that during the continuance of the war or until We do give further public notice, the following articles will be treated as absolute contraband in addition to those set out in Our Royal Proclamations aforementioned:—

Raw cotton, cotton linters, cotton waste, and cotton yarns.

And We do hereby further declare that this Our Royal Proclamation shall take effect from the date of its publication in the London Gazette.[1]

Given at Our Court at the Royal Pavilion, Aldershot Camp, this Twentieth day of August, in the year of our Lord one thousand nine hundred and fifteen, and in the Sixth Year of Our Reign.

God save the King.

(8) Proclamation, dated October 14, 1915, revising the List of Articles to be treated as Contraband of War (Statutory Rules and Orders, 1915, No. 994).

By the King.

A Proclamation revising the List of Articles to be treated as Contraband of War.

George R.I.

Whereas on the 23rd day of December, 1914, We did issue Our Royal Proclamation specifying the articles which it was Our intention to treat as contraband during the continuance of hostilities or until We did give further public notice; and

Whereas on the 11th day of March, and on the 27th day of May, and on the 20th day of August, 1915, We did, by Our Royal Proclamations of those dates, make certain additions to the lists of articles to be treated as contraband of war; and

Whereas it is expedient to make certain further additions to and amendments in the said lists:

Now, therefore, We do hereby declare, by and with the advice of Our Privy Council, that the lists of contraband contained in the Schedules to Our Royal Proclamation of the 23rd day of December, as subsequently amended by Our Proclamations of the 11th day of March, and of the

[1] This Proclamation was published in the London Gazette of August 21st, 1915, being the second Supplement to the Gazette of August 20th.

27th day of May, and of the 20th day of August aforementioned, are hereby withdrawn, and that in lieu thereof, during the continuance of the war or until We do give further public notice, the articles enumerated in Schedule I hereto will be treated as absolute contraband, and the articles enumerated in Schedule II hereto will be treated as conditional contraband.

Schedule I

1. Arms of all kinds, including arms for sporting purposes, and their component parts.
2. Implements and apparatus designed exclusively for the manufacture of munitions of war, or for the manufacture or repair of arms or of war material for use on land or sea.
3. Lathes and other machines or machine tools capable of being employed in the manufacture of munitions of war.
4. Emery, corundum, natural and artificial (alundum), and carborundum, in all forms.
5. Projectiles, charges, and cartridges of all kinds, and their component parts.
6. Paraffin wax.
7. Powder and explosives specially prepared for use in war.
8. Materials used in the manufacture of explosives, including:—Nitric acid and nitrates of all kinds; sulphuric acid; fuming sulphuric acid (oleum); acetic acid and acetates; barium chlorate and perchlorate; calcium acetate, nitrate and carbide; potassium salts and caustic potash; ammonium salts and ammonia liquor; caustic soda, sodium chlorate and perchlorate; mercury; benzol, toluol, xylol, solvent naphtha, phenol (carbolic acid), cresol, naphthalene, and their mixtures and derivatives; aniline, and its derivatives; glycerine; acetone; acetic ether; ethyl alcohol; methyl alcohol; ether; sulphur; urea; cyanamide; celluloid.
9. Manganese dioxode; hydrochloric acid; bromine; phosphorus; carbon disulphide; arsenic and its compounds; chlorine; phosgene (carbonyl chloride); sulphur dioxide; prussiate of soda; sodium cyanide; iodine and its compounds.
10. Capsicum and peppers.
11. Gun mountings, limber boxes, limbers, military waggons, field forges, and their component parts; articles of camp equipment and their component parts.
12. Barbed wire and the implements for fixing and cutting the same.
13. Range-finders and their component parts; searchlights and their component parts.

14. Clothing and equipment of a distinctively military character.

15. Saddle, draught, and pack animals suitable, or which may become suitable, for use in war.

16. All kinds of harness of a distinctively military character.

17. Hides of cattle, buffaloes, and horses; skins of calves, pigs, sheep, goats, and deer; and leather, undressed or dressed, suitable for saddlery, harness, military boots, or military clothing; leather belting, hydraulic leather, and pump leather.

18. Tanning substances of all kinds, including quebracho wood and extracts for use in tanning.

19. Wool, raw, combed or carded; wool waste; wool tops and noils; woollen or worsted yarns; animal hair of all kinds, and tops, noils and yarns of animal hair.

20. Raw cotton, linters, cotton waste, cotton yarns, cotton piece goods, and other cotton products capable of being used in the manufacture of explosives.

21. Flax; hemp; ramie; kapok.

22. Warships, including boats and their component parts of such a nature that they can only be used on a vessel of war.

23. Submarine sound-signalling apparatus.

24. Armour plates.

25. Aircraft of all kinds, including aeroplanes, airships, balloons and their component parts, together with accessories and articles suitable for use in connexion with aircraft.

26. Motor vehicles of all kinds and their component parts.

27. Tyres for motor vehicles and for cycles, together with articles or materials especially adapted for use in the manufacture or repair of tyres.

28. Mineral oils, including benzine and motor spirit.

29. Resinous products, camphor and turpentine (oil and spirit): wood tar and wood-tar oil.

30. Rubber (including raw, waste, and reclaimed rubber, solutions and jellies containing rubber, or any other preparations containing rubber, balata, and gutta-percha, and the following varieties of rubber, viz.:—Borneo, Guayule, Jelutong, Palembang, Pontianac, and all other substances containing caoutchouc), and goods made wholly or partly of rubber.

31. Rattans.

32. Lubricants.

33. The following metals:—Tungsten, molybdenum, vanadium, sodium, nickel, selenium, cobalt, haematite pig-iron, manganese, electrolytic iron, and steel containing tungsten or molybdenum.

34. Asbestos.

35. Aluminium, alumina, and salts of aluminium.

36. Antimony, together with the sulphides and oxides of antimony.

37. Copper, unwrought and part wrought; copper wire; alloys and compounds of copper.

38. Lead, pig, sheet, or pipe.

39. Tin, chloride of tin, and tin ore.

40. Ferro alloys, including ferro-tungsten, ferro-molybdenum, ferro-manganese, ferro-vanadium, and ferro-chrome.

41. The following ores:—Wolframite, scheelite, molybdenite, manganese ore, nickel ore, chrome ore, haematite iron ore, iron pyrites, copper pyrites and other copper ores, zinc ore, lead ore, arsenical ore, and bauxite.

42. Maps and plans of any place within the territory of any belligerent, or within the area of military operations, on a scale of 4 miles to 1 inch or any larger scale, and reproductions on any scale, by photography or otherwise, of such maps or plans.

Schedule II

1. Foodstuffs.

2. Forage and feeding stuffs for animals.

3. Oleaginous seeds, nuts and kernels.

4. Animal, fish, and vegetable oils and fats, other than those capable of use as lubricants, and not including essential oils.

5. Fuel, other than mineral oils.

6. Powder and explosives not specially prepared for use in war.

7. Horseshoes and shoeing materials.

8. Harness and saddlery.

9. The following articles, if suitable for use in war:—Clothing, fabrics for clothing, skins and furs utilizable for clothing, boots and shoes.

10. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.

11. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.

12. Vessels, craft, and boats of all kinds; floating docks and their component parts; parts of docks.

13. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

14. Gold and silver in coin or bullion; paper money.

Given at Our Court at Buckingham Palace, this fourteenth day of October, in the year of our Lord one thousand nine hundred and fifteen, and in the Sixth year of Our Reign.

God save the King.

APPENDIX D

CIRCULAR OF THE DEPARTMENT OF STATE OF THE UNITED STATES WITH REFERENCE TO NEUTRALITY AND TRADE IN CONTRABAND (ISSUED OCTOBER 15, 1914).

The Department of State has received numerous inquiries from American merchants and other persons as to whether they could sell to governments of nations at war contraband articles without violating the neutrality of the United States, and the Department has also received complaints that sales of contraband were being made on the apparent supposition that they were unneutral acts which this Government should prevent.

In view of the number of communications of this sort which have been received it is evident that there is a widespread misapprehension among the people of this country as to the obligations of the United States as a neutral nation in relation to trade in contraband and as to the powers of the executive branch of the government over persons who engage in it. For this reason it seems advisable to make an explanatory statement on the subject for the information of the public.

In the first place it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, &c., or are foodstuffs, clothing, horses, &c., for the use of the army or navy of the belligerent.

Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale.

Neither the President nor any executive department of the government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of a belligerent. There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighbouring American Republics Congress has given the President power to proclaim an embargo on arms and ammunition when in his judgement it would tend to prevent civil strife.

For the Government of the United States itself to sell to a belligerent nation would be an unneutral act, but for a private individual to sell to a belligerent any product of the United States is neither unlawful nor unneutral, nor within the power of the Executive to prevent or control.

The foregoing remarks, however, do not apply to the outfitting or furnishing of vessels in American ports or of military expeditions on American soil in aid of a belligerent. These acts are prohibited by the neutrality laws of the United States.

APPENDIX E

ORDER IN COUNCIL FRAMING REPRISALS FOR RESTRICTING FURTHER THE COMMERCE OF GERMANY (STATUTORY RULES AND ORDERS, 1915, No. 206).

At the Court at Buckingham Palace, the 11th day of March 1915.

PRESENT,
The King's Most Excellent Majesty in Council.

Whereas the German Government has issued certain Orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare;

And whereas in a memorandum accompanying the said Orders neutrals are warned against entrusting crews, passengers, or goods to British or allied ships;

And whereas such attempts on the part of the enemy give to His Majesty an unquestionable right of retaliation;

And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will

be enforced without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity;

And whereas the Allies of His Majesty are associated with Him in the steps now to be announced for restricting further the commerce of Germany:

His Majesty is therefore pleased, by and with the advice of His Privy Council, to order and it is hereby ordered as follows:—

I. No merchant vessel which sailed from her port of departure after the 1st March, 1915, shall be allowed to proceed on her voyage to any German port.

Unless the vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not being contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

II. No merchant vessel which sailed from any German port after the 1st March, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.

All goods laden at such port must be discharged in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just.

Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper Officer of the Crown.

III. Every merchant vessel which sailed from her port of departure after the 1st March, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms

ns the Court may in the circumstances deem to be just, to the person entitled thereto.

Provided that this Article shall not apply in any case falling within Articles III or IV of this Order.

IV. Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods at a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances think fit.

Provided that no proceeds of the sale of such goods shall be paid out of Court until the expiration of such period as the applicant, or the proper Officer of the Crown, may be allowed to show that the goods had become neutral property before the issue of this Order.

Provided also that nothing herein shall prevent the claim of neutral property of enemy origin on the part of the proper Officer of the Crown.

V.—(1) Any person claiming to be interested in or to have any claim in respect of any goods (not being contraband of war) placed in the custody of the Marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper Officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

(2) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order.

VI. A merchant vessel which has cleared for a neutral port from a British or allied port, and which has been allowed to pass having first touched at a possible destination for a neutral port, and proceeds to an enemy port, shall, if captured on any subsequent voyage, be liable to condemnation.

VII. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order.

VIII. Nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in Germany and belonging to German subjects shall enjoy the protection of its flag.

Almeric FitzRoy.

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