CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian institute for Historical Microreproductions / Institut canadian de microreproductions historiques

Technical and Bibliographic Notes / Notes technique et bibliographiques

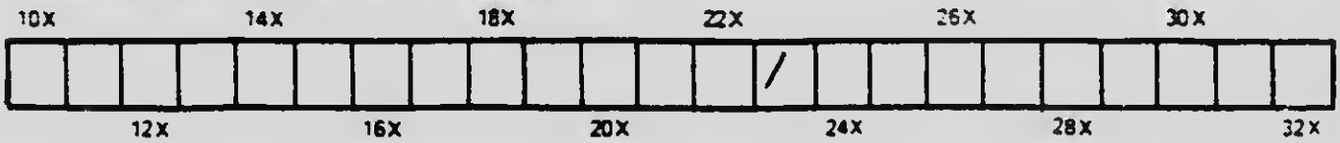
The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

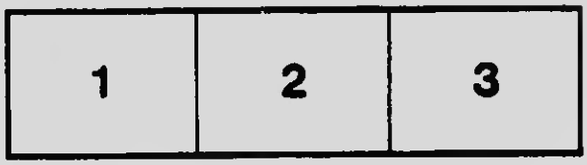
- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☐ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments / Commentaires supplémentaires:

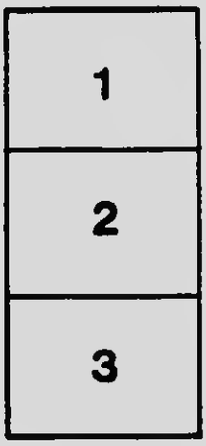
L'Institut a microfilmé le meilleur examplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

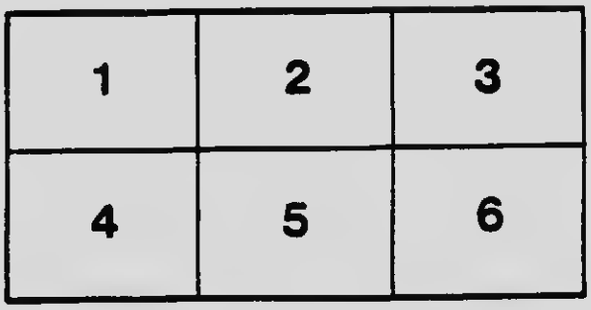
- ☐ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☑ Showthrough / Transparence
- ☐ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary material / Comprend du matériel supplémentaire
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been retilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- ☐ Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleur image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.



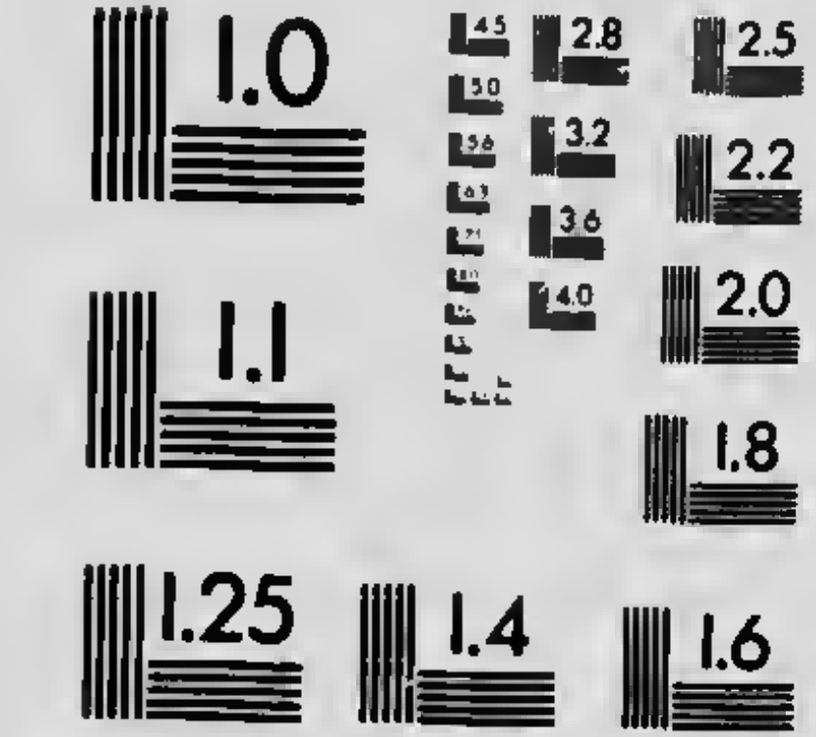






MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 48[illegible]00 - Phone
(716) [illegible] - Fax

CANADIAN BAR ASSOCIATION

ADDRESS

BY

RIGHT HON. VISCOUNT FINLAY OF NAIRN

WINNIPEG, AUGUST 28, 1919

Gentlemen,

Will you allow me in the first place to express to you my strong sense of the honour you have done me in inviting me to take part in this meeting of the Canadian Bar. This is my first visit to Canada, and it could not have been made under better auspices. Indeed, I feel that in Canada I am not altogether a stranger. For many years past it has been my privilege when at the Bar to meet before our great Imperial Tribunal—the Judicial Committee of the Privy Council—many members of your Bar, and I value more than I can tell you the good feeling springing from our intercourse in London on such occasions which has prompted you to invite me to this great gathering. I may add that I almost feel as if visiting a country to a great extent already known to me. I think I have had the honour of conducting cases at the Privy Council on appeals from all Provinces of this great Dominion. Though I have never on any previous occasion crossed the Atlantic, in spirit I have visited every part of it, and from whatever Province appeal was going on, I almost felt as if for the time my domicile were there.

I had the honour of having as my fellow passengers across the Atlantic a large body of Canadian soldiers on their way back to their homes. Your troops have indeed covered themselves with glory. They inspired the Germans with a most wholesome dread of their prowess, and in every British household the records of their daring, their constancy and their successes have been read with pride and with exultation. Your fellow countrymen in England recognize to the full what they owe to Canada.

The great war from which we have just emerged triumphantly, has indeed made us realise, as we never realised before, the essential unity of the British Empire, that great fact in the History of the Nations. In old days we used to hear criticism as to the slightness of the tie which holds the Empire together. Where are such criti-

cisms now? The War has made us realise that the strength of the bond that unites us is that it is not too rigid. Outside of the British Isles the Empire comprises a group of mighty nations, great already, and destined to become still g eater in the future. The mere looseness of the constitutional tie is what makes it so strong. We are united in devotion to the King, the head of the Empire, in the love of freedom, and in the determination to hand down unimpaired to our children that magnificent heritage which our ancestors have bequeathed to us. During this War we have learned to appreciate as we never before appreciated the value of the Crown as the golden link of Empire, and all alike revere the King as at once the symbol of the essential unity of the empire and the bond which secures it. Never has there been a welcome more enthusiastic than that extended by the people of the Dominion to the Heir to the Crown now among us!

Many proposals have been made for drawing closer the legal and constitutional ties between the different parts of the Empire. It is interesting to recall the suggestion made on this subject by Adam Smith in the "Wealth of Nations." That great work appeared in March, 1775—the year in which, some months later, the Declaration of Independence of the American Colonies was made. Adam Smith was writing at the time of the difficulties between the Mother Country and our Colonies, which ended in the establishment of that mighty Republic which has in this War thrown its vast resources into the struggle for freedom and civilization now so triumphantly closed. He proposed as a solution of these difficulties that the Colonies should be represented in the Imperial Parliament. "The Assembly," he said, "which deliberates and decides concerning the affairs of every part of the Empire in order to be properly informed ought certainly to have representatives from every part of it." He pointed out that objections might be raised to any such scheme by those on the other side of the Atlantic, on the ground of their distance from the seat of Government, but he observed that time might cure this difficulty by the natural transfer of the seat of Empire from Great Britain to America as the latter increased in wealth and importance. It is indeed interesting for us in the year 1919 to recollect what Adam Smith said on this subject in 1775: "The distance of America from the seat of Governmen., the natives of that country might flatter themselves with some appearance of reason, would not be of very long continuance. Such has hitherto been the rapid progress

of that country in wealth, population and improvement, that in the course of little more than a century perhaps the produce of American might exceed that of British taxation. The seat of the Empire would then naturally remove itself to that part of the Empire which contributed most to the general support and defence of the whole."

It would be difficult for most Britons to contemplate this solution with the philosophic serenity with which Adam Smith propounded it, and I think we may say that we have found a more excellent way. We have moved far since 1775 and the War has made us realise more clearly than before from what point the question of closer union should be approached. You all know what a great part Canadian Statesmen have played in the Councils of the Empire during this war. Sir Robert Borden has returned to Canada after conspicuous service to the Empire during nearly the whole of that momentous struggle which has just ended. Those meetings of the Statesmen of the various parts of the Empire will, we all believe, be continued, and out of them will grow a permanent Council for Imperial Affairs. This is the solution to which Lord Beaconsfield—Mr. Disraeli—pointed in a speech made so long ago as June, 1872. While the Parliaments remain separate (and for myself I may say that I regard the difficulties in the way of fusion of Parliaments as insuperable) the Empire will be the gainer by the fact that Canada with the other great Dominions has a permanent place in Council in matters that affect the common interests of all.

In an Assembly like this of Lawyers, I cannot fail to say a few words on one Imperial Institution which is a striking illustration of our unity. The Judicial Committee of the Privy Council is in itself a most notable link of Empire. I should recommend any foreigner who visited London and wished to have some idea of what the British Empire is, to spend some days in making acquaintance with the work of the Judicial Committee. He would hear argued and decided cases coming from every quarter of the Globe. The systems of law which are there administered are many and various. The problems presented before the Tribunal vary infinitely. Many races, many religions, many stages of civilization, pass in review before the Judicial Committee, and in the Chamber where it sits the foreigner will get a vivid idea of the vastness of the Empire, and will realise that it rests upon the adoption and maintenance of Local Laws, upon respect for the

religions of all, and upon that freedom which British Rule has ever carried with it. I believe that Canada appreciates to the full the advantages which flow from the appeal to the King in Council. May I add the expression of a pious hope that a Court so great may before long be more worthily housed?

The opinion has been sometimes expressed that the House of Lords enjoys a position in some way superior to that held by the Privy Council. This is based on the idea that as the House of Lords has on some occasions declined to follow opinions expressed in Judgments of the Privy Council, it is to be considered as more emphatically a Supreme Tribunal. This view proceeds from a misapprehension. Each of these two great Tribunals is supreme in its own province. The Judicial Committee is the final Tribunal for deciding questions of law from every part of the Empire outside of Great Britain, and no appeal lies from its decisions, and the House of Lords, of course, recognises them as final. It sometimes, however, may happen that the Judicial Committee, in ascertaining the law applicable to the case under appeal, may refer to its view of English or Scottish law upon the point as a reason for the conclusions at which it arrives. Such a view is, of course, not binding on the House of Lords, or indeed on any English Tribunal, any more than a statement as to the law (say) of Canada or Australia made in the House of Lords, by way of illustration of an English or Scottish case, would be binding on the Judicial Committee when they have to decide n Canadian or Australian appeal.

The Judicial Committee is in every sense of the word a Supreme Tribunal, without any superior in dignity and importance. When appeals are brought before the King in Council, it is recognised I think in all our dominions, as it is in Great Britain itself, that there is no more august tribunal in the world.

I do not propose to enter into the question, on which a great deal has been said, of replacing both the House of Lords and the Judicial Committee by a new and Imperial Tribunal. My own impression is that we should be cautious about making experiments in this direction, and that if any such change were made we should be fortunate if we found that under new names we had tribunals as effective as those which have so long acted as our Supreme Courts of Appeal.

When we turn from the internal affairs of our Empire to a consideration of the relations of nations to one an-

other, and of International law, we cannot fail to be impressed by the profound effect which the War has had upon them. It is not too much to say that this War threatened the entire abolition of all International Law. If Germany had triumphed, Treaties would have become mere scraps of paper; the right of the strongest would have superseded all those rules which for centuries have been recognized as International Law, and which, with indeed an imperfect sanction, have had for their object the mitigation of the horrors of war. If the Germans had had their way, we should have witnessed the substitution for *any* system of International Law, of what is the German code upon the subject, expressed in anticipation by the poet Wordsworth in the words he put into the mouth of "Rob Roy," the Highland freebooter—

> "The good old rule
> Sufficeth them, the simple plan
> That they should take who have the power
> And they should keep who can.
>
> "All freakishness of mind is checked,
> He tamed who foolishly aspires,
> While to the measure of his might
> Each fashions his desires."

International relations would have become a scramble of wild beasts, and the post of Professor of International Law would have been almost a sinecure.

Grotius in the preface to his immortal work "De Jure Belli et Pacis" tells us that it was the spectacle of the horrors presented by the 30 Years' War that led him to write upon the Law of Nations. He says that he had many and grave reasons for drawing up a statement of that "jus commune which is a force with regard to war and in war," and he gives his reasons for undertaking the task in the following memorable words (I quote from Dr. Whewell's translation):—

> "I saw prevailing throughout the Christian World a license in making war of which even barbarous nations would have been ashamed;
>
> recourse being had to arms for slight reasons or no reason and when arms were once taken up all reverence for Divine and human law was thrown away just as if men were henceforth authorised to commit all crimes without restraint."

The original is even more emphatic. Its language is so terse and nervous and is so applicable to what we our-

selves have witnessed during the last four years that I may be pardoned for quoting it:—

> *"Videbam per Christianum orbem vel barbaris "gentibus pudendam bellandi licentiam, levibus "aut nullis de causis ad arma procurri, quibus "semel sumtis nullam jam divini, nullam humani "juris reverentiam, plane quasi uno edicto ad "omnia scelera emisso furore."*

These words were written of the Thirty Years' War in the 17th Century. Could there be a more perfect description of German methods in the twentieth? Fortunately Germany has been defeated. The catastrophe of a return to barbarism has been averted and International Law still breathes!

It is interesting to recall, in view of recent discussions in Paris and throughout Europe, that Grotius, the father of International Law, was an ardent advocate of International arbitration as a means of preventing war.

He says that Christian Kings and States are bound to take this means for avoiding recourse to arms, and he goes on to use language of which what we have heard lately at Paris and throughout Europe is an echo:—

> "And both for this reason and for others, it "would be useful, and indeed it is almost necessary, "that certain Congresses of Christian Powers "should be held, in which the controversies which "arise among some of them may be decided by "others who are not interested; and in which "measures may be taken to compel the parties to "accept peace on equitable terms."

The aspirations of Grotius in this respect have in the Covenant of the League of Nations received an extension beyond his most sanguine hopes. Let me remind you of the objects of that Covenant as recited in the document itself which stands in the forefront of the Treaty of Peace. They are:—

> "To promote international co-operation and to achieve international peace and security
>
> by the acceptance of obligations not to resort to war,
>
> by the prescription of open, just, and honourable relations between nations,
>
> by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and,

by the maintenance of justice and a scrupulous respect for all Treaty obilgations in ths deallngs of organised peopies with one another."

For these high purposes it is agreed that armaments are to be reduced and that any danger of war shall be a matter of concern to the whole League. Differences between nations are to be settied by arbitration or by the Councii of the League. There is to be—and to thls I cail your particuiar attention—a Permanent Court of Internationai Justice for the settiement of Internationai Disputes, and that Court may aiso give advisory opinions on any questions referred to it by the Councii or by the Assembiy of the League. Provision is made for the Revision of Treaties and for the issue of Mandates for the tutelage of iess advanced Races which have hitherto too often been the prey of the stronger.

Thls Covenant marks, we hope, the opening of a new era. Wlth what feeiings wouid the father of Internationai Law have haiied the daw of what we trust is a brighter day ln thc history of th world. The weak point about International Law has ai..ays been the absence of any effective sanction to ensure its observance as between nations. If the League of Nations be worked in a manner worth of the spirit in which it has been framed, the Court of Internationai Justice wiii have behin.. forces which hardly any wiii dare to defy.

The principies of Internationai Law are imniortai, but this war has raised new questions as to their appiication. To some of these questions I desire briefly to draw your attention.

New spheres of wariike activity in the *air* and *under the surface of the sea* have been deveioped and changed circumstances have raised *new problems as to war on sea and on land*. You will, I hope, pardon me for directing your attention in short compass to some of these matters under the three heads that I have mentioned:

I. I propose first to deal with the AIR, the most novel and not the least interesting sphere of wariike operations.

Man's mastery of the air has during the iast five years advanced by ieaps and bounds. The idea that man might fly was iong regarded as appropriate oniy to the region of fabie. *Expertus vacuum Daedalus aera Pennis non homini datis.* You may remember that in "Rasseias" Dr. Johnson introduces an artist who iaboured under the de-

lusion that he had mastered the art of flight and offered to initiate the Prince into his secret on condition that he should promise never to divulge it. "Why," said Rasselas, "should you envy others so great an advantage?" "If men were all virtuous," returned the artist, "I should with great alacrity teach them all to fly. But what would be the security of the good if the bad could at pleasure invade them from the sky? Against an army sailing through the clouds neither walls nor mountains nor seas could afford security." "The Prince promised secrecy and waited for the performance, not wholly hopeless of success. In a year the wings were finished, and on a morning appointed the maker appeared furnished for flight on a little promontory; he waved his pinions a while to gather air, then leapt from his stand and in an instant dropped into the lake. His wings, which were of no use in the air, sustained him in the water and the Prince drew him to land half dead with terror and vexation."

I remember well how an expert in patents expressed to me his regret that a great inventor was turning his attention to flying — a mere waste of time my friend thought, as the problem was impossible of solution. How far have we travelled since then! "The nations' airy navies grappling in the central blue"—the dream of the poet—has become a terrible reality. The Air has been conquered for the purposes of War and of Peace, and International lawyers are busy in drawing up codes to regulate its use.

At the meetings of the Institute of International Law in 1902 and 1911, there was raised a fundamental question as to the extent of sovereignty in the air above any territory. Has the Sovereign power of any country the right to treat it as an invasion of its sovereign rights, if any airship passes through the air above that country without the leave of its Rulers? There was much controversy on this subject, but it is now settled that the answer must without any doubt whatever be in the affirmative.

Light upon this question was sought by the consideration of the rights which a private owner of land has with regard to the air above him. Lord Ellenborough, in a case tried before him at Nisi Prius said that it was not a trespass to interfere with the column of air above any close, and added that if it were it would follow that an aeronaut is liable to an action of trespass at the suit of the occupier of every field over which his balloon

passes in the course of his voyage. He added that if any damage arises from such transit over the close, the remedy would be by action on the case, not by action of trespass. Mr. Justice Blackburn said with regard to these remarks of Lord Ellenborough, that he understood the good sense of his view, but not the legal reason for it. There is a great deal of authority on the subject which is collected in a most interesting work on the "Law of the Air," first published in 1911, by Mr. Harold Hezeltine, professor of law at the University of Cambridge.

Whatever in point of strict law are the rights of the owner of land in England with respect to the air above it, it is out of the question that any one owner should have it in his power to prevent the passage of airships through the air over his land, unless indeed it takes place near the surface or otherwise under such circumstances as to amount to a nuisance. The practice of aeronautics is recognised as essential to the safety of this country, and if any cantakerous owner showed a disposition to carry the rights of property in this respect to their logical conclusion by stopping aviation, a remedy would doubtless be found if necessary by legislation supplementary to that already in force. But no such considerations apply in favour of authorising any interference with the control by a State over the air above its territories. It is essential for the safety of any territory that the Sovereign power should have complete control of the air over it. The principle is the same as that which gives control over what are known as the Territorial Waters; it is necessary for national safety. It has been urged that as the ocean is free to all, the air should be free also to all. There is no analogy whatever in such matters between the air and the ocean. The conditions are absolutely different and the difference has been recognised in practice throughout this War. It has been admitted over and over again that it is an infringement of the territory of a neutral that a belligerent airship should pass through the air over it. During the recent War this has been uniformly asserted and never contested. From aeroplanes bombs might be dropped, and the safety of the country demands that its Government should have the right to prevent all passage by alien aeroplanes over its surface. It may be conceded that it is desirable that the right to innocent passage through the air should be granted to the subjects of friendly nations. But the right of granting or withholding such consent must be vested in the Sovereign of the territory in question. He may in the absence of Conven-

tion impose upon the grant of a license such conditions as in his absolute discretion he thinks proper. Conventions on this subject have been made and no doubt will be made in the future—the Treaty of Peace with Germany supplies an example—but the right of passage must in every case depend, apart from Convention, upon the pleasure of the sovereign power. The 1st Article of the Convention as to the Air, recently agreed by Representatives of the Allied Powers, which has been published and now awaits ratification, provides that "every State has complete and exclusive sovereignty in the airspace above "its territory and territorial waters." The Convention goes on to make provision for according in time of peace freedom of innocent passage, subject to the conditions prescribed by its articles.

In connection with aviation some questions of International Law have been raised which are curious, perhaps, rather than important. A code was, I am informed, actually drawn up with regard to the air which contains provisions for determining the nationality of children born in an aeroplane, and perhaps some future jurist may make provision for the celebration of marriage under such circumstances.

It is impossible to touch upon the subject of the air in war without referring to air-raids as we have known them in England. With such raids London during the War became painfully familiar. It was an education for the people of London as to German methods of warfare. I happen to know of the case of a child of very tender years, who had been born shortly after the commencement of the War, to whom her mother was explaining as she best could during a thunder-storm what a thunder-storm is. The child said: "I suppose it is a sort of air-raid in the skies." Five years ago who would have dreamed that English children would be more familiar with bombs dropped from aeroplanes than with thunder-storms, and that a little girl should recur to her recollection of air-raids to form an idea of the rationale of a thunder-storm? War is indeed a strange schoolmaster!

These air-raids were not carried on for military purposes. The pretence that they were was a piece of transparent hypocrisy. Such raids had no analogy with the bombardment of a besieged fortress with a view to compel its submission. Neither London nor any of the British towns victimised by such outrages were ever besieged. Indeed a siege by aeroplane is impossible. The real object was to cause destruction, and, by destruction of

human life and property, to induce panic in the population. Such enterprises are branded by International Law as wholly unjustifiable and we may look forward to precautions being taken in the way of International agreement for the imposition of the severest penalties for outrages of this description, so as to render them impossible in any later war. The murder of women and children, and the wanton destruction of property not demanded by the necessities of war can never be justifiable. Such outrages would inevitably lead to reprisals and it is shocking to think of a war conducted systematically by these methods. I cannot do better than quote in this connection the words used by Sir Erle Richards, the Chichele Professor of International Law at Oxford, whose acquaintance many of you have no doubt made at the Bar of the Judicial Committee of the Privy Council. In a Lecture delivered before the University of Oxford on "Some Problems of the War" so long ago as the 30th October, 1915, Sir Erle Richards said:—

> "If the indiscriminate murder of the civil population and the general destruction of civil property is to continue, then in future wars we should have every belligerent equipped with a fleet of airships and the inhabited portions of every enemy territory will be ravaged by bombs dropped from the clouds. The aim of the laws of war has been to alleviate as much as possible the calamities of war and to confine the military operations of belligerents to the weakening of the military forces of the enemy: to spare non-combatants in the interests of humanity. But this kind of warfare is a complete reversal of that policy."

By its air-raids Germany succeeded in this last war in throwing into the shade even the horrors of the Thirty Years' War. The universal abhorrence which these methods excited in every quarter of the globe should secure the world against their repetition.

II. I turn to the subject of SUBMARINE WARFARE which has of late assumed such prominence. There is, of course, no objection from the point of view of International Law, to the employment of submarines for the destruction of the enemy's vessels of war, but there is every objection to their employment for the destruction of merchant vessels.

The merchant vessels of the enemy are subject to capture and condemnation as prizes. But the destruction of

such merchant vessels is not permitted except under very special circumstances, and then only when the safety of the crew and passengers can be secured. To sink such a vessel without warning is mere murder. You all remember the thrill of horror which went through the world when the "Lusitania" was sent to the bottom by German torpedoes. It is strange indeed to reflect that the news of this great crime was received with rapture and exultation in Germany, and it is even said that the Iron Cross was bestowed upon the criminals. If this be true, the Iron Cross has indeed become a badge of infamy. Even when warning was given, it was an outrage to sink a merchantman in mid-ocean. The sufferings imposed upon the crews and passengers who had to take to the boats are untold. How many women and children must have died of cold and exposure!

It must be remembered that the sinking of British merchantmen by German submarines was carried on systematically. It was a new form of wickedness and was regarded by popular sentiment here as piracy. The fact that this wickedness was perpetrated under the orders of the German Government prevents it from being piracy in the eye of the law. The essence of the crime of piracy is that it is carried on by persons not authorized by any established Government. This is, however, a crime which no order ought to be allowed to justify. It is to the shame of Germany that such orders were given, and it must be part of the Law of Nations for the future that those who obey such orders cannot plead them as exempting them from the doom of pirates.

What I have said on this topic applies with even greater force if the merchantman sunk be a neutral. If a neutral vessel be engaged in carrying contraband or in running a blockade, it may be seized and condemned, but the Germans systematically sent neutral vessels to the bottom, if they regarded them as engaged in trade with this country or in any traffic which could be for the benefit of the Allied Powers.

It is a fatal objection to the employment of submarines against merchantmen that a submarine in practice cannot take prizes. She can destroy but she has not the means of bringing any vessels into port for trial and condemnation in due course of law. This consideration is enough to stamp the employment of submarines against merchantmen as unlawful.

III. I pass on to consider certain PROBLEMS which have come to the front during the recent war as regards the conduct of hostilities both on land and by sea.

We have heard a great deal lately about the "Freedom of the Seas." It is urged by some that such freedom does not exist unless it is recognized that private property cannot be captured at sea. I do not pause to consider how far it is true that private property is exempt from seizure on land. Very slight enquiry would reveal a formidable list of exceptions to the supposed immunity. But this mode of stating the question involves a misconception. The property of the enemy is seized at sea, because this is the only means of preventing the enemy from carrying on trade during war. It is one of the most effective means of crippling the enemy that his commerce should be destroyed. The only available means of preventing the enemy from increasing his resources during war by commerce is by rendering enemy property found at sea liable to condemnation. The capture of private property is not an end in itself. It is merely the means, and it is the only means, of preventing the enemy from enriching himself by trade during war. The enemy is not permitted to carry on trade on land during war. Its prohibition by land and by sea is one of the most potent weapons for reducing the enemy to submission as has been shown by the experience of all wars and very notably by what has happened during the war which has just ended.

It appears to me to be a mere dream to suppose that trade can go on unfettered during war precisely as in peace. Let us concentrate our energies on securing that the means used to check enemy trade shall not be inhuman, but shall be in conformity with the well understood rules of International Law. Liability to capture and condemnation is the true and only sanction. Freedom of the seas consists in making it impossible that in the endeavour to check enemy trade such murderous means should be employed as those with which the Germans during this War have made us so painfully familiar. Do not let us lose the reality in pursuit of a phantom.

The effect of the War upon the rights and liabilities of neutrals depends very largely upon the doctrine of CONTRABAND OF WAR. No subject has bulked more largely in Treaties on International Law in time of war than that of contraband. The principles which have been laid down are sound, but the experience of modern conditions of warfare shows that there must be some modifica-

tion of the canons which have hitherto governed their application. The experience of this war has brought out very clearly two points:

(1) The great difficulty which exists under modern conditions as to carrying out in practice the distinction between conditional and absolute contraband, and

(2) The necessity of having regard to the ultimate destination of the goods, or as it is sometimes called, the doctrine of continuous voyage.

I desire to say a few words upon these two points. It is to Grotius that we owe that threefold division with reference to questions of contraband which is now so familiar. "In the first place," he says, "we must make a distinction as to the things supplied. For there are some articles of supply which are useful in war only, as arms. Others which are of no use in war, but are only luxuries. Others which are useful both in war and out of war, as money, provisions, ships and their furniture."

The first observation to be made with regard to this division, is that the application of science to warfare, which has been so strikingly exemplified during the recent war, has greatly increased the number of articles which have now become *ancipitis usûs*. The progress of invention, especially with regard to high explosives, has led to the use of many substances formerly regarded as innocuous, for the purpose of the manufacture of munitions of war, so that articles falling under the third head in the classification of Grotius are much more numerous now than they were even in very recent years.

It is thoroughly well established that it is not in any way contrary to the law of nations for the subjects of a neutral state to supply contraband of any kind to a belligerent, but he does so at the risk of seizure and condemnation. The Government of the neutral country may not itself lawfully supply contraband to the belligerent, but it is not bound to prevent its subjects from engaging in such trade. It is indeed a matter of common knowledge that the supply of ships to a belligerent has been specially dealt with by the legislatures of Great Britain and of other countries. But the exception is more apparent than real. Ships of war in this matter stand by themselves, for in truth the supply of ships of war in many respects tends to assimilate itself to the fitting out of expeditions in a neutral country, which is of course forbidden by international law. This is the real explanation of an apparent anomoly. But while a neutral is at liberty to sup-

ply a belligerent with articles of contraband, the other belligerent is at liberty to seize the goods if he finds them in transit upon the high seas. He has of course to show that they are intended for the enemy. If the ship is bound for an enemy port this does not admit of much doubt, and in the old cases the test of the destination of the ship was accepted as sufficient for the purpose of determining the destination of the goods. But the inadequacy of this test is apparent. Goods may be transhipped and the real destination of the goods may be very different from that of the vessel in which they are found. The doctrine of "continuous voyage," as it was then called, excited great attention at the time of the American Civil War, and after a very great deal of controversy, I think it may be taken as settled that if it can be shown that the ultimate destination of the goods is the enemy country, they are if contraband liable to seizure as intended for the enemy.

In every case the first question is—are the goods in themselves of the nature of contraband? In the case of all articles which are merely conditional contraband this would involve the enquiry whether they were intended for the use of the civilian population, or for the enemy government, or its armed forces by sea or land. This was a distinction which in the old days was a very real one and the test was easy to apply. Armies were small as compared with the vast hosts with which we have become familiar in these days, in which we see nations in arms. We have not to deal, as the older jurists had, with large civilian populations and small armies of professional soldiers—the whole country of a belligerent is now a camp. Further, in the war which has just come to an end, governments have to a great extent asserted the right of control over all foodstuffs, so that for whatever purpose such a consignment was made, it would, when it reached the enemy country, fall into the hands of the enemy government. The effect which this change of circumstances may have on the application of the old doctrine of law to changed conditions is well illustrated by the Judgment in the case of the *Kim* of the President of the Prize Court, the late Sir Samuel Evans. I cannot mention his name without expressing the sorrow which all felt at his removal by death while yet in the prime of his prowess from that Court in which he presided with so much distinction. That was a case in which great quantities of foodstuffs consigned to neutral countries had been seized by British cruisers as contraband on the

ground that they were intended for Germany. The Judgment of Sir Samuel Evans, which was afterwards affirmed by the Privy Council, rests to a great extent on the changed conditions of the day as compared with those which obtained when Grotius wrote, and indeed were assumed to exist until the question was re-opened by the circumstances revealed in the recent war.

In fact, I doubt whether in the changed conditions which this war has brought to light the distinction between absolute and conditional contraband still retains the importance which it formerly had in International Law.

The doctrine of "continuous voyage," or, in the better phrase, of the real ultimate destination of the cargo, is obviously in its nature just as applicable to conditional as to absolute contraband. If goods *ancipitis usûs* are really meant for the enemy government or for his forces by land or sea they are as open to the charge of contraband as would be munitions of war themselves. It is not always realised what a peril it was from which this Empire was delivered, when in December, 1911, the House of Lords rejected the Naval Prize Bill. That Bill was one which was intended to give effect to the Declaration of London. It is not too much to say that if that Declaration had been ratified the observance of its provisions would have seriously crippled Great Britain in the war with Germany which broke out only three years later. The advantage of a Second Chamber was never more signally vindicated than by the action of the House of Lords on that occasion. But for that action, we should have entered upon the supreme struggle for liberty and for existence with one arm tied. The 24th Article of the Declaration classed foodstuffs as conditional contraband. The 33rd Article laid down that "conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or for a government department of the enemy." But then came Article 35 and that Article provided that conditional contraband is not liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy and when it is not to be discharged at an intervening neutral port, with an exception, however, for the rare case of the enemy's country having *no* seaboard (Art. 36). In other words, the doctrine of "continuous voyage" was practically excluded in the case of foodstuffs. What would have been the effect of this provision if it had been in force when the war broke out? Our Navy would have been

powerless to treat as contraband the importation of foodstuffs into Germany. Such cargoes were always sent to neutral ports in Sweden, Norway, Denmark or Holland, and from such neutral ports they were to be conveyed either by sea or by land into Germany. Bound by such a treaty we might have been helpless spectators while foodstuffs of all descriptions for the use of the armies of Germany and Austria were poured into these countries. I believe that men of all parties now recognize how colossal was the blunder from which we were so narrowly saved in 1911. Fortunately the Declaration of London was never ratified and it has now been completely discarded.

As things turned out, the outrageous conduct of Germany in organizing and carrying on the submarine campaign placed in our hands another weapon for dealing with her, apart from the lines of contraband, by the exercise of the right of retaliation in respect of trade in goods intended for the enemy country. Retaliation in its effect upon neutrals and the "indirect blockade," as it has been called, has been considered in elaborate judgments of the Judicial Committee sitting as the Court of Appeal in prize cases. It will form a most important section in the legal history of this war. I have given a good deal of attention to it and wish that it were possible for me to enter upon it now. But to do so would extend this address beyond all reasonable limits. It would require at least as much time as that which your patience has already accorded to me and the expression of my views must be reserved for some other occasion.

Gentlemen, I have been able within the compass of this address to touch only on the fringe of a vast subject. Our thoughts naturally revert to the experiences of the war from which we have just emerged—the greatest war in the history of the world. And in such a gathering as this, the new chapter in International Law which has yet to be written in consequence of the experience of this war is one that will be awaited with keen interest.

I have touched upon some of these topics on the side of International Law, but I have had vividly present to my mind the sense of what the world has lost by the death of one who would have approached them from a broader point of view, and whose treatment of these questions would have been interesting alike to the Statesman, to the Sailor, and to the Lawyer. We had all learned to value what Admiral Mahan wrote upon SEA POWER, that great factor in human history, the import-

ance of which has been so signally demonstrated in this war. It is matter for the deepest regret that we cannot have from him a Review of the present war and of the new problems in Naval warfare which it has brought to light. His death has indeed entailed a grievous loss to the literature of the world. Such a review by his hand would have been welcomed alike by his own profession and by ours. I trust that some among you, Gentlemen, may be destined to enrich the literature of International Law by a treatise dealing with the great questions, on some of which I have ventured, however inadequately, to touch.

We are entering on a period of Peace, but it will be a very strenuous peace.

"Yet much remains
To conquer still—peace hath her victories
No less renowned than war."

Difficulties and struggles lie before us. In many ways the prospect is dark and the issue uncertain. Of one thing I believe we may all be assured: the Mother Country and the Dominions alike will face the problems of Peace with the same constant courage which has carried them to victory through the long and weary years of war.