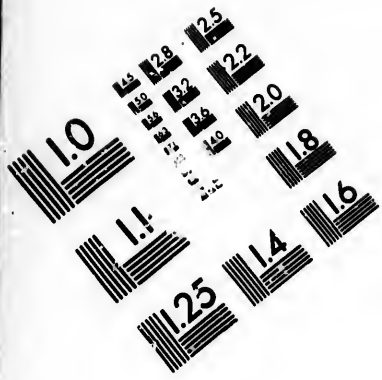

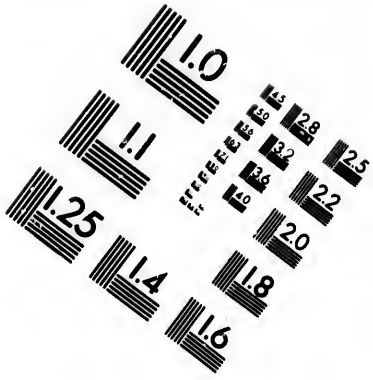

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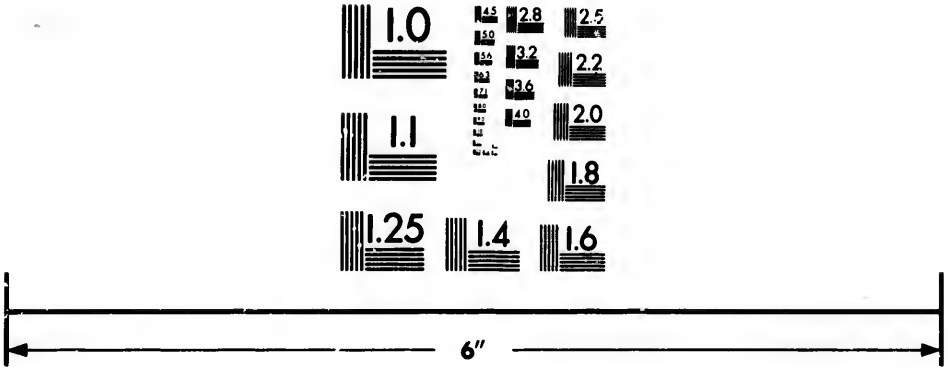

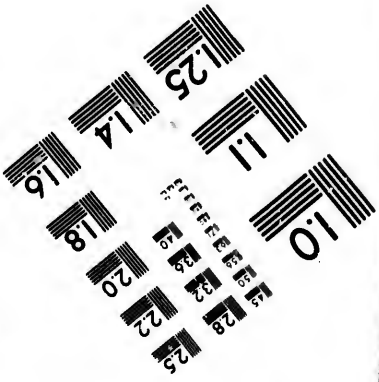

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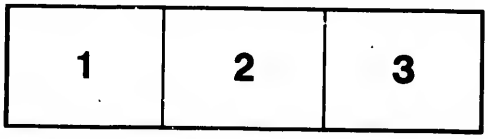

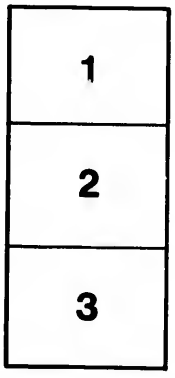

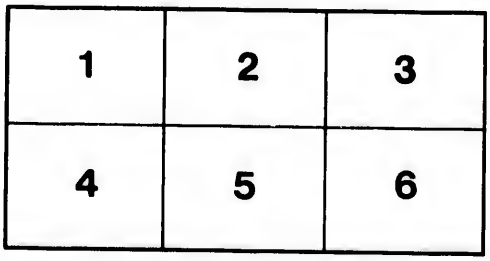

NOTES

ON

SOME QUESTIONS SUGGESTED BY THE CASE OF THE "TRENT."

BY

MOUNTAGUE BERNARD, B.C.L.,

CHICHELE PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY
IN THE UNIVERSITY OF OXFORD.

MARCH, MDCCCLXII.

Oxford and London:
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THESE Notes, the publication of which has been delayed by illness and other causes, are not intended as a discussion of the question of the "Trent," which has been disposed of argumentatively as well as practically. Had they been so, much would have been added and much omitted. They are meant to contribute, however slightly, to the elucidation of some points in that discussion which were handled, as it appeared to me, on both sides with a somewhat uncertain touch.

NOTES, &c.

"CERTAIN individuals have been forcibly taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a lawful and innocent voyage—an act of violence which was an affront to the British flag and a violation of international law."—*Earl Russell's Despatch to Lord Lyons, Nov.* 30, 1861.

DOES international law, under any circumstances, permit a belligerent to seize the persons of enemies found on board of a neutral ship? If so, under what circumstances?

There are three classes of cases in which this question may arise. The ship may have been brought into port and condemned by a competent prize-court; she may have been brought into port and not condemned; or she may not have been brought into port at all.

In the first case the persons are lawfully in the hands, and at the disposal, of the belligerent Power. The ship in which they were has been condemned *jure belli*, as having clothed herself, by her employment or by the acts of her owners, with the character of an enemy's ship, and forfeited the protection of the neutral flag. The neutral Power, therefore, to which she originally belonged, can have no right to reclaim them. It does not appear to be necessary that the presence of the persons on board should have formed the ground of condemnation. But it may be useful, in order to present

something like a general view of the question, to consider this branch of it separately.

In the second case the ship retains her neutral character, never having been stripped of it by the judgment of a competent tribunal. She may, or she may not, have been lawfully captured—captured, that is to say, upon reasonable grounds of suspicion, which, according to the practice of these courts, not only protect the captor from any claim for damages, but entitle him, as against her owners, to payment of the costs and expenses he has incurred in bringing her in for adjudication. But although she may have exposed herself to these disagreeable consequences, she has never ceased to be a neutral ship; and she is as much a neutral ship whilst lying in the belligerent port as she was before her capture, or as she will be after her release. In the eye of the law, therefore, there is no real distinction between the second case and the third. She has been either brought in unlawfully, or brought in for a purpose which will be exhausted when the judicial investigation is ended and the captor's expenses paid. And, when that is done, the belligerent government will have acquired by the temporary possession no rights over those who were on board of her which it could not have exercised when she was on the high seas.

I propose, therefore, to consider shortly these two questions:—

Does the law of nations, under any and what circumstances, permit a belligerent to seize the persons of enemies on board a neutral ship whilst on the high seas?

Under what circumstances is the presence of enemies on board of a neutral vessel a ground for the condemnation of the ship?

I. Does the Law of Nations, under any and what circumstances, permit a belligerent to seize the persons of enemies on board of a neutral ship whilst on the high seas?

Maritime international law is collected ordinarily from the following sources:—Ancient compilations of maritime usages; the works of approved text-writers; adjudications of prize-courts; ordinances, proclamations, and instructions issued by particular governments for the guidance of their own judges or officers; published opinions of official jurists; treaties and conventions. General history is of use as a commentary, and legal analogy both as a subsidiary source of law when these materials fail, and as an instrument for turning them to account.

No compilation of usages, old or new, no text-writer, no reported case, no ordinance or public act of any single Power, no published official opinion, lends, as far as I am aware, any sanction to the notion that the persons of enemies may be forcibly taken out of a neutral vessel on the high seas. They are wholly silent on the subject.

This mass of negative evidence is made up of different items, having different degrees of weight. The force due to the silence of a particular authority on a particular subject depends on two things; the value of the authority, and the probability of its speaking on one side or on the other—the second point being the most material of the two. For it signifies nothing how grave an authority may be if we have no reason to expect that it will have anything to say on the matter in hand.

Hence it signifies little that the supposed right is sanctioned by no reported case, because it is hardly pos-

sible to imagine a combination of circumstances which could render it, even indirectly, the subject of a judicial decision. Neither will the absence of all reference to it in the *Consolato del Mare* and other like compilations appear important to any one who considers their scope and structure. But the silence of marine Ordinances is important, although, as affirmative evidence, they are of no great value; the assertion of the right in one such Ordinance, or in several, would not prove that it existed; but, if it did exist, it would be pretty sure to be asserted in some of them. We might have expected also to find some notice of it in the works of those text-writers who have explained and defined the belligerent right of visit and search. Taking the whole mass together, the presumption is strong that, as they afford no proof of the right having been ever exercised, it never existed at all.

Legal analogy, it is true, has something to say on the other side. The law has always permitted the property of enemies to be captured on board of a neutral ship —then why not their persons? But before you can apply the principle, you must ask what it is. On what principle may enemies' goods be seized under a neutral flag? Modern writers, following Bynkershoek, have generally founded this right upon that of visit and search. It is lawful for you to stop and search the neutral ship—if for nothing else, for articles contraband of war: being there, you have a right to take the property of your enemy,—which is, as it were, under your hand, —and the neutral carrier is not injured by your doing so, because you must pay him the freight which he would have earned had he conveyed his cargo to its destination. By English writers the analogy has frequently been used to justify the search for seamen in neutral merchant-

ships[a]; and it must be admitted, I think, that if this use of it be correct, it might be applied, *à fortiori*, to the question now under consideration. For it is more legitimate to argue from the seizure of enemies' goods and contraband to that of enemies' persons, which would be a right of the same kind, than to the seizure of deserters or seamen, which would be a right of a different kind, and a mere enforcement of municipal law. But the analogy is, in truth, of little value for either purpose. Bynkershoek's explanation of the right to take enemies' goods is not very satisfactory, since the neutral carrier

[a] Thus a writer in the *Edinburgh Review*, xi. 22:—"There seems to be no good reason for excepting the case of deserters from this right, [the right of search]. If the crew belonging to an English man-of-war escape on board of American merchantmen, it is difficult to discover why they should not be pursued there, and brought back by their lawful commanders. It is preposterous to call each merchant-ship a portion of the territory of the State, because the jurisdiction of the State extends to the persons on board of it. The same jurisdiction extends to the subjects of the State, though by any accident they should be swimming at a distance from the vessel. An Englishman who should commit murder in this situation on the high seas would be tried at the Admiralty sessions; and yet he was on no part of the English territory. An English vessel, too, in a foreign port is held to be foreign territory. If, then, deserters are pursued into a merchant-ship on the high seas, they are only pursued on common ground; and no violation of territory takes place, any more than if they were picked up swimming at sea in their attempt to escape."

Can we wonder that Americans should ask, "If deserters, why not rebels?" But the English reasoning was wrong in two material points:—1. English law governs the persons on board of an English merchant-ship on the high seas, not only *ratione personarum*, but *ratione loci;* 2. The reviewer confounds a *belligerent* right, permitted by international law to be exercised over a neutral ship, with the claim to enforce English *municipal* law on board a foreign ship, which international law no more allows in time of war than in time of peace.

is certainly the worse for the transaction, even though he receives his freight. This right, which was incorporated very early into the maritime law of Europe, appears originally to have sprung from the notion, that to transport goods for the enemy was an unfriendly act on the part of the neutral, though not of so aggravated a complexion as the supplying him with contraband[b]. But there is nothing to shew that the conveyance *per se* of persons being subjects or citizens of the co-belligerent State was regarded in the same light, or exposed the vessel carrying them to any inconvenient consequences. And the truth is, that this is a point on which Analogy would practically be refused a hearing, had she never so much to say. Her testimony is not required if the right has been exercised, and is inadmissible, if it has not, against the negative usage of centuries; and I have touched upon this argument only because it may be thought to have a place in a comprehensive discussion of the subject.

I have said nothing, as yet, of treaties and conventions. Whilst the other authorities with which they are usually classed are silent on this question, they are not so. In many treaties, ranging from the second half of the seventeenth to the first half of the present century, it is expressly provided that neither of the contracting parties (being at war) shall take persons out of the ships of the other party (being neutral), unless they be soldiers in the actual service of the enemy. A cursory review of the history of this stipulation will enable us to judge of its legal effect and of the inferences which may reasonably be drawn from it.

It dates, I believe, from the time of the Congress of

[b] This appears very clearly from the earlier treaties on the subject, especially throughout the fifteenth century.

Nimeguen, and was originally invented by the Dutch. I find it for the first time in a treaty of navigation and commerce between the United Provinces and Sweden, concluded at Stockholm on the 26th of November, 1675, where it appears as follows:—

"Bona sive Merx quæcunque pertinens ad subditos alterutrius, etiam illa quam ex superiorum Paragraphorum auctoritate permissam ac neutiquam prohibitam esse constabit, in Navibus inimicis forte deprehensa in prædam occupanti cedat; ac Fisco addicatur, ullâ sine exceptione; e contra, tutum omnino et immune a Fisco habeatur quicquid Navigiis ad alterutrius subditos pertinentibus concredetur, utcunque sit Partis alterutrius inimicorum, excepta solummodo Merce Contrabandâ ad Portum hostilem destinatâ, adversus quam procedatur per modos jam supra designatos; *sed et vectores quoscunque, quamvis subditos inimicos Partis alterutrius, tutos navigare conveniet, dum devehuntur aliquâ in navi ad subditos alterutrius pertinente, nec eos inde avelli aut auferri licebit, exceptis tantum Ducibus sive Officialibus hostilibus* [c]."

It next appears in a somewhat different form in the treaty of commerce between the United Provinces and France, made at Nimeguen on the 10th of August, 1678.

This is one of the earliest in the series of treaties by which the burgher-statesmen of the Low Countries laboured with steady perseverance to secure immunity in time of war for the extensive carrying-trade which formed the chief employment of their commercial marine, and the great source of their prosperity. As early as 1646, at a time when it was an object of primary importance with the French Government to retain by subsidies and concessions the alliance of the States-General, and to prevent them from making (as they eventually

[c] Dumont, *Corps Diplomatique*, VII. i. 316.

did) a separate peace with Spain, France had agreed, for a period of four years only, and "*en attendant qu'on fait un bon règlement,*" to exempt the Dutch from the operation of the Ordonnance of 1584, which subjected to confiscation the goods of a friend found in the ship of an enemy. In 1662, as a part of the price of the Alliance of Paris, by which Louis XIV. hoped to further his designs upon the Spanish monarchy, they succeeded in obtaining a more explicit and effectual engagement, which forms Art. xxxv. of the treaty of the 17th of April, 1662:—

"Il a été en outre accordé et convenu que tout ce qui se trouvera chargé par les sujets de Sa Majesté en un navire des ennemis desdits Seigneurs Etats, bien que ce ne fût marchandise de contrebande, sera confisqué avec tout ce qui se trouvera audit navire sans exception ni réserve; mais d'ailleurs aussi sera libre et affranchi tout ce qui se trouvera dans les navires appartenant aux sujets du Roi Très Chrétien, encore que la charge ou partie d'icelle fût aux ennemis desdits Seigneurs Etats, sauf les marchandises de contrebande[d]."

During the negotiations of Nimeguen, the Dutch did not neglect their usual policy of coupling with a treaty of peace a treaty of navigation and commerce. They proposed, therefore, as a part of their bargain, a renewal of the arrangements of 1662; but judging, as it appears, that these engagements were not in all respects so stringent and precise as was desirable, they submitted to the French negotiators a revised and corrected draft of several of the articles, and, amongst others, of Art. xxxv., which in its new shape was to run as follows:—

"Il a été en outre accordé et convenu, que tout ce qui se trouvera chargé par les sujets de Sa Majesté en un navire des

[d] D'Hauterive et de Cussy, *Recueil des Traités*, ii. 270.

ennemis desdits Seigneurs Etats, bien que ce ne fût marchandises de contrebande, sera confisqué, avec tout ce qui se trouvera audit navire, sans exception ni réserve ; mais d'ailleurs aussi sera libre et affranchi tout ce qui sera et se trouvera dans les navires appartenant aux sujets du Roi Très Chrétien, encore que la charge ou partie d'icelle fût aux ennemis desdits Seigneurs Etats, sauf les marchandises de contrebande, au regard desquelles on se réglera, selon ce qui a été disposé aux articles précédens. Et pour éclaircissement plus particulier de cet article, il est accordé et convenu de plus, que les cas arrivant que toutes les deux Parties, ou bien l'une d'icelles, fussent engagées en guerre, les biens appartenant aux sujets de l'autre Partie, et chargés dans les navires de ceux qui sont devenus ennemis de toutes les deux, ou de l'une des Parties, ne pourront être confisqués aucunement, à raison ou sous prétexte de cet embarquement dans le navire ennemi ; et cela s'observera non-seulement quand lesdites denrées y auront été chargées devant la déclaration de la guerre ; mais même quand cela sera fait après ladite déclaration, pourvu que ç'ait été dans les temps et les termes qui s'ensuivent ; à savoir, si elles ont été chargées dans la mer Baltique, ou dans celle du Nord, depuis Terneuse en Norwège jusqu'au bout de la Manche dans l'espace de quatre semaines, ou du bout de ladite Manche jusqu'au cap de Saint-Vincent dans l'espace de six semaines, et de là dans la mer Méditerranée et jusqu'à la ligne, dans l'espace de dix semaines ; et au-delà de la ligne, et en tous les autres endroits du monde, dans l'espace de huit mois, à compter depuis la publication de la présente. Tellement que les marchandises et biens des sujets et habitans chargés en ces navires ennemis, ne pourront être confisqués aucunement durant les termes et dans les étendues susnommés, à raison du navire qui est ennemi, mais seront restitués aux propriétaires sans aucun délai, si ce n'est qu'ils aient été chargés après l'expiration desdits termes. Et pourtant il ne sera nullement permis de transporter vers les ports ennemis telles marchandises de contrebande, que l'on pourrait trouver chargées en un tel navire ennemi, quoiqu'elles fussent rendues par la susdite raison. *Et comme il a été réglé ci-dessus qu'un navire libre affranchira les denrées y chargées, il a été en outre accordé et convenu, que cette liberté s'etendra aussi aux personnes qui se trouveront en un navire libre ; à tel effet que quoiqu'elles fussent*

ennemies de l'une et de l'autre des Parties, ou de l'une d'icelles, pourtant se trouvant dans le navire libre, n'en pourront être tirées, si ce n'est qu'ils fussent gens de guerre, et effectivement en service desdits ennemis[e]."

And the article in this form was inserted in the treaty, (Art. xxii.[f]) It is copied in the Dutch and Swedish Treaty of 1679, (Art. xxii.[g]), and in the commercial treaty of Ryswick between France and the United Provinces, Sept. 20, 1697, Art. xxvii.[h] And it was reinserted, after undergoing a further revision, in the treaty of Utrecht, between the same Powers, April 11, 1713, Art. xxvi.[i]

The clause had by this time been adopted by France, which had learnt that it was her interest to secure, as against England at least, the immunities of neutral trade; and it forms Art. xvii. of the commercial treaty concluded on the same day and at the same place between England and France[k]. But it was not inserted

[e] *Actes et Mémoires et Negociations de la Paix de Nimégue*, ii. 154. Art. xxvi. of the treaty of 1662 was at the same time enlarged, so as to permit trade between one port of the enemy and another.

[f] Ib. 600.

[g] Dumont, *Corps Dipl.*, VII. i. 366.

[h] Dumont, ib. 440.

[i] Dumont, VII. ii. 380.

[k] "Et comme .... de même il a été convenu que cette même liberté doit s'étendre aussi aux personnes qui naviguent sur un vaisseau libre, de maniére que, quoiqu'elles soient ennemis des deux parties ou de l'une d'elles, elles ne seront point tirées du vaisseau libre si ce n'est que ce fussent des gens de guerre actuellement au service desdits ennemis."—*D'Hauterive et de Cussy*, ii. 91. It is suggested in a recent article in the *Edinburgh Review* (ccxxxiii. 271) that this clause was intended to protect English subjects in French vessels from impressment, which seems hardly compatible with either its form or its history.

in the treaty of the same year between England and Spain. The article of the Anglo-French treaty of Utrecht is copied in the commercial treaty of 1739 between France and the United Provinces; and, in a treaty concluded in 1769 between France and the town of Hamburg, it makes its appearance in this form :—

"S'il se trouve dans un navire de la ville de Hambourg des passagers d'une nation ennemie de la France, ils ne pourront en être enlevés, à moins qu'ils ne soient gens de guerre actuellement au service des ennemis, *auquel cas ils seront faits prisonniers de guerre*[l]."

When the United States of North America, in the midst of their struggle for independence, concluded a treaty of commerce with France, the arrangements of Utrecht were naturally adopted as the basis of negotiation, and the article recited above, with five which follow it, is transcribed in the treaty of 1778.

The concluding sentences of that article (relating to persons) re-appear again in the following commercial treaties subsequently made by the United States—with the Dutch United Provinces, Oct. 8, 1782; with Sweden, April 3, 1783, (revived, as to this clause, Sept. 4, 1816); with Prussia, July and Aug. 1785; with Spain, Oct. 27, 1795, (confirmed Feb. 22, 1819); with Columbia, Oct. 1824; with Central America, Dec. 1825[m].

It occurs also in Mr. Pitt's commercial treaty with France, Sept. 26, 1786, with a not unimportant addition :—

"Si ce n'est que ce fussent des gens de guerre actuellement au service desdits ennemis, *et se transportant pour être employés comme militaires dans leur flottes ou dans leurs armées*[n]."

[l] *D'Hauterive et de Cussy*, iii. 445.
[m] See *Elliot's Diplomatic Code of the United States.*
[n] *D'Hauterive et de Cussy*, ii. 104.

And it is found, without this last addition, in treaties concluded by Denmark with Genoa (1789) and Prussia (1818).

It may now be asked—

What inferences, if any, respecting the general practice of nations, may be fairly drawn from these facts? Is it reasonable, for instance, to infer that, in the opinion of the various statesmen who concluded this long series of treaties, the freedom of a free ship would not, in the absence of an express provision, have extended to the persons on board of it, not being soldiers on service, and that such persons might lawfully have been taken from under a neutral flag—or at least that there was a doubt on the subject, which it would be prudent to remove? This question concerns Powers which, like Great Britain, are not now bound by any stipulations of this kind, as well as Powers which are.

What is their legal effect as between the contracting parties? Do they permit a belligerent to take soldiers out of a neutral ship without carrying in the ship for condemnation—or to take them in cases where the ship would clearly not be condemned if she were brought in?

The second of these questions concerns the contracting parties only; and we need not therefore consider it, except so far as it mixes itself with the first [°].

It is a general, but not a strong, presumption, that an express stipulation in a contract derogates from or modifies in some way the legal rights which the parties

[°] It would of course have been open to the Government of the United States to answer M. Thouvenel's despatch, in which the treaties between the States and France were insisted on, by saying that those treaties furnished a rule only as between the Powers which were parties to them, and not therefore as between the United States and England.

would have had if it had not been inserted. For people do not commonly think it necessary to bind themselves expressly not to do what the law forbids, or to do what it enjoins. It is not a strong presumption, especially as applied to treaties of friendship and commerce, which always contain some surplusage; but it *is* a presumption, and, where it does not hold, this is frequently apparent from the form of the article and from its place in the treaty. The stipulation in question is part of an article creating exceptional privileges, surrounding neutral ships with a peculiar immunity which they did not legally enjoy. It provides that free ships shall make free goods: and then it goes on to declare that the persons on board of them (a particular class excepted) shall be free likewise. If this stipulation had appeared for the first time in the nineteenth century, we should certainly have inferred that in the nineteenth century it was at least doubtful whether subjects of the enemy, although not soldiers in his service, might not lawfully be seized in a neutral ship. But this inference, as applied to the nineteenth century, vanishes almost into nothing when we find that the clause is nearly two hundred years old, and that it has been substantially repeated during that period in one treaty after another, with such alterations only as might serve to round off and improve the sentence. Every one of the numerous and intricate clauses now inserted in an English deed of conveyance probably had its use when it was invented; it served to obviate some doubt which actually existed, or it provided against some probable risk; but they have in many instances been retained, expanded, and elaborated by the anxious caution and patient industry of conveyancers, though the doubt has long expired and the risk ceased to be any risk at all. It would be per-

fectly reasonable to assume that the exercise of the belligerent right of capture did really require to be guarded and restrained by stipulations of this nature in the latter half of the seventeenth century; nor would it be difficult to find in the history of that period evidence that the practice of maritime warfare was, as compared with later times, very loose and irregular[p]. The original intro-

[p] Such complaints as these are not uncommon:—"That the petitioner [a Swede], sailing with the said ship from Nicoping to Hamburgh on the third of this month, hee was seized by John Tresorr, captain of a private man-of-war, with no flag out, who took two men out of my ship, and pretending himself to be an Irishman, presently plundered me and my men of all things," &c. —*Thurloe's State Papers*, ii. 182. See also in Thurloe (ii. 503) a complaint made by a Dutch officer commanding a convoy, that an English man-of-war had "fetched" out of the ships under convoy "all the passengers that were on board of them, which, however, were sent back." And (iv. 553) a letter from St. Sebastian, (1656):—"Here are to the number of fifteen ships in all; most of them are taken by those pirates lately come hither from Brest with the Duke of York's commission, though those of this town have set out near ten small men-of-war upon this King's commission. The Brest men have brought in here the persons of five merchants, which they took out of several Dutch ships they met at sea; and they do petition that they may have a prison allowed them to keep such merchants as they take, and set a ransom on them, which yet is not granted them." In the war of 1674 between England and the Dutch, the presence of Dutchmen on board of a neutral ship was treated as a ground of condemnation. Sir Leoline Jenkins, writing on the case of a French ship which had been brought in for adjudication, declares it to be fatal to the claim of the owners that she had three Hollanders on board, (escaped prisoners,) and takes occasion to recommend that some rule should be laid down explaining how many "unfree persons" would, under the King's declaration of Feb. 22, 1664, "affect a free ship." "In the many ships," he adds, "that were brought up as they pass to and fro from Spain, Portugal, Flanders, Sweden, and the Hanse Towns, there is most commonly one of the subjects of the States deprehended among the ship's company, and yet

duction of the clause is therefore easily accounted for, and the re-insertion of it in later treaties does not appear to me to prove the continued existence of practices, or even of doubts, of which, as far as I know, there is no other trace in later history.

But as to the excepted class, soldiers in actual service, is nothing to be collected from these treaties? To stipulate, in the nineteenth century, that civilians shall not be taken, may not imply a belief that they lawfully might, nor even any serious doubt on the subject; but to except soldiers, is to admit that they, at any rate, are actually liable to seizure, and that they will be so liable after the conclusion of the treaty. The two questions —the construction and effect of the clause, and the inferences to be drawn from it—here run into each other.

Here it is to be observed, that the primary object of

seldom more than one that is discovered. The reason, I suppose, is, lest a number of them should bring the ship to confiscation." And he suggests that this practically increased the naval strength of the Dutch by keeping their seamen at home. (*Life and Letters of Sir Leoline Jenkins*, ii. 740.) The Declaration referred to, which is given in Bishop Kennet's *History*, (iii. 272,) contains the following passage:—"And we hereby do further declare that whatsoever ship or vessel of what nation soever shall be met withal having any goods, merchandises, or *any number of persons* in her belonging to the said States of the United Provinces, or any of their subjects or inhabitants, the whole being taken shall be adjudged as good and lawful prize. As likewise all goods and merchandises of what nation soever, whether of our own or of foreigners, that shall be laden aboard any ship or vessel that shall belong to the States of the United Provinces, or any of their subjects, or any inhabiting with them, and shall be taken, the whole shall be condemned as good and lawful prize, except the said ship or vessel has ours or our dear brother's letters of safe conduct granted to them." So the French Ordonnance published in 1584 by Henry III. declared all ships "esquels y ait biens, marchandises, *ou gens* de nos ennemis" to be good prize; but this is not repeated in the Ordonnance of 1681.

the article, on the face of it, is not to extend, but to restrict, a liberty of capturing goods and persons which was actually possessed, or which had been or might be claimed, by belligerents. It was not intended to grant a new right, but to limit and define a right which either existed, or might probably have been asserted in the absence of a special prohibition. The right to take the persons of soldiers "effectively in the service of the enemy" is not created *de novo;* it is only assumed as existing, and saved, by way of exception, out of a general prohibition, by which it would have been implicitly swept away. On the one hand, it is impossible to doubt that *some* power to take soldiers in the enemy's service out of a neutral ship was deemed to exist by those who framed, and by those who have adopted this clause, and that they meant to leave it untouched; on the other, it is clear that *any* such power, if shewn to exist, would satisfy the words of the clause, and that we could not be called upon to give them a more extensive meaning.

That the conveyance of soldiers *to* the enemy was in the seventeenth and eighteenth centuries, as it is in the nineteenth, deemed a violation of neutrality, it is needless to say. In many of the treaties of the seventeenth century, and in some of the next, *milites* or *gens de guerre* are enumerated, with some want of scientific accuracy, among the objects classed under the general head of contraband. The insertion of the word seems to have depended less upon policy or design than on the model which the framer of the treaty happened to have before him; the omission of it would not protect the neutral from the consequences, whatever they might be, of rendering direct assistance to the enemy. The same principle would of course apply to a conveyance of soldiers from one part of the enemy's territory to

another—an act which falls also within the grasp of another and a distinct principle. But it never was a violation of neutrality to carry soldiers *away from* the enemy, or to carry them to any destination not within his territory, and not serviceable to his military operations. According to the ordinary rules of construction, therefore, the exception of soldiers "effectively in the service of the enemy" may justly be taken to mean only soldiers on their way to a hostile destination, or (as it is expressed in the treaty of 1786) "being transported to be employed in a military capacity in the enemy's fleets or armies."

What is the force of the words "enlevès ou tirès?" Did they confer a right to take the persons out of the ship without carrying the ship in for condemnation? I think, as I have already said, that they did not confer a new right of any kind; nor does it appear to me that any clear general conclusion can be drawn from them. They do not say that it shall be lawful in every case to take soldiers, but that it shall in no case be lawful to take any persons who are not soldiers. I agree, however, with M. Hautefeuille[q], to this extent at least, that they appear to point to some cases in which this could be done. Soldiers, as we have seen, were frequently classed in treaties under the head of contraband, sometimes with the superadded provision that, the contraband article being given up to the captor, its presence should not infect the ship, which should be suffered to proceed on her voyage. I do not think that in the seventeenth century, when the jurisdiction of Admiralty Courts was less established than it now is, any complaint would have been made if a neutral ship carrying soldiers to the enemy had been disburdened of her cargo by a hostile cruiser,

[q] *Droits et Devoirs des Nations Neutres*, ii. 181, (ed. 1858).

without the fiat of a prize-tribunal condemning the ship. I leave to the jurists of those countries which are now bound by these treaties the question, whether the same thing could at present be done under their provisions. But I should certainly decline to accept any general inference drawn from them as to the practice of nations, or the liberty allowed by international law.

The foregoing considerations appear to me to warrant the general conclusion that the Law of Nations does not, under any circumstances, permit a belligerent to seize the persons of enemies on board a neutral ship on the high seas.

II. *Under what circumstances is the presence of enemies on board of a neutral vessel a ground for the condemnation of the ship?*

The answer to this question will of course be furnished chiefly by the decisions of prize-courts. These tribunals, though they are not (strictly speaking) international, administer international law, and mutually recognise, within certain limits, the authority of each other. And here we turn naturally to the judgments of Lord Stowell. Lord Stowell's judgments are not infallible interpretations of international law; but he was the greatest Admiralty judge who ever lived; he sat in a prize-court which had more business than all the other prize-courts in the world put together; and his decisions have been copiously reported.

There are two decisions of Lord Stowell's in which the conveyance of military persons in the enemy's service was the ground of the condemnation of the ship[r]. In both these cases the judge was able to satisfy himself,

[r] The "Friendship," 6 *Rob. Adm. Rep.*, 420; the "Orozembo," *ib.*, 430. See also the "Carolina," (Nordquist), *ib.*, 4. 250.

and took pains to shew, that the vessel was not merely conveying soldiers to the enemy, but was hired by the enemy's government, through its agent, for the voyage—that it was hired to convey military persons to the enemy's country or to one of his colonies.

The points on which the stress of the judgment were laid were the *hiring*, and the *purpose* of the hiring. The ship was virtually an enemy's transport, sailing under a neutral flag. But it was not necessary to prove that the hirer was an agent of the enemy's government, if the hiring was a hiring for the enemy's service; nor to prove that either master or owner actually knew the nature of the hiring, at least where the circumstances were such as to fix either of them with constructive knowledge.

The principle of these cases is distinct from the principle on which contraband articles are condemned, either with or without the vehicle that carries them.

The shipowner, in the latter case, is assisting the military operations of the enemy; in the former he has gone further, and incorporated his ship, for the voyage, in the enemy's military marine.

It does not appear to be necessary, in such a case, that the actual destination of the voyage should be hostile territory. A hostile destination may help to prove the nature of the employment, but the employment may be clearly established though there be no hostile destination. Were England at war with France and mistress of the Mediterranean, and were a Spanish ship chartered by the French Government to carry Marshal Macmahon and his staff to some neutral port from whence they might safely travel to Algeria, I do not think an English Admiralty Court would feel much difficulty in condemning her as a French transport. It would make no difference, of course, whether she sailed from Marseilles,

Barcelona, or Leghorn. In other words, a ship chartered by the enemy for the conveyance of military persons would be liable to condemnation as a transport, whether her port of clearance, or her port of destination, or both, were hostile or neutral, provided her voyage were directly subservient to the military operations of the enemy.

In the application of this principle two questions may be expected to arise:—

1. What is a hiring?

2. What is meant by "purposes connected with the military operations of the enemy?"

It is impossible to lay down *à priori* rules which will furnish a solution of these questions. The familiar distinction between a contract by charter-party and a contract for the conveyance of goods or passengers in a general ship, would, generally speaking, supply a sufficient answer to the first; but I am by no means sure that it would do so in all cases. It is of course not necessary that the ship should pass, as a vessel let to our Transport Board has been held to do, into the legal possession of the freighter.

The second question presents greater difficulties, which are increased by Lord Stowell's now celebrated *dictum* in the case of the "Orozembo." The "Orozembo" was conveying from Lisbon, ostensibly to Macao, but really, as it appeared, to Batavia, three Dutch military officers and two other persons going to be employed in civil capacities in the government of Batavia. "Whether the principle," said Lord Stowell, "would apply to them (the civilians) alone, I do not feel it necessary to determine."

"I am not aware of any case in which that question has been agitated; but it appears to me on principle to be but reasonable that whenever it is of sufficient importance to the enemy that

such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations."

It does not appear that these persons had any connection with hostile operations, except that they were to be employed in the civil administration of a colony which might be attacked by Great Britain. The success of any military movement, offensive or defensive, may certainly depend very much on the civil administration of the country which is its theatre or its base; but if we are to say that this intimately connects the civil officials of every colony with hostile operations, we give those words a pretty extensive meaning. All that we learn, however, from the "Orozembo" is, that Lord Stowell was prepared to do this, and that in his opinion (though it was not necessary to decide the point) the conveyance of civil officials to an enemy's colony *was* a purpose so connected with hostile operations as to fasten on the vessel so employed the character of a transport.

On the other hand, there is no authority, nor, in my opinion, any ground of reason, on which it could be held, that a ship chartered by the enemy's government for a purpose absolutely unconnected with military operations was liable to condemnation. The mere hiring would not effect the ship's national character, the purpose being innocent; and such an employment, rare and exceptional as it must undoubtedly be, would be as lawful in time of war as it would have been in time of peace.

If we adopt the principle on which Lord Stowell decided the case of the "Caroline," a ship chartered to convey an ambassador to or from a neutral country

would not be hired for a hostile purpose. Much less, of course, would she expose herself to condemnation by taking on board an ambassador as a simple passenger. It must always be an innocent employment to carry a man on a lawful and peaceful errand[s].

[s] More than enough has been written on Mr. Seward's slovenly perversion of Vattel's *dictum* that "you may stop the ambassador of the enemy on his passage." Of course you may—if you can catch him; but to assume that you can catch him on board a neutral ship is to beg the whole question. The *dictum*, however, would never have been pressed into the service of a bad cause if it had not been quoted by Lord Stowell, and it is reasonable to ask what Lord Stowell meant by quoting it. Why did he lay so much stress on conditions which do not seem very material—on the envoy's having actually arrived—been admitted—taken upon him the functions of his office? Why did he not lay down the broad principle that communications with a neutral country, conveyed in a neutral ship, were protected as a matter of course. Evidently because he was not prepared to lay down that principle. He confined himself to the case of regularly authorised agents, whether envoys or consuls, and held that a favourable presumption arose from the official character of the agent, and that this presumption created a privilege. The principle, however, even when restrained within these narrow limits, evidently covers an ambassador travelling to his post, as much as a bag of letters on its way to an ambassador.

In the case of the "Rapid," (*Edwards R.*, 228,) we have the case of a person residing in a neutral country as the agent of a belligerent, but not openly commissioned, nor acknowledged as a public accredited minister by the neutral government. He had been stationed at New York by the Dutch Governor of Batavia to induce American merchants to embark in the Batavian trade. Letters from this person on public affairs (which are printed at length in an appendix to the Report) addressed to the Dutch Colonial Minister, were found in an American ship; and Lord Stowell said that the master, pleading ignorance of their contents, was "perhaps entitled to the benefit of the distinction that the papers, though mischievous in their own nature, proceeded from a person not clothed with any public official character." He was not entitled to the privilege of an ambassador; his communica-

Does it follow from what has been said that a ship carrying soldiers to the enemy ought to be suffered to pursue her voyage without seizure or interruption, unless it can be established that she is actually *hired* for the service? Or does it appear that this was the opinion of Lord Stowell?

Text-books—I except, of course, M. Hautefeuille—do not speak this language; neither, as we have already seen, do treaties. Nor can any such proposition be extracted from the judgments of Lord Stowell. It was never necessary for him to determine the point; and he took care, as all judges do, to rest his decisions on the

tions were not protected simply because he was an agent stationed in a neutral country: but the master was allowed to aver ignorance of the public character of the papers because the sender appeared to be a private person.

The case of an agent commissioned by an insurgent and unacknowledged government raises a somewhat novel, but not a difficult question. Such a person is, as Bynkershoek says, a *nuntius*, not a *legatus;* he is simply a person carrying a message, without the privileges of an ambassador. Mr. Mason is a gentleman regarded in very different lights in different quarters. At Washington he is considered a rebel, at Richmond an envoy, and in London he is Mr. Mason, and that is all. On the deck of the "Trent" he was not a rebel: whether he was an envoy or a private passenger, was indifferent, since either way it would be no breach of neutrality to carry him; but to the captain of an English steamer he could in truth only be what he is to the English government—a gentleman from Virginia. I can imagine, I own, few things more irritating to a maritime Power which commands the sea, than to see an agent sent to solicit for a revolted commonwealth the immense political advantage of recognition, franked across the Atlantic under a neutral flag. And the constant jealousy with which Lord Stowell regarded the carriers of ambassadors' despatches shews what the inclination of his mind would have been had such a case come before him. But a transaction may be very irritating and yet very innocent, and this is a question of law, not a question of feeling.

strongest ground that the facts before him would supply. But he guarded himself studiously, as it seems to me, against the inference that, because it was possible in these cases to prove a hiring, it was necessary to carry the evidence to that length in every case. "The principle," he said, in the "Orozembo," "on which I determine this case, is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of military functions, will lead to condemnation, and that the court is not to scan with minute arithmetic the number of persons that are so carried." "It would be a very different case," he observed, in the "Friendship," "if a vessel appeared to be carrying only a few individual invalided soldiers or discharged sailors, taken on board by chance, and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the French marine as any can be." And again: "It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger, as other passengers do, the question would present itself in a very different form. Neither this Court, nor any other British tribunal, has ever laid down the principle to that extent."

"A few invalided soldiers or discharged sailors, taken on board by chance"—"a military officer finding his way home as a passenger at his own expense!" Language could hardly be more circumspect. A broad principle is laid down, and the utmost caution is exerted in suggesting exceptional cases which might possibly be protected from its operation.

Nor, in a case where there was evidence of a hiring,

(it is right to bear this qualification in mind, though Lord Stowell does not express it,) was it, in his judgment, material that neither captain nor owner knew for what purpose the ship was really employed.

"It has been argued that the master was ignorant of the character of the service on which he was engaged, and that in order to support the penalty, it would be necessary that there should be some proof of delinquency in him or his owner. But I conceive that is *not* necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. . . . . In cases of *bond fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation."

It is easy, I think, to perceive that Lord Stowell, in these cases, was struggling with a difficulty, arising from the nature of his jurisdiction, to which I shall advert hereafter. He had to administer an anomalous and imperfect system, and to carry on an incessant warfare with every artifice and subterfuge which the love of gain could suggest or mercantile ingenuity devise. No judge was ever more anxious to do substantial justice, or more ready to modify, when justice appeared to require it, a previously expressed opinion. And he certainly left this branch of the law in a somewhat rough and unformed state. But the general course which his mind took is not too obscurely marked for us to follow. The first question which he asked was, whether there was evidence that the ship had been hired by the enemy. If the facts pointed to that conclusion, the number of persons conveyed was of little consequence. It was of comparatively little consequence whether they had a strictly military character, provided there was reasonable ground

for believing that to carry them to their destination would in any way assist the prosecution of the war. The ignorance of the owner and of his agent, the master, was of no consequence at all; the ship's employment being clearly hostile, it mattered not if she was pressed into it by force or entrapped by fraud. But if there was no such evidence of hiring, these things might become very material, because on them might depend the whole colour of the transaction. The number of the persons on board, their character, occupation, and precise relation to the enemy's government; the circumstances under which their passage was taken; the knowledge or means of knowledge possessed by the owner or by his agent, the master; might make all the difference between a really innocent and a substantially hostile voyage. I do not think, to put a somewhat extreme case,—I do not think, were we now at war with the United States, we should find much difficulty in convincing ourselves that a neutral steamer running from Panama to San Francisco, and conveying half a Federal regiment or a Federal general and his staff sent to assist in the defence of California, but taken on board as individual passengers, was as effectually serving the enemy—was as truly and really a Federal transport—as if she had been specially chartered for the purpose. I have no doubt it would be held that a vessel which was in fact performing for the enemy, with the knowledge of her owner or master, the service which is performed by a transport, was liable to be treated as such, although she might carry some cargo and some innocent passengers—although every soldier on board might have taken and paid for his own passage, and although she might be running, without the least deviation, on her accustomed line.

The cases which have been decided on the conveyance of despatches, may be used to throw light upon this subject, because the principle is the same. A ship which carries troops for the enemy is serving him as a transport; a ship which carries despatches for the enemy is rendering him an exactly analogous service. There is no direct authority on this point, as far as I am aware, earlier than the close of the last century, and the branch of law relating to it has been made almost entirely by Lord Stowell. Evidence of hiring is not necessary here. In none of the cases could the ship have been fairly said to have been hired for the voyage, or to have made the voyage for the purpose of carrying the despatch. To subject a ship to condemnation on this account only, two things are necessary—that she should be conveying despatches *for* (not *to*) the enemy, and that the despatches should be on board with the knowledge of the owner or master, or under circumstances which would have led one of them to that knowledge if due enquiry had been made. A despatch is "any official communication from an official person on the public affairs of his government." Here, on the one hand, it is not material whether the despatch does or does not relate to military operations; it may have no reference to them whatever. For it is impossible to draw a line; the contents of a sealed letter must always be presumed to be unknown to the carrier; and to permit the conveyance of such as were found, when opened, to be harmless, would destroy the prohibition altogether. On the other hand, the knowledge or constructive knowledge of the owner or his agent is an essential point in these cases; for that a letter is official is a fact which may be known, and to inflict the penalty of confiscation where that circumstance was

clearly shewn to be absent, would be a gross and intolerable hardship. And it is only as bearing upon this point, that it is important to enquire what was the ship's port of departure, or even what was her port of destination. "*Where the commencement of the voyage is in a neutral country, and it is to terminate in a neutral port,* or at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and therefore *it may be proper to make some allowance* for any imposition that may be practised on him[t]." He is to have the benefit of a probability of ignorance, and to be relieved from the burden of proving it. But if knowledge be proved against him, the fact that he was sailing from or to a neutral port, or even from one neutral port to another, will afford him no protection. This is plain, not only from Lord Stowell's language in the passage above quoted, but from the whole course of his decisions on this subject. In four cases out of seven, the ship was sailing to a neutral port. In three of these, the "Constantia[u]," the "Susan[x]," the "Hope[y]," she was condemned; in the fourth, the "Madison[z]," the captor's expenses were given. In a fifth, the "Rapid[a]," she was bound from a neutral port to Tönningen, a port open to trade. The "Atalanta" (condemned) was on her way from the Isle of France to Bremen[b], and the "Caroline[c]" (released) from New York to Bordeaux. In all these cases the letters were to be delivered to some one at the port of destination, except in one, the "Hope," where they were in a passenger's trunk. In not one of them was either the port of departure or that of destination treated as anything more than a circumstance from which an

[t] The "Rapid," *Edw.* 228. [u] 6 *Rob.* 461. [x] *Ib.*
[y] *Ib.* 463. [z] *Edw.* 224. [a] *Ib.* 228. [b] 6 *Rob.* 440. [c] *Ib.* 461.

excusable ignorance on the part of the master might be presumed. In every one of the seven, in which the ship was not condemned, the captor was decreed his expenses, which is tantamount to a decision that the capture was not without probable cause, and not unlawful. So erroneous—if Lord Stowell was not deliberately and persistently wrong—is the position (borrowed probably from Hautefeuille and De Martens) which has been so confidently asserted of late, that a neutral ship ought always to be permitted to pursue her voyage without further molestation, as soon as it is ascertained that she is sailing to a neutral port; on the contrary, it is established law, so far as the repeated and careful decisions of this great judge can make it, that this is no protection, if there be reasonable suspicion that the ship is carrying despatches[d].

This is a feature of the distinction which it is important to observe between the case of despatches and that of munitions of war. It is well settled that munitions of war consigned to a neutral port are not contraband, and that "a possible ultimate destination" to a hostile country will not make them so. The reason is plain. The transaction, on the face of it, is innocent. The transit of the goods will be over when they are in the hands of the consignee, and it is not the carrier's busi-

[d] M. Hautefeuille observes on these cases:—"L'avis de Sir W. Scott ne saurait avoir aucun poids à mes yeux. Organe officiel de l'Amirauté Anglaise, il a dû soutenir les doctrines de son pays: il les a revêtues de tout le prestige de sa science et de son talent. Mais si on adoptait son système, toute correspondance deviendrait impossible en temps de guerre entre les neutres et les belligerants, et même très difficile entre les nations restées spectatrices loyales de la lutte, si ce n'est par l'intermédiaire du belligérant le plus puissant sur mer."—*Droits et Devoirs des Nations Neutres*, ii. 187.

ness to enquire what the consignee will do with them when he has got them. To pursue them afterwards through successive hands, to speculate on the intentions of successive owners or consignees, and to fasten by anticipation on a lawful enterprise the guilt of an unlawful one, undertaken after the first was at an end, would not only open the door to endless enquiries, but involve intolerable injustice.

The only real destination of a despatch is its ultimate destination. Till it reaches the hands of the person to whom it is addressed, it is on its travels; when it arrives there, and not till then, it is, as lawyers say, at home. All who lend their services to forward it on its journey, are engaged as accessories or intermediaries in assisting its transit to that final destination, as is the friend who obliges you by taking to Paris the packet which another friend is to convey to Rome. At what particular stage that assistance is given, from whom each carrier takes the letter, or to whom he delivers it, are matters absolutely immaterial, provided he knows what he is doing. This is a transaction which, instead of being innocent on the face of it, is unlawful on the face of it. The master of the ship is acting, and knows that he is acting, as a courier for the enemy, and he must take the consequences. The ground of condemnation in these cases is not the having a noxious article on board,—which indeed, *per se*, never is a ground for condemnation,—but the nature of the service performed.

If we compare the conveyance of military persons to that of munitions of war on the one hand, and of despatches on the other, we see at once that it is not exactly analogous to either of them. The goods are consigned, the letter is addressed, to the persons for whom they are respectively intended; but the traveller

does not come on board ticketed with his final destination. That his journey is not ended till he gets there, is as clear in his case as it is in that of the despatch; an officer going to India is only forwarded towards that ultimate goal by the railway which carries him to Marseilles. His character, and the place to which he is proceeding, *may* be wholly unknown to the captain, as well as to the owner of the ship, and it may be justly said that these are matters into which they are not called upon to enquire. They *may*, on the other hand, be perfectly notorious. We have seen that in the case of persons, as in that of despatches, the true ground of condemnation is *the nature of the service*, and I think it a just inference from Lord Stowell's decisions, and the principles they involve, that where the conveyance of persons is the alleged offence, and even where the ship is not proved to have been specially chartered for the purpose, her destination is but one element in determining the question, whether she is serving the enemy or no. It is an element, however, of such importance that it would probably be quite conclusive in by far the larger proportion of cases [e].

I suggest, on the whole, the following general conclusions, some of them with more or less of doubt.

[e] This is not inconsistent with the case of the "Hendric and Alida," decided by Sir George Hay, (*Marriott's R.*, 96). This Dutch ship was carrying to St. Eustatius, a Dutch island, a cargo consigned to Dutch merchants, part of which consisted of arms and powder, and also five persons going to serve in the army of the revolted American colonies, though it does not appear that they had their commissions on board. The character of the passengers does not seem to have been much insisted on in the argument, and is only referred to in the judgment (which is very meagrely reported) as bearing on the question of costs. There was *some* evidence that the ship was to go on to New England.

1. A ship conveying persons in the enemy's employment, military or civil, is only liable to condemnation if the Court is of opinion, on a consideration of all the circumstances, that she is serving the enemy as a transport, and so as to assist (substantially, though not perhaps directly,) his military operations.

2. It is not necessary to prove an actual hiring of the ship by the enemy.

3. Where a hiring for such a purpose is proved, the number and importance of the persons conveyed, and the knowledge or ignorance of the owner or master, are immaterial.

4. Where a hiring is not shewn, it is necessary to prove that the service performed was in fact such as is rendered by a transport, (as to which the number and importance of the persons conveyed, as well as their character and destination, are material,) and generally perhaps to shew a *mens rea*.

5. The destination of the *ship* is in both cases important, in the second much more material than in the first, but in neither absolutely conclusive.

6. It is not lawful to take persons, whatever their character, as prisoners, out of a ship which has not been proved, or admitted, to have forfeited the privileges of neutrality [f].

[f] What if the persons be voluntarily given up, without an appeal to a prize-court? In such a case the neutral Government has no ground of complaint against the belligerent. For the appeal to a prize-court exists only for the protection of the private interests of the owners of the ship and cargo. As to the honour of the neutral flag, that is in the keeping of the neutral Government; as to the persons on board, the sentence can only affect them indirectly and incidentally, by establishing the fact that the ship has forfeited its neutral character. If that fact be admitted, and the captor waives his claim to confiscation, there is no ques-

If these views are correct, how great, it may be said, and how obscure, are the risks and uncertainties which surround the neutral ship-owner! His vessel is not secure from detention, nay, from condemnation, even when sailing on her accustomed line, even when bound for a neutral port. And he is liable to have his property confiscated, not upon plain grounds which he can easily understand and can be prepared beforehand to disprove, but on the opinion which a judge sitting in the captor's country may form, respecting so indefinite a thing as the general character of a transaction, from a mass of

tion for a prize-court to decide: parties between whom there is nothing in dispute cannot be forced to litigate a matter on which they are agreed, for the sake of an incidental effect which may flow from the sentence. And the waiver cannot deprive the belligerent Government of its right to retain the prisoners. For the same reasons, the Government to which the captured persons belonged would have no complaint against the neutral Government on account of the conduct of the neutral master. It might indeed be possible for the neutral Government to prohibit by law its own subjects from such surrenders, and to take care, through its own consular agents, that the case should be properly argued when it came before the prize-court. But we have no such law; nor does it appear that a neutral state undertakes any such obligation towards the foreigners who become passengers under its flag. It should be added, however, that as the belligerent's right to take the prisoners rests on the assumed violation of neutrality by the neutral ship, the neutral Government is perfectly free to take its own view of the facts, and to reclaim the prisoners (if it thinks fit) on the ground that there was no such violation. And, neglecting to do so in a clear case, it would lay itself open to the complaints of the Government to which the prisoners belonged. The effect, therefore, of the question not being submitted to a prize-court simply is, that the *same* question remains open for discussion between the neutral and belligerent Governments. But the mere fact of the prisoners being taken without adjudication does not appear to be a ground of complaint.

circumstances capable of being regarded in the most various lights.

I admit it. The risks and the uncertainty are great—though not perhaps quite so great as they may seem. The principle is not too vague to be grasped; nor so loose but that it may be fairly and justly applied; and an arbitrary and oppressive exercise of the belligerent right would speedily provoke the resentment and bring down on the offender the just hostility of neutral powers. There are obvious presumptions which help to define what exertions of the right ought to be deemed arbitrary and oppressive; in what cases it is so plainly improbable that the ship will be condemned, that it is a wanton injury to carry her into port, or even to detain her, after ascertaining her name and destination. The presumption, noticed by Lawrence and Hautefeuille, in favour of a regular mail-packet, is one of these: indeed, as regards the contents of the mail-bags in an English packet, which does not carry a pendant, the responsibility ought probably to be held to rest with the Government which has the control of the postal service, and has an officer on board in charge of the mails; as to the passengers and goods conveyed, and papers not put into the bags, I do not see how such a ship can be held exempt from search, notwithstanding the presumption, in a case of reasonable suspicion, unless the Government under whose flag she sails will undertake the same general responsibility which it acknowledges for the acts of a man-of-war. Presumptions of this nature will necessarily gain in number and precision by lapse of time, and will be fortified by the daily increasing strength of neutral trade.

These uncertainties cannot be dispelled by broad and loose assertions of such a "principle" as that every ship

is a part of the territory of the state whose flag she bears; which is indeed no principle at all, but a metaphor; useful, like other metaphors, as presenting a certain amount of truth in a lively and popular form, but, like them, unfit to be made the basis of an argument. The way to test it is to substitute for the metaphor the truth which it represents. To say that an English ship is English territory, is just as true as to say that an Englishman's house is his castle. An Englishman's house is inaccessible, to a certain extent, to the officers of the law; it may not be forcibly entered for the purpose of executing a civil process; and so far it is like a castle. An English ship is a floating habitation under the protection of the English Crown, and subject, with all who are on board, to the municipal law of England, and to no municipal law besides; and to that extent it is like English territory. But the considerations that apply to the soil of these islands, fixed for ever where nature has built their cliffs out of the sea, and over every square yard of which the laws and government of England may constantly exert their empire and control, have but a limited and imperfect application to a wooden vehicle which wanders over the surface of the globe, visiting one foreign port after another, private property itself, and emancipated, except in law, from all public authority. Hence it has been justly laid down by the French writer whose authority stands highest in these matters[g], that international rights, such as those of a belligerent, may be exercised over a foreign private ship on the high seas, but that municipal rights may not; that the flag is a protection against the latter, and is not a protection against the former. English lawyers have uniformly maintained the same opinion. It flows, indeed, directly

[g] Ortolan, *Diplomatie de la Mer*, ii. 74.

and inevitably from the admission of the right of visit and search. This brings us back again to the point from which we set out. A neutral ship is as inviolable as neutral ground, except as against the exercise of belligerent rights. Granted; but what are these belligerent rights? That is the very question under discussion.

If the neutral has some reason to complain, so also perhaps has the belligerent, who appears to be debarred in some cases from exercising the right of self-defence, unless where justice permits him to inflict a penalty. It can hardly be denied, whatever may be thought of the views here expressed, that some confusion between these two perfectly distinct things has found its way into the law; nor is it difficult to see how this has happened. The right which a belligerent has against a neutral is that of preventing the neutral from doing him an injury—a right which is not judicial; but it has come to be exercised through the agency of courts of justice, which act judicially and govern themselves by judicial principles. Out of that right their jurisdiction springs, and to regulate its exercise is their proper duty; yet while the belligerent is entitled to regard nothing but the wrong, the judge is bound to take into account the knowledge and intentions of the wrong-doer. Their power has consolidated itself by degrees, riveted by degrees its wholesome and beneficent restraints, possessed itself gradually of the whole field, and given a strong forensic colour to this part of international law. It has become settled by degrees that, until confirmed by them, no seizure, whether of ship or goods, is valid against a neutral; and an appeal to them on all questions arising out of maritime captures has become his great security against violence and injustice.

But they decide only on questions of property, not on the *status* or condition of persons. And thus, while an Admiralty judge can permit you to take out of a large assorted cargo a single bale of sail-cloth as contraband, —even giving freight, out of the rest of the cargo, to the neutral ship-owner whose offence was so small,—he cannot authorize you to take the person of a hostile general who may be on board unknown and in disguise, except by decreeing the confiscation of the ship. If you take him, you do it, at least, without the sanction either of a legal sentence or of an acknowledged rule. Such a state of things must inevitably breed some uncertainties, some anomalies, some occasional straining of legal principles. But it is easier to find fault with the law than to mend it; and easier perhaps to shew that it has anomalies than that it works substantial injustice. There are inconveniences, unquestionably, in holding that a naval officer, even with Vattel and Wheaton on his cabin shelves, cannot take prisoners out of a neutral ship without seizing the ship. But there are inconveniences also in permitting him to do so. We have lately been spectators of such a proceeding—the *modus operandi*—and the consequences. It is an excellent thing, no doubt, to fortify the rights of neutral commerce, in which all the world is interested; but the subject requires careful handling, and I hope we shall agree, whilst at peace, to no changes which we cannot trust ourselves to stand by when again in our turn surrounded by the provocations and temptations of war.

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