an interference in the war. It is therefore a non-neutral act; and the only excuse which can be accepted for its performance would be the impossible one that it is equally advantageous to, and desired by, both belligerents at once.

A broad distinction is however to be drawn between a grant of passage for a specific purpose in time of war, and a grant of passage made in time of peace to enable a state to reach an outlying portion of its territory, or to enable it to reach its possession with more ease than would otherwise be practicable. In the former case the grant, as has been seen, is essentially un-neutral; in the latter it is essentially colourless when made; and if by the occurrence of a war which happens to touch the outlying territory its effects become injurious to one of the two belligerents, the result is an accidental and possibly an unforeseen one. It is difficult to separate the harmless use of the neutral territory for mere garrison purposes from its use for belligerent purposes; and if the former use has been habitual, and especially if it has been secured by treaty, it probably could not be fairly held that the neutral state is guilty of un-neutral conduct in allowing the passage of troops during war. Its behaviour would however require to be judged by the circumstances of the case; a hard and fast line could scarcely be drawn; and while a rigid limitation of the force permitted to pass to the amount of the ordinary reliefs might be the equivalent of handing over the detached territory to the enemy, the grant of passage to greatly more than the usual numbers might be as definitely un-neutral an act as a grant made solely for the purposes of the war[1].

[1] The simplification of the map of Europe which has been effected by the formation of the German Empire has notably diminished the possible occasions upon which the question of the permissibility of continued passage could arise; but at least in one case a right still exists, the use of which in war time might possibly become a subject of dispute. [The railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the Canton Schaffhausen, and Germany has a right of military passage over it. But by the opening of the line from Ulm to Basle, *via* Sigmaringen, Tuttlingen, and Waldshut, which passes altogether clear of Swiss territory, an alternative route has now been provided.]

PART IV
CHAP. III

Analogous use of neutral territory.

With the passage of troops in an organised condition across neutral territory, and as illustrating the advantages which a belligerent might reap from such passage, may be mentioned an ingenious attempt which was made by Germany in 1870 to use Belgian territory, under a plea of humanity, to facilitate the operations of war. After the battle of Sedan, the victorious army was embarrassed by masses of wounded, whom it was difficult to move into Germany by the routes which were open, and whose support in France in part diverted the commissariat from its normal function of feeding the active army. The German government therefore applied to Belgium for leave to transport the wounded across that country by railway. In consequence of the strong protest of France, Belgium, after consultation with the English government, rejected the application. It is indeed difficult to see, apart from the grant of direct aid or of permission to move a corps d'armée from the Rhine Provinces into France, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railway from Nancy to the frontier from encumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access. [But under article 59 of the Hague Convention a neutral state may authorise the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material.]

Hostilities committed within neutral territory.

It has been already seen that the commission of hostilities within neutral territory was the earliest subject of legal restraint. Their prohibition was so necessary a consequence of the doctrine of sovereignty, and is so undisputed a maxim of law, that it would be superfluous to recur to the subject were it not that aberrations in practice have been more common than in any other matter connected with neutrality in which the rule is so clear. In 1793 the French frigate Modeste was captured in the harbour of Genoa by two English men of war; and it was neither

restored nor was any apology made for the violation of Genoese neutrality[1]. But in the same year the American government acted upon this law by causing the restoration of the ship Grange, seized in Delaware Bay; and the English Courts gave effect to it by voiding a capture which took place within the mouths of the Mississippi[2]. The principle upon which the closely allied act of issuing from neutral ground for an immediately hostile end is interdicted was laid down by Lord Stowell in a case in which an English frigate lying within Prussian waters sent out its boats to make captures among vessels anchored in the neighbouring roads at the entrance of the Dollart.

Use of neutral territory by a belligerent as a base of operations.

Much the larger number of cases in which the conduct of a neutral forms the subject of complaint is when a belligerent uses the safety of neutral territory to prepare the means of ultimate hostility against his enemy, as by fitting out expeditions in it against a distant objective point, or by rendering it a general base of operations. In many such cases the limits of permissible action on the part of the belligerent, and of permissible indifference on the part of the neutral, have not yet been settled. Generally the neutral sovereignty is only violated constructively. The acts done by the offending belligerent do not involve force, and need not entail any interference with the supreme rights of the state in which they are performed. They may be, and often are, innocent as regards the neutral except in so far as they endanger the quiescence of his attitude towards the injured belligerent; and their true quality may be, and often is, perceptible only by their results.

At the root of this class of cases lies the principle that a neutral state cannot allow its territory to become a scene of hostile operations to the disadvantage of one of two belligerents. The

[1] Botta, Storia d'Italia, i. 161 and 192. See also the case already mentioned of the Swedish vessels seized at Oster Riøser (antea, p. 80); that of the General Armstrong in 1814 (postea, p. 624); and that of the Florida, captured in Bahia Bay by the Wachusett in 1864 (id. p. 620).

[2] Mr. Jefferson's letter to M. Ternant, Am. State Papers, i. 77; The Anna, v Rob. 373.

extension of this principle to acts of hostility taking their commencement in neutral ground and leading to immediate violence, which was made by Lord Stowell, is equally applicable to acts the completion of which is more remote in point of time or place, but which have been as fully prepared within the neutral territory. All such acts must be offences against the neutral on the part of the belligerent performing them; and if knowingly permitted by the neutral they are offences on his part against the belligerent for whose injury they are intended. Ordinarily their identification presents little difficulty. There could be no question as to the nature of the filibustering expeditions from the United States, of those which fed the Cretan insurrection [of 1867], or of the Fenian incursions into Canada; and there can be as little question that the conduct of the Greek and American governments presented examples of grave deviations from the spirit of the rule of neutrality and from the letter of that which guides nations in time of general peace[1]. In cases of this kind the neutral country is brought under the common military definition of a base of operations; it becomes the territory 'from which an army' or a naval force 'draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need[2].'

Special mode in which cruisers may make neutral ports their base of operations.

But there are some cases in which the question whether a neutral territory is so converted by a belligerent into a base of operations as to affect the neutral state with responsibility is not so readily answered. An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess

[1] [The landing of Colonel Vassos in Crete with a force of regular Greek troops in February, 1897, falls within a different category. The expedition was under the direct sanction of his government who were then on the brink of war with Turkey, and though the Greek army did not cross the Thessalian frontier till seven weeks later (April 8), the acceptance of responsibility for the action of Vassos was tantamount to a declaration of war.]

[2] Jomini, Précis de l'Art de la Guerre, 1re partie, chap. iii. art. 18.

a wider scope than is usually given to them. In 1865 the Shenandoah, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States; her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the government of that country that 'the main operation of the naval warfare' of the Shenandoah having been accomplished by means of the coaling 'and other refitment,' Melbourne had been converted into her base of operations. The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable.

That previously to the American Civil War neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no

question; but there is equally little question that opinion has moved onwards since that time and the law can hardly be said to have remained in its then state. Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval[1]. There can be little doubt that no neutral states would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive action; and consequently to violate the essential principles of neutrality.

What constitutes an expedition.

In the case of an expedition being organised in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the

[1] Earl Russell to the Lords Commissioners of the Admiralty, January 31, 1862. State Papers, 1871, lxxi. 167. Among late writers, Ortolan (ii. 286), Bluntschli (§ 773), and Heffter (§ 149) simply register the existing rule. Calvo (§ 2371) expresses his approval of the English regulations.

moment of leaving. In 1828, a body of troops in the service of Dona Maria, who had been driven out of Portugal, took refuge in England. They remained for some time an organised body under military officers. In the beginning of 1829 they embarked in four vessels, nominally for Brazil, but in fact for Terceira, an island belonging to Portugal. In order to avoid the arrest of the expedition in England, the arms intended for it had been sent as merchandise from a port other than that from which the men started. The English government considered that as the men were soldiers, although unarmed, they constituted a true expedition, and a small squadron was placed in the neighbourhood of Terceira to prevent a landing from being effected. The vessels were stopped within Portuguese waters, and were escorted back to Europe[1]. The British government interfered so thoroughly at the wrong time and in the wrong manner, that in curing a breach of its own neutrality it was drawn into violating the sovereignty of Portugal. But on the main point, as to the character of the expedition, it was no less distinctly right than in its methods it was wrong.

On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organised whole. In 1870, during the Franco-German War, nearly 1,200 Frenchmen embarked at New York in two French ships, the Lafayette and the Ville de Paris, for the purpose of joining the armies of their nation at home. They were not officered or in any way organised; but the vessels were laden with 96,000 rifles and 11,000,000 cartridges. Mr. Fish was of opinion that the ships could not be looked upon as intended to be used for hostile purposes against Germany; the men not being in an efficient state, and the arms and ammunition being in themselves subjects of legitimate commerce[2]. There can be no

[1] Hansard, N. S. xxiii. 738–81, and xxiv. 126–214; Bulwer's Life of Lord Palmerston, i. 301–2.

[2] Mr. Thornton to Lord Granville, Aug. 26, 1870; State Papers, 1871,

doubt that the view taken by the government of the United States was correct. It was impossible for the men and arms to be so combined on board ship, or soon after their arrival in France, as to be capable of offensive use. It would have been a different matter if the men had previously received such military training as would have rendered them fit for closely proximate employment.

Expeditions combined outside neutral territory from elements issuing separately from it.

It has been proposed to stretch the liability of a neutral sovereign so as to make him responsible for the ultimate effect of two independent acts done within his jurisdiction, each in itself innocent, but intended by the persons doing them to form part of a combination having for its object the fitting out of a warlike expedition at some point outside the neutral state. The argument upon which this proposal rests has been shortly stated as follows: 'The intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory —whether acts of building, fitting, arming, or of procuring materials for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise [1].'

In accordance with this view, it was contended on the part of the United States before the Tribunal of Arbitration at Geneva that the Alabama and Georgia, two vessels in the Confederate service, were in effect 'armed within British jurisdiction.' The Alabama left Liverpool wholly unarmed on July 29, 1862, and received her guns and ammunition at Terceira, partly from a vessel which cleared a fortnight later from Liverpool for Nassau in the Bahamas, and partly from another vessel which started from London with a clearance for Demerara. In like manner the Georgia cleared from Glasgow for China, and

lxxi. 128. [But in the recent case of Wiberg *v.* United States, 163 United States Reports, p. 632, the Supreme Court took a stricter view of the proximate combination into an expedition of men, arms and ammunition when conveyed in the same ship to a common destination with a common object.]

[1] Dana, Notes to Wheaton, Elem. No. 215.

received her armament off the French coast from a vessel which sailed from Newhaven in Sussex.

The intent of acts, innocent separately, but rendered by this theory culpable when combined, can only by their nature be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot therefore be prevented by the state which is saddled with responsibility for them; and this responsibility must mean either that the neutral state will be held answerable in its own body for injury suffered by the belligerent, in which case it will make amends for acts over which it has had no control, or else that it is bound to exact reparation from the offending belligerent, at the inevitable risk of war.

If this doctrine were a legal consequence of the accepted principles of international law it might be a question whether it would not be wise to refuse operation to it on the ground of undue oppressiveness to the neutral. But no such difficulty arises; for, as responsibility is the correlative of power, if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be enabled to follow their authors to the place where the character of the acts becomes evident, and to exercise the functions of sovereignty there. But even on the high seas it is not permissible for a non-belligerent state to assume control over persons other than pirates or persons on board its own ships; and within foreign territory it has no power of action whatever.

Limits of neutral responsibility.

The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral

sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent in effect says: I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organise my expedition when I am so far off that the use of your territory is no longer the condition of its being.

Equipment of vessels of war in neutral territory.

It is somewhat difficult to determine under what obligations a neutral state lies with respect to vessels of war and vessels capable of being used for warlike purposes, equipped by or for a belligerent within its dominions.

1. Is the mere construction and fitting out, in such manner that they shall be capable of being used by him for warlike purposes, an international offence? or,

2. Is such construction to be looked upon as an act of legitimate trade; and is it necessary, to constitute an international offence, that some further act shall be done, so as to make such vessels elements in an expedition?

When, on general principles of International Law, (1) a breach of neutrality is committed,

The direct logical conclusions to be obtained from the ground principles of neutrality go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission, or belonging to a belligerent and able to inflict damage on his enemy. A commission is conclusive evidence as to the fact of hostile intent; and in order to satisfy the alternative condition it is not necessary that the ship shall be fully armed or fully manned. A vessel intended to mount four guns and to carry a crew of two hundred men would be to an unarmed vessel sufficiently formidable with a single gun and half its complement of seamen. But to possess any force at all, it must possess a modicum of armament, and it must have a crew sufficient at the same time to use that armament and to handle

the ship. If then the vessel seems at the moment of leaving the neutral port to fulfil these conditions, the neutral must, judging from the facts, infer a hostile intent, and prevent the departure of the expedition.

(2) An armed vessel is merely contraband of war.

On the other hand, it is fully recognised that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man of war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters. 'There is nothing,' says Mr. Justice Story, 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit[1].' If the neutral may sell his vessel when built, he may build it to order; and it must be permissible, as between the belligerent and the neutral state, to give the order which it is permissible to execute. It would appear therefore, arguing from general principles alone, that a vessel of war may be built, armed, and furnished with a minimum navigating crew, and that in this state, provided it has not received a commission, it may clear from a neutral harbour on a confessed voyage to a belligerent port without any infraction of neutrality having been committed.

Effect of usage.

The question remains, Is there a special usage with respect to the building and fitting out of ships which abridges the common law privileges of neutrals?

It has been already mentioned that in 1779 the neutrality edicts of various minor Italian States rendered it penal to sell, build, or arm privateers or vessels of war for any of the then belligerents; and a like provision occurs in the Austrian ordinances of 1803[2].

[1] La Santissima Trinidad, vii Wheaton, 340.
[2] Antea, p. 590; De Martens, Rec. viii. 106.

PART IV
CHAP. III

Practice of the United States.

In 1793 the instructions issued to the collectors of customs of the United States professed, according to an accompanying memorandum, to mark out the boundaries of neutral duty as then understood by the American government. And though Washington, in a speech to Congress [1], took the narrower ground that in the then posture of affairs he had resolved to 'adopt general rules which should conform to the treaties and assert the privileges of the United States,' the wider language of the memorandum should probably be preferred. The first paragraph declares 'that the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful;' and the seventh adds that 'equipments of vessels in the ports of the United States which are of a nature solely adapted to war are deemed unlawful [2].' These regulations, besides forbidding the original arming and equipping of vessels by a belligerent, prohibit the reception of any warlike equipment by vessels already belonging to him: but they do not specify as illegal the building and arming of a vessel intended to be delivered outside neutral territory, but not belonging to a belligerent at the moment of exit, although built to his order. The Neutrality Act of the United States went further, and made it penal to fit out and arm or procure to be fitted out and armed, &c., any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign state to cruise or commit hostilities against the subjects, &c., of another state with which the United States shall be at peace [3]. For some time the policy of the

[1] Dec. 3, 1793.

[2] The word 'original' not being repeated, either the first paragraph becomes mere surplusage, or the equipment forbidden in the seventh paragraph must be read as equipment other than original.

Relation of municipal laws to international duty.

[3] Act of 1795, sect. 3. In this instance indications external to the Act lead to the belief that it was intended to give effect to what was believed to be the duty of a neutral state; but it must be remembered that it is generally unsafe to use municipal laws to define the view of international duty taken by a nation. It may be more convenient to discourage the inception of acts, which would only in the later stage become international wrongs, than to deal with them when ripe; and it was never pretended

United States was in strict accordance with their municipal law; and subsequently they have at least expected the conduct of other nations to be in conformity with its requirements; it must therefore be supposed to continue to embody what are to their view international duties.

Of England.

England has also retained a Foreign Enlistment Act for many years upon her Statute Book, and she has strengthened its provisions after full warning of the manner in which municipal laws may be employed to damnify the position of a nation in international controversy.

Finally, Great Britain and the United States have agreed that they will for the future 'use due diligence to prevent the fitting out, arming, or equipping within the jurisdiction' of the contracting power 'of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended

that a nation lies under an international obligation to give effect to its municipal regulations, until the United States suggested the doctrine for a special object to the arbitrators at Geneva. For reasons of humanity England chose to go beyond the line of duty towards persons not her own subjects in keeping up a squadron on the coast of Africa for the suppression of slavery. It would be as reasonable to say that she contracted an international obligation to continue the maintenance of this squadron, as to declare that a country is bound by a municipal law which is in advance of what can be required of it by international usage.

There are only two ways—both of them indirect—in which municipal laws can produce an international effect. After a law has been administered for some time by the courts of a state, it either insensibly becomes to the majority of the people their standard of right, or it arouses in them pronounced dislike. In the latter case a law dealing with such matters as international relations will fall into desuetude or be repealed. In the former a tendency will in time grow up to act according to its provisions irrespectively of the obligations which it imposes. So long also as the law is administered at all, foreign nations will each expect to reap the full benefit which has accrued to another from its operation; and any failure on the part of the neutral government to make use of its powers gives a ground for suspecting unfriendliness, which the belligerent cannot be expected in the heat of war to estimate at its true value. It is therefore unwise for a people to enact or to retain neutrality laws more severe than it believes the measure of its duty to compel.

to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use[1].' As the respective governments of the two countries are not agreed on the true meaning of this language, it is useless to speculate as to the effect which might be given to the provisions of the Treaty of Washington during any future war in which either Great Britain or the United States is a belligerent, the other of the two being neutral.

Of France.

In France no special law exists forbidding the construction or outfit of vessels of war, but all persons exposing the state to reprisals or to a declaration of war are liable to punishment under the Penal Code, which leaves the state to accommodate its rules to international law existing for the time being[2]; and in 1861, on the outbreak of the American Civil War, a Proclamation of Neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all French subjects from 'assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties.' Under this proclamation six vessels which were in course of construction in French ports for the Confederate States were arrested.

Of other nations.

In 1864 the Danish War gave occasion to Italy for the adoption of a like rule; and in 1866 the government of the Netherlands for the first time 'undertook to see that the equipment of vessels of war intended for the belligerent parties should not take place in the ports of the Netherlands[3].' The codes of Austria, Spain, Portugal, and Denmark prohibit any one from procuring arms, vessels, or munitions of war for the service of a foreign power[4]. The intention may have been to prevent the issue of privateers, but the language would no doubt

[1] Treaty of Washington, art. vi; De Martens, Nouv. Rec. Gén. xx. 702.

[2] Code Pénal, arts. 84 and 85. For a summary of the municipal laws of France affecting enlistments and expeditions, see letters of M. de Moustier to Mr. Fane, Neut. Laws Commissioners' Rep., Append. iv. p. 46.

[3] Note of M. Zuylen de Nyevelt to Mr. Ward, 1867. For this and the whole continental practice in the matter, see Neut. Laws Commissioners' Rep., Append. iv.

[4] Rev. de Droit Int. vi. 502.

restrain the construction of vessels for belligerent use. No nation except England and the United States has gone further than to prohibit the armament of a vessel fitted solely for fighting purposes.

Conclusions as to existing law.

A comparison of international custom with the logical results of the unquestioned principles of neutrality seems then to lead to these conclusions.

1. That an international usage prohibiting the construction and outfit of vessels of war, in the strict sense of the term, is in course of growth, but that although it is adopted by the most important maritime powers, it is not yet old enough or quite wide enough to have become compulsory on those nations which have not yet signified their voluntary adherence to it.

2. That in the meantime a ship of war may be built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or it may be delivered to him within such territory, and may issue as belligerent property, if it is neither commissioned nor so manned as to be able to commit immediate hostilities, and if there is not good reason to believe that an intention exists of making such fraudulent use of the neutral territory as has been before indicated.

That the usage which is in course of growth extends the duties of a neutral state into new ground is plain; but it does not follow that the extension is either unhealthy or unnecessary. Though an armed ship does not differ in its nature from other articles merely contraband of war, it does differ from all in the degree in which it approaches to a completed means of attacking an enemy. The addition of a few trained men to its equipage, and of as much ammunition as can be carried in a small coasting vessel, adapts it for immediate use as part of an organised whole of which it is the most important element. The same cannot be said of any other article of contraband. It is neither to be expected nor wished that belligerent nations should be patient of the injury which would be inflicted upon them by the

supply of armed vessels to their enemies as mere contraband of war.

Within what limits equipment of vessels should be forbidden.

But it is much to be hoped that the rule will not retain the indefiniteness which attaches to it in its present inchoate form. In planting their doctrine upon the foundation of the intent of the neutral trader, or of the agent of the offending belligerent in the neutral country, instead of upon the character of the ship itself, jurists appear hardly to have realised how unimportant is the advantage which is given to the injured belligerent in comparison with the grave evils of an indefinite increase in the number of international controversies. Experts are perfectly able to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce. Perhaps few fast ships are altogether incapable of being so used as to inflict damage upon trade; and there is at least one class of vessels which on the principles urged by the government of the United States in the case of the Georgia might fix a neutral state with international responsibility in spite of the exercise by it of the utmost vigilance. Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country[1].

[1] In 1875, the Institute of International Law adopted a series of resolutions with respect to the duties of neutrals, founded upon the three rules of the Treaty of Washington. In these it was declared that 'l'État neutre est

PART IV CHAP. III

Effect of neutral sovereignty upon, 1. captured persons,

The jurisdiction of a sovereign being exclusive, upon him necessarily depends the liberty of the person and the ownership of property within his dominions. If any one is retained in captivity there, he is identified with the act; and therefore, as it has always been held, with obvious reason, that it is a continuation of hostilities to bring prisoners of war into neutral territory, its sovereign cannot allow subjects of a state with which he is in amity to remain deprived of their freedom in places under his control. If they touch his soil they cease to be prisoners[1]. An exception from this general rule is made in the case of prisoners on board a commissioned ship of a belligerent power, since the act of retaining them in custody falls under the head of acts beginning and ending on board the ship, and not taking effect externally to her, and is therefore one in respect of which a ship of war, under its established privileges, is independent of the jurisdiction of a foreign state within the waters of which it may be[2].

tenu de veiller à ce que d'autres personnes (than its own agents) ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction. Lorsque l'État neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher, et de poursuivre comme responsables les individus qui violent les devoirs de la neutralité.' Annuaire de l'Inst. de Droit Int. 1877, p. 139.

[1] Vattel, liv. iii. chap. vii. § 132; Lord Stowell, in The Twee Gebroeders, iii Rob. 165; Bluntschli, § 785. In 1588 several hundred Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais. They were claimed by the ambassador of Spain, but the council of the king decided that in touching the shores of France they had regained their liberty, and they were sent to Constantinople. Martin, Hist. de France, x. 93. The Neutrality Ordinance of Austria of 1803 says: 'Il ne sera pas permis aux Puissances belligérantes de mettre à terre dans nos ports, etc., aucun individu comme prisonnier de guerre: car aussitôt que de tels prisonniers auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' De Martens, Rec. viii. 111; and the Neutrality Edict of Venice, 1779, art. xx, ib. iii. 84.

[2] See antea, p. 194. The principle is applicable to privateers, L'Invincible, i Wheaton, 252; and according to Hautefeuille (tit. vi. chap. ii. sect. 3) and

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2. property.

It is not easy to see why property should not be subject to the principle which governs the treatment of persons. It is in fact admitted in the case of that which has come into the possession of a belligerent by way of booty, if the requirement of deposit in a safe place of possession during twenty-four hours has not been satisfied before neutral territory is entered[1]. But the practice with respect to property taken at sea has till lately been anomalous. The right of the captor to that which unquestionably belongs to his enemy is no doubt complete as between him and his enemy so soon as seizure has been effected; but as between him and a neutral state, as has been already seen[2], further evidence of definitive appropriation is required, and his right to the property of a neutral trader seized, for example, as being contraband goods or for breach of blockade, is only complete after judgment is given by a prize court. If therefore the belligerent carries his prize into neutral waters, without deposit in a safe place or possession during twenty-four hours in the case of hostile property, or without protection from the judgment of a prize court in the case of neutral property, he brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power. Indirectly also he is militarily strengthened by his use of the neutral territory; he deposits an encumbrance, and by recovering the prize crew becomes free to act with his whole force. Nevertheless, although the neutral may permit or forbid the entry of prizes as he thinks best, the belligerent is held, until express prohibition, to have the privilege not only of placing his prizes within the security of a neutral harbour, but of keeping them there while the suit for their condemnation is being prosecuted in the appropriate court[3]. Most writers think that he

Calvo (§§ 1132–3) it so far extends to prizes that prisoners may be retained on board of them.

[1] Vattel, liv. iii. ch. vii. § 132.

[2] Antea, pp. 453 et seq.

[3] 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793–1815) leads

is also justified by usage in selling them at the neutral port after condemnation; and, as they then undoubtedly belong to him, it is hard to see on what ground he can be prohibited from dealing with his own[1]. But it is now usual for the neutral state to restrain belligerents from bringing their prizes into its harbours, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow; and it is impossible not to feel an ardent wish that a practice at once wholesome and consistent with principle may speedily be transformed into a duty[2].

Duty of a neutral state to procure redress for injuries done to a belligerent within its territory.

It follows from the fact of a violation of the sovereignty of a nation being an international wrong, that the injured country has the right of demanding redress; and the obligation under which a neutral state lies to prevent infraction of its neutrality would seem to bring with it the duty of enforcing such redress in all cases in which the state would act if its own dignity and interests were alone affected. Its duty cannot be less than this, because quiescence under any act, which apart from the interests of the belligerent would not be permitted, is the concession of a special favour to his enemy; and it cannot be more, because no

to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.' This is also the law in France. Phillimore, iii. § cccLxxix.

[1] Ortolan, Dip. de la Mer, ii. 303, 306, 310. He grounds the admission of prizes into a neutral port on the *primâ facie* evidence of property which is afforded by the belligerent flag.

Kent, Comm. lect. vi; Manning, 387; Wheaton, Elem. pt. iv. ch. iii. § 13; Heffter, § 147.

Bluntschli (§§ 777 and 857) appears to agree with the above writers as to the existing law, but to think, as is unquestionably the fact, that it is in course of being changed.

Phillimore (iii. § cxxxix) seems to look upon a treaty made before outbreak of war as needed to make the reception of prizes a strictly legitimate act.

[2] Denmark laid down the rule for her guidance so long ago as 1823, and England, France, the United States, Prussia, Italy, Sweden, Holland, Spain, Portugal, and the Hanseatic Towns gradually acceded to it. Some admit prizes taken by public ships of war, while excluding those captured by privateers; but all forbid their sale. Neut. Laws Commissioners' Report, Append. iv; Calvo, § 2379.

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Practice in the matter.

one has a right to expect another to incur greater inconvenience or peril for him in their common quarrel than a man actuated by the ordinary motives would undergo on his own account. A state is supposed not to allow open violations of its territory to take place without exacting reparation; it is therefore expected to demand such reparation in the interest of the belligerent who may have received injury at the hands of his enemy within the neutral jurisdiction. And, as, from the exclusive force of the will of a sovereign state, all acts contrary to it done within the territory of the state are void, the redress which it is usual to enforce consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act. Thus, when in 1864 the Confederate cruiser Florida was seized in the harbour of Bahia by the United States steamer Wachusett, the Brazilian Government immediately demanded reparation from the Cabinet at Washington. The latter was unable to restore the vessel, which had foundered in Hampton Roads, but it surrendered the crew, and offered a more special satisfaction for the affront to Brazilian sovereignty by saluting the flag of the Empire at the spot where the offence had been committed, by dismissing the consul at Bahia, and by sending the captain of the Wachusett before a court-martial. Again, in 1863, the Chesapeake, a passenger boat plying between New York and Portland, was captured on its voyage by a small number of Confederate partisans, who had embarked at New York. She was pursued by an armed vessel belonging to the United States, which found her and seized her in British waters. Two men only were on board, the rest of the captors having deserted her, but a third prisoner was taken out of an English ship lying alongside. The United States surrendered the vessel and the men, and made an apology for the violation of territory of which its officers had been guilty [1].

When property captured in

If an occasion offers, the neutral sovereign will take upon himself to undo the wrongful act of the belligerent. When property

[1] Dana's Wheaton, note, Nos. 207 and 209, gives the cases in detail.

Violation of neutrality returns to the neutral jurisdiction.

is captured in violation of neutrality, whether actually within the neutral territory, or by a vessel fitted out in a neutral port, it will be seized on entering the neutral jurisdiction, and will be restored to its original owner[1]; and as a state possesses a right of pursuing vessels into the open sea and arresting them there for

[1] Wheaton, Elem. pt. iv. chap. iii. § 12; Pando, tit. iii. sect. vii. § 192; Hautefeuille, tit. vi. sect. ii. and tit. xiii. sect. i. § 2; Ortolan, Dip. de la Mer, ii. 298; Phillimore iii. §§ clvii–viii, cccxxvii, and ccclxxii. Calvo (§ 2843) limits the right of the neutral sovereign to cases of capture within his jurisdiction.

Mode in which restitution is effected.

'When a captured vessel is brought, or voluntarily comes *infra praesidia* of the neutral power, that power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.' La Estrella, iv Wheaton, 298. See also La Amistad de Rues, v Wheaton, 385; Talbot *v.* Janson, iii Dallas, 157; and The Betsey Cathcart, Bee. 292.

Properly, whatever the municipal means employed, restoration ought in all cases to be effected, so far as the surrender to the belligerent is concerned, by an immediate act of the state. The wrong being solely international, all its consequences are international also; and in most countries restoration may be made either by the state administratively, or by its courts judicially. Calvo, § 2363; Hautefeuille, ubi sup. But the advantage, when the property of individuals is involved, of a judicial investigation of evidence, generally throws such cases into the lap of the courts. When restoration is craved on the ground of capture within the neutral territory, the belligerent government is expected itself to prosecute the suit—the individual owner will not be heard; and even a consul is not clothed with sufficient representative character to appear on behalf of his state. Note to The Twee Gebroeders, iii Rob. 162; La Santissima Trinidad, vii Wheaton, 341; The Anne, iii Wheaton, 446. The latter part of the rule is undoubtedly logical. 'Capture in neutral waters as between enemies is deemed to all intents and purposes rightful. If the neutral sovereign omits or declines to put in a claim, the property is condemned *jure belli* to the captors.' The Anne, iii Wheaton, 447; and see Bluntschli, § 786. But when the capture has been the result of a remoter breach of neutrality on the part of the offending belligerent, as by making neutral territory a base of operations, the private owner is allowed to claim in the courts of the United States. Justice Story, speaking in 1822, said: 'If the question were entirely new it would deserve very grave consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way, and it is now too late to disturb it.' La Santissima Trinidad, vii Wheaton, 349. If the captured property has been carried into the jurisdiction of the belligerent whose subjects are the wrongdoers, his courts will do justice to the neutral state on application being made by it to them. Twee Gebroeders, ubi sup.;

infractions of its municipal laws, directed only against itself, it must be held competent to give effect by like action to its neutral duties [1].

When it so returns after having been *infra praesidia* of the captor.

According to Wheaton it is doubtful whether the neutral will restore property 'which has been once carried *infra praesidia* of the captor's country, and there regularly condemned in a competent court of prize;' but Ortolan justly urges that as the sovereign rights of a nation cannot be touched by the decision of a foreign tribunal, the consequences of such a decision cannot be binding upon it [2]; and it may be put still more generally that nothing performed *mero motu* by a wrong-doer in confirmation of his own wrongful act can affect the rights of others.

When it is a vessel which has been converted into a commissioned ship of war.

The case however stands differently when the captured property is a ship which, before returning to the neutral port, has been furnished with a commission from the captor's sovereign. The Admiralty courts of the neutral may enquire whether the vessel is in fact commissioned [3]; but so soon as it is proved to be invested with a public character, though the right of the neutral state to expect redress for the violation of its sovereignty remains

La Nostra Señora del Carmel contre la Vénus de Médicis; Pistoye et Duverdy, Traité des Prises Maritimes, i. 106; Ortolan, ii. 298.

The practice is everywhere more or less erroneous theoretically. There can be no doubt that it is the government within whose territory the wrong has been done which ought to call into action its own courts in all instances in which the prize comes within its jurisdiction; and that the neutral state, when the property has been carried into the dominions of the belligerent, should confine itself to international means for obtaining restitution.

[1] Comp. antea, p. 256. The Courts of the United States have decided to the above effect; Hudson *v.* Guestier, vi Cranch, 284, overruling Rose *v.* Himely, iv Cranch, 279. These cases only involved breaches of municipal regulations; but they are generally held to admit of a wider application.

[2] Wheaton, Elem. pt. iv. chap. iii. § 13; Ortolan, Dip. de la Mer, ii. 312. An incidental remark of Justice Johnson, made while giving a decision in the Supreme Court of the United States, supports, and perhaps was the source of, Wheaton's opinion. The Arrogante Barcelones, vii Wheaton, 519. It has also been said that 'The sentence of a court of admiralty or of appeal in questions of prize binds all the world as to everything contained in it, because all the world are parties to it.' Penhallow *v.* Doane's Executors, iii Dallas, 86.

[3] L'Invincible, i Wheaton, 254.

unaltered, its own right to apply the remedy is gone. The vessel has become invested with the immunities belonging to public ships of a state. Its seizure would therefore be an act of war, and the neutral can only apply for satisfaction to the offending belligerent [1].

Exclusion of such ships from neutral ports.

But though, if a vessel so commissioned is admitted at all within the ports of the neutral, it must be accorded the full privileges attached to its public character, there is no international usage which dictates that ships of war shall be allowed to enter foreign ports, except in cases of imminent danger or urgent need. It is fully recognised that a state may either refuse such admission altogether, or may limit the enjoyment of the privilege by whatever regulations it may choose to lay down [2]. It is therefore eminently to be wished that a practice may be established under which a neutral government shall notify at the commencement of a war, that all vessels mixed up in certain specified ways, whether as agents or as objects, with an in-

[1] It was contended on behalf of the United States before the Tribunal of Arbitration of Geneva, that Great Britain had a right to seize vessels fitted out in violation of her neutrality on entry into her ports after receipt of a commission. State Papers, North America, 1872, Case of the United States, p. 55, Argument of the United States, p. 113. The argument seems to rest on the assumptions, 1. That the privileges accorded to foreign public vessels are revocable at will; 2. That a belligerent people not recognised as a nation does not possess the same belligerent privileges as a recognised state. Neither assumption can be admitted for a moment to be correct. It is unfortunate that the arbitrators, with the exception of Sir A. Cockburn, committed themselves to the statement that 'the privilege of exterritoriality accorded to vessels of war has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.' Whatever sources the immunities of vessels of war may have originally sprung from—and, as has been seen (antea, p. 169), courtesy was no doubt one, though not the only one—there is no question that those immunities cannot now be refused at will. For the extent of the immunities of vessels of war see antea, p. 194.

[2] 'Siendo el asilo un derecho y no un deber para la Potencia neutra, claro está que puede negarlo ó concederlo, y en este último caso imponer á los buques admitidos todas las restricciones que estime convenientes á su seguridad ó á sus intereses.' Negrin, p. 179.

fringement of its neutrality, will be excluded from its ports. The rules established by the Empire of Brazil during the American Civil War adopted this precaution, though in dangerously vague language, by directing that no belligerent who had once violated the neutrality of the Empire should be admitted to its ports during the continuance of hostilities, and that all vessels attempting acts tending to such violation should be compelled to leave its maritime territory immediately, without receiving any supplies[1].

No practice as yet exists with respect to the exaction by the neutral sovereign of reparation for acts done outside his jurisdiction, but flowing from a violation of his neutrality, when neither the captured property nor the peccant vessel return to his territory.

Effect of resistance by a belligerent attacked within neutral territory.

A belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility.

In 1814 an American privateer, the General Armstrong, was found at anchor in Fayal harbour by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the General Armstrong to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, 'had not applied at the beginning to the neutral, but had used force to repel an improper

[1] State Papers, North America, 1873; Protocols, &c., 202. Mr. Bernard, however, shows that such a practice would not be unattended with inconvenience. Neutrality of Great Britain, 414. [And no such provision is contained in the British Proclamation and rules of neutrality issued during the Spanish-American War.]

aggression, of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese government could not be responsible for the results of a collision which had taken place in contempt of its sovereign rights[1].'

Reparation due by a neutral state for permitted violation of neutrality.

A neutral state which overlooks such violations of its neutrality as it can rightly be expected to prevent, or which neglects to demand reparation in the appropriate cases, becomes itself an active offender. It is bound therefore to give satisfaction in some form, if satisfaction be required, to the belligerent whose interests have been prejudiced by its laches. The nature of this satisfaction is of course a matter for agreement between the parties.

Hospitality and asylum.

Although it is incumbent on the neutral not to lend his territory for purposes of war, his right to admit his friends within it extends to the reception of belligerent forces under such conditions as shall guard against any abuse of his hospitality. Custom and the inherent difference between land and marine war have rendered these conditions unlike in the two cases. Perhaps the only occasion which hostilities on land afford to the neutral of extending his hospitality to belligerent persons other than those who resort to his country for commercial or private reasons, and who have therefore no relation to the war, is when a beaten army or individual fugitives take refuge in his territory from the pursuit of their enemy. Humanity and friendship alike recommend him to receive them, but his duty to the other belligerent requires that they shall not again start from his soil in order to resume hostilities; and it has been the invariable practice in late wars to disarm troops crossing the neutral frontier and to intern

To land forces of a belligerent.

[1] Ortolan (Dip. de la Mer, ii. 547) gives the text of the President's award. Mr Justice Story (The Anne, iii Wheaton, 447) seems to have considered a belligerent attacked in neutral territory to be justified in using force in self-defence.

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them till the conclusion of peace. The convention of February 1871 under which Switzerland received the army of General Clinchant suggests a difficulty which may in the future interfere with the continuance of neutral custom in the precise form which it wears at present[1]. It would be intolerably burdensome to a neutral state to maintain as guests for a long time any considerable body of men; on the other hand, by levying the cost of their support upon the belligerent an indirect aid is given to his enemy, who is relieved from the expense of keeping them and the trouble of guarding them as prisoners of war, while he is as safe from the danger of their reappearance in the field as if they were in his own fortresses. Perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states by which the latter should undertake not to employ them during the continuance of the war. [The Hague Convention imposes upon the neutral state the duty of supporting the interned troops, subject to reimbursement on the conclusion of hostilities[2].]

To naval forces.

Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigour of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbour without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety, she may take in such provisions as she needs, and if a steamer she may fill up with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of

[1] De Martens, Nouv. Rec. Gén. xix. 639.
[2] Art. 58.

neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immoveable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each successive war.

It is easy to fix the proper measure of repairs; difficulties, short of such circumstances as those which have already been discussed, may sometimes occur with reference to supplies of coal or provisions; but if a belligerent can leave a port at his will, the neutral territory may become at any moment a mere trap for an enemy of inferior strength. Accordingly, during a considerable period, though not very generally or continuously, neutral states have taken more or less precaution against the danger of their waters being so used[1]. Perhaps the usual custom until lately may be stated as having been that the commander of a vessel of war was required to give his word not to commit hostilities against any vessel issuing from a neutral port shortly before him, and that a privateer as being less a responsible person was subjected to detention for twenty-four hours[2]. The disfavour however with which privateers have long been regarded has not

[1] So long ago as 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should only be followed by the other after an interval of twenty-four hours. Ortolan, Dip. de la Mer, ii. 257. In 1778 the Grand Duke of Tuscany forbade both ships of war and privateers to go out for twenty-four hours after a ship whether enemy or neutral (di qualsivoglia bandiera). De Martens, Rec. iii. 25. The Genoese rule was the same; Venice was contented with the promises of the neutral commander that he would not molest an enemy or neutral for twenty-four hours, but she retained privateers for that time in port. Ib. 80. The Austrian proclamation of neutrality of 1803 ordered vessels not to hover outside the Austrian ports, nor to follow their enemies out of them; it also imposed the twenty-four hours' rule on privateers, and in the case of ships of war required the word of the captain that he would not commit hostilities.

[2] Pistoye et Duverdy, i. 108.

infrequently led to their entire exclusion, save in cases of danger from the sea or of absolute necessity; and the twenty-four hours' rule has been extended to public ships of war by Italy, France, England, the United States, and Holland. Probably it may now be looked upon as a regulation which is practically sure to be enforced in every war.

Mr. Bernard says: 'The rule that when hostile ships meet in a neutral harbour the local authority may prevent one from sailing simultaneously with or immediately after the other, will not be found in all books on international law. It is however a convenient and reasonable rule; it has gained, I think, sufficient foundation in usage; and the interval of twenty-four hours adopted during the last century in a few treaties and in some marine ordinances has been commonly accepted as a reasonable and convenient interval[1].'

It will probably be found necessary to supplement the twenty-four hours' rule by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The insufficiency of the twenty-four hours' rule, taken by itself, is illustrated by an incident which occurred during the American Civil War. In the end of 1861, the United States corvette Tuscarora arrived in Southampton Water with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser Nashville, which was then in dock. By

[1] Hist. Acc. of the Neut. of Great Britain, p. 273. The treaties in which the exercise of this rule is provided for are all with the Barbary States. Bluntschli declares in unqualified terms that 'in strict law a ship of war cannot quit a neutral port for four-and-twenty hours after the departure of an enemy's vessel.' § 776 bis. If international law contained any such rule, a correlative duty of enforcing it would weigh upon the neutral; but of this I can find no indication. The neutral may take what precautions he chooses in order to hinder a fraudulent use being made of his ports provided he attains his object. If he prefers to rely upon the word of a commander, there is nothing to prevent him. Even if the twenty-four hours' rule becomes hardened by far longer practice than now sanctions it, the right of the neutral to vary his own port regulations can never be ousted. The rule can never be more than one to the enforcement of which a belligerent may trust in the absence of notice to the contrary.

keeping up steam and having slips on her cable, so that the moment the Nashville moved, the Tuscarora could precede her, and claim priority of sailing, by moving and returning again within twenty-four hours, and by notifying and then postponing her own departure, the latter vessel attempted and for some time was able to blockade the Nashville within British waters. In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities, any vessel of war of either belligerent entering an English port should 'be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;' in either of which cases the authorities of the port were ordered 'to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours.' In 1870 [and in 1898] the same rule was laid down; and the United States, unwilling to allow to others the license which she permitted to herself, adopted an identical resolution. It is perhaps not unlikely soon to become general[1].

[1] Bernard, 270; Neut. Laws Commissioners' Rep., Append. No. vi; State Papers, lxxi. 167, 1871. [Hertslet, Commercial Treaties, vol. xxi. p. 834.]

Negrin (p. 180) well sums up as follows the conditions upon which belligerent vessels are now admitted into neutral ports.

'Las condiciones,' he says, 'del asilo respecto de los beligerantes son:

'1ª. Observar la mejor armonía y una paz completa en el puerto, aún con los mismos enemigos.

'2ª. No reclutar gente para aumentar ó completar las tripulaciones.

'3ª. No aumentar el calibre de la artillería, ni embarcar armas y municiones de guerra en buques militares y corsarios.

'4ª. No hacer uso del asilo para vigilar los buques enemigos ni obtener noticias sobre sus futuros movimientos.

'5ª. No abandonar el puerto hasta veinticuatro horas despues de haberlo hecho la escuadra ó buque enemigo, mercante ó de guerra que en él se hallaba.

'6ª. No intentar apoderarse, ya sea por la fuerza ó por la astucia, de las presas que pueda haber en el puerto.

'7ª. No proceder á la venta de las que se conduzcan al mismo, miéntras no hayan sido declaradas legítimas por el tribunal competente.'

CHAPTER IV

GENERAL VIEW OF THE RELATIONS OF BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

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General principles of the law.

The general right possessed by a belligerent of restraining commercial acts done by private persons which materially obstruct the conduct of hostilities, gives risé to several distinct groups of usage corresponding to different commercial relations between neutrals and the other belligerents.

All trade divides itself into two great heads. It consists either in the purchase or sale of goods, or in carrying them for hire from one place to another. The purchase of goods by a neutral is the subject of no belligerent restriction. The general principle that a neutral has a right to trade with his belligerent friend, necessarily covers a commerce by which the war can in no case be directly affected. The belligerent gains nothing else than his mercantile profit, and to forbid such trade would therefore be to forbid all trade. But by the sale of goods the neutral may provide his customer with articles which, either by their own nature, or from some peculiar need on the part of the belligerent, may be of special use in the conduct of hostilities. These therefore the enemy of the latter may intercept on their road after leaving neutral soil, and before sale to a belligerent purchaser has transformed them into goods liable to seizure as enemy property. Again, under the second head a neutral may send articles innocent in themselves for sale in places access to which the belligerent thinks it necessary for the successful issue of his war to forbid altogether, and which he is allowed to bar by so placing an armed force as to make approach dangerous; or the neutral may employ his ships in effecting a transport illicit because of the character of the merchandise or of the place to which it is taken; or finally he may associate his property

with that of the belligerent in such manner as to show the existence of a community of interest, or an intention of using his neutral character to protect his friend. The effect of the various acts which fall under these heads differs with the degree of noxiousness which is attributed to them; but in all cases, as the possession of a right carries with it the further right to use the means necessary for its enforcement, the belligerent is allowed to inflict penalties of sufficient severity to be deterrent.

The larger bodies of practice which have asserted themselves successfully with reference to these divisions, may on the whole be explained by the more or less reasonable application of the principle that a belligerent has the right to carry on his operations without obstruction. It is easy to see the relation to this principle of the prohibition to carry goods the supply of which may increase the strength of a belligerent, and of that to carry any goods to besieged places; and though the connexion is less plain, it can still be discovered in the cases where, by associating himself with belligerent property, a neutral would, if left alone, impede the belligerent right of weakening and embarrassing his enemy by seizing his property. But two exceptional practices must either be looked upon as abnormal, or must be explained by the admission of a different and very dangerous principle as a ground of international rule.

Exceptional practices.

The better established of these customs arises out of the right of barring access of innocent trade to an enemy's country, and under the name of commercial blockade has extended the prohibition beyond the area of purely military operations to all coasts which can be guarded by the fleet of the belligerent. A blockade which is or which forms part of a military operation, may consist in a siege—i. e. in an investment combined with an attack; or in a simple investment, of which the object is to reduce a place by famine; or in the denial to commerce of territory access to which is commanded by an army, or finally in the denial to commerce of a portion of coast of indefinite extent, in order to embarrass the movements of a land force of the enemy which but for the

Commercial blockade.

blockade would draw its supplies, or a portion of them, from the sea. All these kinds of blockade are of course fully warranted by the right of a belligerent to carry out his operations of war without being obstructed by neutrals. But according to existing usage it would be legitimate, in a war between England and the United States, for the former power to blockade the whole Californian coast, while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada. To forbid all neutral commerce, when no immediate military end is to be served, and when the effect of the measure upon the ultimate issue of the war is so slight as usually to be almost inappreciable, is to contradict in the plainest manner the elementary principle that neutrals have a right, as a general rule, to trade with the enemy [1]. If this principle can

[1] 'The right of blockade is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade which was open to him in time of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz. that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.' The Franciska, x Moore, 50.

Until the outbreak of the civil war in America some disposition was shown by the statesmen of the United States to question the propriety of commercial blockades, and they put the objection to them with much force. Mr. Marshall said: 'On principle it might well be questioned whether this rule (viz. that of confiscation of vessels) can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals.' Mr. Marshall to Mr. King, September 20, 1800; iii Wheaton, Append.

And Mr. Cass, on the breaking out of the Italian war, issued a circular to the American representatives in Europe in which it was laid down that 'The blockade of an enemy's coast, in order to prevent all intercourse with neutrals, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests, and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and materials neces-

be invaded in order that a belligerent may be subjected to a mere incidental annoyance, it is for all practical purposes non-existent. The theoretic reasoning which would justify a commercial blockade would equally justify an order, unsupported by the presence of an armed force, prohibiting neutrals from entering an enemy's port, and declaring any vessel with such destination to be a good prize. The best excuse for the usage is that the line of separation between a military and a commercial blockade is in some cases extremely fine; and that occasionally a blockade which in its origin is of the latter character is insensibly transformed into the former. Thus the blockade of the whole coasts of the Confederated States during the American Civil War, which began by being no more than the largest commercial blockade ever instituted, was ultimately of considerable military importance, and aided directly in carrying out a plan of operations which had for its object to stifle the enemy by compression on every side.

It may also be urged that in proportion as general maritime commerce becomes freed from liability to capture, it is necessary that a belligerent should be confirmed in the special privileges which enable him to overcome the advantages derived by his enemy from the ease and cheapness of transport by sea. Owing to the limitation of transport by land to certain lines of road, and to the cost of effecting it by indirect routes, an invasion

sary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates, if now first presented for consideration.' Quoted in Cobden's Speeches, vol. ii. 288. Mr. Cobden himself argued warmly in favour of the suppression of commercial blockades. See his Speeches, Foreign Policy, No. vii.

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intercepts trade over a larger area than could be generally touched by such maritime blockades as are combined with military operations. Hence wars which are carried on by land, incidentally establish blockades upon a very large scale, and among the means by which an invasion is calculated and intended to reduce an enemy, is the derangement to his foreign and internal trade which is caused by the occupation of his country. Although therefore, when this derangement is itself the sole object to which naval or military forces are directed, they are engaged in naval or military operations in so strained a sense that the manner in which a neutral is affected must be looked upon as anomalous, it is not likely that the right of maintaining commercial blockades will be readily abandoned, nor, in spite of the very serious objections which exist against them in their more extreme forms, is it quite certain that neutrals have a moral right to demand their cessation [1].

The rule of the war of 1756.

The second exceptional practice is that known as the rule of the war of 1756. It was formerly the policy with all European governments to exclude foreign ships from trade with their colonies, and though this rule has been destroyed or modified, it is still unusual to permit strangers to engage in the coasting trade from one port to another of the home country.

These exclusions gave rise to the question whether if a belligerent throws open his close trade in time of war either to a favoured neutral or to all neutrals, his enemy has a right to

[1] Some foreign writers (Ortolan, ii. 329; Hautefeuille, tit. ix. chap. i. sect. 1) have endeavoured to found the right of blockade on the theory that the space of water attached territorially to the land is conquered by the belligerent who occupies it with his naval forces, and that he refuses entrance to it in virtue of his territorial right. M. Cauchy objects to this, that as water is merely attached to the land, which alone renders it susceptible of appropriation, conquest of the land must be a necessary preliminary of legal right over the neighbouring sea. Whether the theory is tenable or not it is scarcely worth while to consider, for the usage did not arise out of it; it is merely a modern invention, useless for any purpose except to give a logical satisfaction to the minds of writers who without it would have been painfully affected by the abnormal character of a practice which they were bound to recognise.

deny to them the enjoyment of the proffered advantages. The first occasion on which the principle came into dispute, on considerations of general law[1], was in 1756, when the French, under the pressure of the maritime superiority of England, opened the trade between the mother-country and its colonies to the Dutch, while persisting in their habitual exclusion of other neutrals. The English captured and condemned the Dutch ships, with their cargoes, on the ground that they had been in effect incorporated into the French commercial navy. Before the outbreak of war in 1779, France announced, probably as a measure of precaution, that trade with her West Indian colonies would thenceforth be permanently open; the rule which the English had laid down in 1756 was therefore allowed to sleep. It is not easy to say how far acquiescence in a change of policy on the part of France, which can only have been looked upon as colourable, was suggested by the dominant opinion of the time. In the century which preceded the commencement of the American War, eight treaties, including those of Utrecht between England and France, and between France and the United Provinces, stipulated that either of the contracting parties should be at liberty to trade between ports belonging to enemies of the other[2]; and, as might be expected, the First Armed Neutrality asserted the freedom of coasting trade as one of the privileges for which its members contended. On the other hand only two treaties have expressly declared such trade to be unlawful: but the French Règlements of 1704 and 1744 both enforced the principle of the rule with the utmost stringency. Whatever may have been the state of current

[1] A controversy which occurred between the English and the Dutch in 1674 seems to have been determined on conventional grounds.

[2] These treaties were, besides those of Utrecht, that between England and the United Provinces in 1675 (Dumont, vii. i. 319), and those between the United Provinces and Spain, 1676 (ib. 325), the United Provinces and Sweden, 1679 (ib. 439), the United Provinces and Russia, 1715 (id. viii. i. 469), Spain and the Empire, 1725 (ib. ii. 115), and France and the United States, 1778 (De Martens, Rec. ii. 598).

opinion before the beginning of the French revolutionary wars, the rule of 1756 was then revived in more than its former strength.

Its extension in 1793.

There can be no question that a special privilege such as that enjoyed by the Dutch, exposes the neutral to be suspected of collusion with the belligerent whose favours he accepts; and that he cannot complain if the enemy of his friend forms a harsh judgment of his conduct. The matter stands otherwise if a trade is opened to all neutrals indifferently. In 1793, however, the French having opened their coasting and colonial trade to neutrals, the latter were not only forbidden by England to carry French goods between the mother-country and her colonies, or to engage in her coasting trade [1], but they were also exposed to penalties for conveying neutral goods from their own ports to those of a belligerent colony, or from any one port to another belonging to the belligerent country. The reasons for this severity may be gathered from the judgments of Lord Stowell. It was considered that a belligerent would not relax a system of such importance as that under which he retained in his own hands the coasting and colonial traffic, unless he felt himself to be disabled from carrying it on; that under such circumstances the neutral must be aware that he was assisting one of the two parties to the war in a peculiarly effective manner; 'was it,' in fact, 'possible to describe a more direct and more effectual opposition to the success of hostilities, short of actual military assistance?' With respect to colonial trade, there was a further reason. Colonies were often dependent for their existence on supplies from without; if they could not be supplied and defended by their owner, they fell of necessity to the belligerent who had incapacitated him from holding the necessary communication with them. What right had a third party to step in and

[1] It was the rule of English prize courts to give freight to the neutral carrier when enemy's goods in his custody were seized. The prohibition to trade with belligerent goods between belligerent ports entailed as its practical effect the withdrawal of this indulgence.

prevent the belligerent from gathering the fruit of his exertions? These arguments, taken alone, would be equally valid against any trade in innocent commodities, the possession of which might be accidentally valuable to a belligerent; but they were really rooted in the assumption that a neutral is only entitled to carry on trade which is open to him before the war. Upon him lies the burden of proving that his new trade is harmless to the belligerent; and if he fails in this proof, the support which he affords to the enemy may be looked upon as intentionally given. The justice of this doctrine was strongly contested by the American government; it has since remained a subject of lively debate in the writings of publicists[1]; and it cannot be said to have been sanctioned by sufficient usage to render such debate unnecessary. Nor is it easy to see that the question has necessarily lost its importance to the degree which is sometimes thought. The more widely the doctrine is acted upon that enemy's goods are protected by a neutral vessel, the more necessary it is to determine whether it ought to be governed in a particular case by exceptional considerations.

The arguments which may be urged on behalf of the right of neutrals to seize every occasion of extending their general commerce do not seem to be susceptible of a ready answer. Neutrals are in no way privy to the reasons which may actuate a belligerent in throwing open a trade which he has previously

[1] See Wheaton, i. Append. Note iii for a detailed history of the practice during the Seven Years' War, and those of the American and French Revolutions. Mr. Justice Story thought coasting trade to be too exclusively national for neutrals to be permitted to engage in it, and was 'as clearly satisfied that the colonial trade between the mother-country and the colony, when that trade is thrown open merely in war, is liable in most instances to the same penalty;' but he objected to the further extension of the rule which forbade all intercourse with the colony. The English writers, Manning (267), Phillimore (iii. § ccxxv), uphold the principle of the rule, and Heffter (§ 165), though clearly disliking the rule, treats it as fairly established; Wheaton (pt. iv. chap. iii. § 27), Kent (Lect. v.) and Ortolan (lib. iii. chap. v) come to no definite conclusion; Bluntschli (§§ 799–800), Gessner (266–77), Calvo (§ 2410) pronounce for the legality of the prohibited commerce.

been unwilling to share with them; they can be no more bound to enquire into his objects in offering it to them than they are bound to ask what it is proposed to do with the guns which are bought in their markets. The merchandise which they carry is in itself innocent, or is rendered so by being put into their ships; in the case of coasting trade they take it to ports into which they can carry like merchandise brought from a neutral harbour; and the obstructing belligerent is unable to justify his prohibition by any military strength which it confers upon him. On the one hand the neutral is free from all belligerent complicity with a party to the war; on the other the established restrictive usages afford no analogy which can be extended to cover the particular case.

Heads of law.

The above being the only exceptions from the general rule that permitted restraints upon neutral trade to flow from a right conceded to the belligerent to prevent his military operations from being obstructed, it is evident that such differences as may exist in other matters between the practices and the doctrines on the subject which are in favour with various nations, arise not from disagreement as to the ground principles of law, but as to the extent or the mode of their application. It is admitted in a general sense that a belligerent may restrain neutral commerce, but it is disputed whether he may interfere at all with certain kinds of trade, and with respect to others how far his rights extend. In one or other of these ways each of the divisions of trade before mentioned has been, or still is, the subject of lively controversy; and in the following chapters it will therefore be necessary to examine each in more or less of detail.

The law affecting them may be divided into the following heads:—

i. That which deals with forbidden goods, viz. articles contraband of war.

ii. That which deals with forbidden carriage in its subdivisions of

1. Carriage of analogues of contraband, viz. persons and despatches affected with a specially dangerous character.
2. Carriage of goods to forbidden places; i.e. to places under blockade.

iii. That which deals with neutral goods entrusted to or under the protection of a belligerent.

Together with the law belonging to the second head, must be mentioned the prohibition to carry goods belonging to a belligerent, which though no longer a dominant rule, is not yet so fully abandoned that it can be passed by in silence.

Finally, it is convenient to treat separately the law of visit and seizure, or the means which a belligerent is authorised to take in order to establish that a neutral trader can be affected by penalties for any of the above reasons.

CHAPTER V

CONTRABAND

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Uncertainty of usage as to what objects are included in contraband.

THE privilege has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself. But at no time has opinion been unanimous as to what articles ought to be ranked as being of this nature, and no distinct and binding usage has hitherto been formed, except with regard to a very restricted class.

Views of Grotius.

Grotius placed all commodities under three heads. 'There are some objects,' he says, 'which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and in peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessaries of war. The second class of objects gives rise to no dispute. With regard to the third kind, the state of the war must be considered. If seizure is necessary for defence, the necessity confers a right of arresting the goods, under the condition however that they shall be restored unless some sufficient reason interferes[1]. The division which was made by Grotius still remains the natural framework of the subject. Objects which are of use in war alone are easy to enumerate and to define. They consist of arms and ammunition, the lists of which, as contained in treaties, remain essentially the same as in the eighteenth century. The only variations which time has introduced have followed the changes in the form and names of weapons. As to this head

[1] De Jure Belli et Pacis, lib. iii. c. i. § 5.

therefore there is no difference of opinion; but beyond it certainty is at once lost. The practice of different nations has been generally determined by their maritime strength, and by the degree of convenience which they have found in multiplying articles, the free importation of which they have wished to secure for themselves, or to deny to their enemy. Frequently, they have endeavoured by their treaties to secure immunity for their own commerce when neutral, and have extended the list of prohibited objects by proclamation so soon as they became belligerent.

Practice in the seventeenth century. The United Provinces.

Of the treaties concluded by the United Provinces with England, France, Spain, and Sweden, between 1646 and the end of the seventeenth century, only three contained articles classing as contraband any other commodities than munitions of war. In these three the addition of horses was made. In four treaties provisions, and in two naval stores, were expressly excluded[1]. But in 1652, being at war with England, and again in 1657 with Portugal, they issued edicts placing articles of naval construction in the list of contraband; in the beginning of each subsequent war a like edict was promulgated, and in 1689 a further enlargement embraced grain and provisions of every sort[2].

England.

The stipulations of the treaties entered into by England were more varied than those by which Holland was bound. In one provisions were stated to be contraband; in two they were excluded. Horses and soldiers were included in three, and money and ships in two; on the other hand materials of naval construction were excluded in one[3].

There is some reason to believe that the accepted English list of contraband articles varied considerably during the century.

[1] With France, 1646 (Dumont, vi. i. 342); Spain, 1650 (ib. 570); England, 1654 (ib. ii. 74); England, 1668 (id. vii. i. 74); England, 1674 (ib. 282); England, 1675 (ib. 288); Sweden, 1675 (ib. 316); France, 1678 (ib. 357).

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. c. x.

[3] Besides the conventions mentioned above, England concluded treaties with Sweden, 1654 (Dumont, vi. ii. 80); France, 1655 (ib. 121); Sweden, 1661 (ib. 385); Sweden, 1666 (id. vi. iii. 83); Spain, 1667 (id. vii. i. 31); France, 1667 (ib. 327).

In 1626, it appears from letters of the Maréchal de Bassompierre, then ambassador in London, that the English negotiators with whom he treated counted amongst the number metals, money, timber, and provisions[1]; but in 1674, Sir Leoline Jenkins, in reporting to the King upon a case in which English pitch and tar, carried in a Swedish vessel, had been captured and taken into Ostend for adjudication, said that 'these goods, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law but by the general law of nations. I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the use of war, except it be in the case of besieged places, or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with[2].' It would seem therefore that, in the opinion of the chief English authority on international law in the latter end of the century, articles of direct use for warlike purposes were alone contraband under the common law of nations, but that each state, in order to meet the special conditions of a particular war, possessed the right of drawing up at its opening a list of articles to be contraband during its continuance.

France.

France was insignificant as a naval power till the war of 1672, and the larger number of her treaties have already been mentioned in speaking of England and Holland. One which was entered into with the Hanse Towns in 1655 is to be noted as including horses and naval stores, while excluding provisions; and the Peace of the Pyrenees was silent as to naval stores, and coincided in its stipulations as regards horses and provisions with the treaty of 1655[3]. In 1681, the Ordonnance de la Marine, which has been generally looked upon as fixing French law upon the matter, laid down that 'arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated[4].'

[1] Ortolan, ii. 185.
[2] Wynne, Life of Sir Leoline Jenkins, ii. 751.
[3] Dumont, vi. ii. 103 and 64.
[4] Valin, Ord. de la Marine, ii. 264.

Practice in the eighteenth century.

The eighteenth century was opened with the inclusion of naval stores by France in 1704, but on the whole French practice was sufficiently consistent. Its treaties invariably stated munitions of war and saltpetre to be contraband, and with one exception they included horses; but they all expressly excluded provisions; except in one case they refused to admit into the list money and metals; in two cases materials of naval construction are unmentioned, and in only one treaty, made in 1742, are they specifically included. The treaties made with the United States in 1778, with England in 1786, and with Russia in 1787, also excluded ships. The practice of Spain has been identical in principle with that of France[1].

England.

The treaties concluded by Great Britain during the eighteenth century in the main followed the terms of the Treaty of Utrecht, which embodied the French doctrine of contraband; they all excluded provisions, and confiscated saltpetre; six include horses, two are silent with respect to them, and one with Russia—a state which seems to have made a point of securing free trade in horses—strikes them from the list by name. In five cases no mention is made of money or metals; in three both, and in one money alone, are excluded. Naval stores are unmentioned in five treaties; by the rest commerce in them is permitted[2].

These treaties bound England at different times with France, Spain, Sweden, Russia, Denmark, and the United States, but they in no way expressed the policy of the country as apart from special agreement; and their principles were not acted upon in dealing with states with which no convention existed. Thus a larger part of Europe was usually exposed to the operation of English private regulations than was protected by treaty

[1] [The Spanish Decree of April 23, 1898, does not expressly include horses among contraband of war.]

[2] It would seem from Burrell's Admiralty Reports (p. 378) to have been considered by England in 1741 that contraband articles, apart from treaty, were confined to arms, saltpetre, and horses with their furniture. 'Ropes, sails, anchors, masts, planks, boards, and all other materials for building and repairing ships are reputed free goods.'

from the effects of her maritime predominance. In the end of the Seven Years' War, for example, Sweden and the United Provinces were the only countries with which any limiting treaty remained in force. Towards Russia, Denmark, the Hanse Towns, Mecklenburg, Oldenburg, Portugal, the Two Sicilies, Genoa, and Venice, she might act in accordance with her general views of belligerent rights[1]; and these seem then, as afterwards, to have permitted the list of contraband articles to be enlarged or restricted to suit the particular circumstances of the war[2].

The Baltic Powers.

The Baltic Powers are said by Wheaton to have been at issue with England during the whole of the eighteenth century with respect to the contraband character of naval stores[3]. But though Sweden concluded a treaty with Great Britain in 1720, by which materials of naval construction were declared not to be contraband, her own ordinance of 1715 includes all articles 'which can be employed for war[4].' Russia agreed with the United Provinces in 1715, that naval stores should be taken to be contraband, and made a treaty with England in 1766, in which the question is left open. Denmark on the other hand excluded naval stores by her treaty of 1701 with the United Provinces, but made them contraband by a regulation issued in 1710 during war with Sweden[5], as well as by treaty with France in 1742, and with England in 1780. Down to the time of the First Armed Neutrality therefore, the practice of the three northern states does not seem to have been characterised by definite purpose. Holland maintained her policy of varying the lists of contraband articles at pleasure until the middle of the eighteenth century, when the diminution of her naval power carried her from among the advocates of belligerent privilege into those of neutral rights.

[1] The clause forbidding trade in contraband in the treaty with Denmark of 1670 is not inconsistent with the inclusion of anything useful to the enemy of the contracting parties.

[2] The Jonge Margaretha, i Rob. 193.

[3] Elements, pt. iv. chap. iii. § 24.

[4] v Wheaton, Appendix, 75.

[5] Valin, Ord. de la Marine, ii. 264.

Jurists of the eighteenth century.

The writers of the period were not more consistent with each other than was practice with itself. Heineccius, writing in 1721, ranked as contraband of war not only munitions of every kind, saltpetre, and horses, but cordage, sails, and other naval stores, together with provisions[1]. Bynkershoek on the other hand strives to limit the number of prohibited commodities as rigidly as is possible, consistently with the rules applied by his nation. He lays down broadly that everything is contraband which may be employed by belligerents for purposes of war, whether it is a completed instrument of war, or some material in itself suitable for warlike use. What articles however he intends to indicate by the second clause of his description is not very evident, for he immediately expresses a doubt whether the material is contraband out of which something may be fitted for war. Descending to particulars, he allows materials for building ships to be confiscated if the enemy is in urgent need of them; saddles, scabbards, and such articles, he is ready to condemn unless they are in numbers so small as not apparently to be intended for hostile use; as regards saltpetre he seems to leave the question open[2]. It is important, as Sir R. Phillimore re-

[1] 'In quibus mercibus vetitis accenseri animadvertimus omnia arma ignivoma, eorumque adparatus, qualia sunt tormenta, bombardae, mortaria, petardae, bombi, granatae, circuli picei, tormentorum sustentacula, furcae, balthei, pulvis nitratus, restes igni capiendo idoneae, sal nitrum, globi, item hastae, gladii, galeae, cassides, loricae, bipennes, spicula, equi, ephippia, aliaque instrumenta bellica. Quin et triticum, hordeum, avena, legumina, sal, vinum, oleum, vela, restes, et siqua alia ad adparatum nauticum pertinent. . . . Ceterum sunt quaedam de quibus inter gentes aliquando disceptatum est, an mercibus vetitis sint accensenda. Sic de vaginis aliquando dubitatum. . . . Vaginis non minus opus est hosti quam gladiis; et quamvis vaginis non vulneret aut stragem edat, inutiles tamen essent ipsi gladii futuri, nisi vaginae eos a pluvia et rubigine tuerentur. Eadem ergo ratio, quae vela, restes nauticas, frumenta, prohiberi suasit, ipsis etiam vaginis facile poterit accommodari.' De Nav. ob Vect. Merc. Vetit. Comm. xiv.

[2] 'Excute pacta gentium, quae diximus, excute et alia quae alibi exstant, et reperies, omnia illa appellari contrabanda, quae, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta. . . . Atque inde judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zoucheus' (De Jure Feciali, pt. ii. s. vii. q. 8). 'Ego non essem, quia ratio et exempla me movent in contrarium. Si omnem

marks, that Bynkershoek adopts the principle of considering the circumstances of each case, and that the list of contraband articles must therefore, according to him, be variable. Vattel enumerates 'arms and munitions of war, timber, and everything which serves for the construction and armament of vessels of war, horses, and even provisions, on certain occasions when there is hope of reducing the enemy by famine [1].' Valin, writing in 1766, says that 'tar has also been declared to be contraband, with pitch, resin, sailcloth, hemp, and cordage, masts and ship-building timber. Thus, apart from their contravention of particular treaties, there is no reason to complain of the conduct of the English, for by right these things are now contraband, and have been so from the beginning of the century, though formerly the rule was otherwise [2].' Lampredi reduces contraband merchandise to those articles only, 'which are so formed, adapted, and specialised as to be unfit to serve immediately and directly for other than warlike use [3].' He appears to ground his doctrine upon the language of treaties. On comparing the jarring opinion of these different authors with the treaties which have been enumerated and with the indications of unilateral practice which here and there occur in history, it seems to stand out with tolerable clearness that no distinct rule existed in the eighteenth century with regard to the classification of merchandise as innocent or as contraband. On the one hand, there is no doubt that France thought it to her interest to restrict the number of articles classed under the latter head; on the other, it is as evident that England wished to preserve entire freedom of action; but the position of other nations is not so certain,

materiam prohibeas, ex qua quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex qua non saltem aliquid, bello aptum, facile fabricemus. Hac interdicta, tantum non omni commercio interdicimus, quod valde esset inutile. . . . Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit.' Quæst. Jur. Pub. lib. i. c. x.

[1] Droit des Gens, liv. iii. chap. vii. § 112.

[2] Ord. de la Marine, ii. 264.

[3] Del Commercio dei Popoli Neutrali in Tempo di Guerra, 70.

and the extended catalogues which were sanctioned by a German, a Swiss, and a Frenchman must have been grounded on a wider opinion than could be evidenced by the practice of England and Holland alone.

The First Armed Neutrality.

It was natural, however, that the secondary maritime powers should in time accommodate their theories to their interests. They were not sure of being able as belligerents to enforce a stringent rule; they were certain as neutrals to gain by its relaxation. Accordingly, in 1780 Russia issued a Declaration of neutral rights, among the provisions of which was one limiting articles of contraband to munitions of war and sulphur. Sweden and Denmark immediately adhered to the Declaration of Russia, and with the latter power formed the league known as the First Armed Neutrality. Spain, France, Holland, the United States, Prussia, and Austria, acceded to the alliance in the course of the following year. Finally it was joined in 1782 by Portugal, and in 1783 by the Two Sicilies.

It is usual for foreign publicists to treat the formation of the Armed Neutrality as a generous effort to bridle the aggressions of England, and as investing the principles expressed in the Russian Declaration with the authority of such doctrines as are accepted by the body of civilised nations. It is unnecessary to enter into the motives which actuated the Russian government[1]; but it is impossible to admit that the doctrines which it put forward received any higher sanction at the time than such as could be imparted by an agreement between the Baltic Powers. The accession of France, Spain, Holland, and the United States was an act of hostility directed against England, with which they were then at war, and was valueless as indicating their settled policy, and still more valueless as manifesting their views of existing international right. It was the seizure by Spain of two Russian vessels laden with wheat which was the accidental

[1] The intrigues which led to the issue of the Russian Declaration are sketched by Sir R. Phillimore, iii. § clxxxvi; see also Lord Stanhope, Hist. of Eng. chap. lxii.

cause of the original Declaration, and within a few months of adhering to the league France had imposed a treaty upon Mecklenburg, and Spain had issued an Ordinance, both of which were in direct contradiction to parts of the Declaration[1]. The value of Russian and Austrian opinion in the then position of those countries as maritime powers is absolutely trivial. Whatever authority the principles of the Armed Neutrality possess, they have since acquired by inspiring to a certain but varying extent the policy of France, the United States, Russia, and the minor powers.

France.

On the outbreak of war between France and England in 1793, the Convention decreed that neutral vessels laden with provisions destined to an enemy's port should be brought in for preemption of the cargo[2], although treaties were then existent between France and the Hanse Towns, Hamburg, the United States, Mecklenburg, and Russia, in which it was stipulated that provisions should not be contraband of war. But the Prize Courts seem to have acted upon the rules of the Ordinance of 1681[3]; and of the few treaties which have been concluded by France during the present century, only one varies from the form which is usual in her conventions[4].

United States.

The conduct of the United States has been less consistent. Between 1778 and the end of the eighteenth century they concluded four treaties, by which munitions of war, horses, and sulphur or saltpetre, or both, were ranked as contraband; and provisions, money and metals, ships and articles of naval construction, were declared to be innocent[5]. The treaty of 1794 with England includes naval stores among objects of contraband, and provides,

[1] All the signataries to the Declaration of the Armed Neutrality violated one or other of its provisions when they were themselves next at war.

[2] Phillimore, iii. § cxlv. The decree was issued on May 9, and the English Instructions to the like effect were dated June 8.

[3] Il Volante, Pistoye et Duverdy, i. 409.

[4] The convention with Denmark made in 1842 includes naval stores. Phillimore, iii. § cclx.

[5] France, 1778 (De Martens, Rec. ii. 598); Holland, 1782 (id. iii. 451); Sweden, 1783 (ib. 569); Spain, 1795 (id. vi. 561).

when 'provisions and other articles not generally contraband are seized,' that they shall not be confiscated, but that the owner shall be indemnified[1]. But the government of the United States did not look upon provisions as incapable of entering the class of prohibited articles under special circumstances; for in 1793, while protesting against the Instructions issued by England in June of that year, it argued against them on the ground that provisions can only be contraband when carried to a place which is actually invested, and which therefore there is a well-founded expectation of reducing by famine[2]. And it fully recognised that materials of naval construction are contraband by the common usage of nations[3]. In a case arising out of the subsequent war with England, the Prize Courts of the United States held that provisions 'destined for the army or navy of the enemy, or for his ports of naval equipment,' were to be deemed contraband[4].

Practice in the nineteenth century. United States.

In the nineteenth century a treaty of the United States with England retains naval stores and saltpetre, and is silent upon other points; another with Sweden includes sulphur and saltpetre, excluding naval stores; a third with France follows the terms affected by the latter power; and fourteen treaties, all, with one exception, contracted with American States, mention munitions of war and horses; and treat provisions, money, metals, ships, and articles of naval construction as innocent[5]. Those with

[1] De Martens, Rec. v. 674.

[2] Mr. Randolph to Mr. Hammond, May 1, 1794, American State Papers, i. 450.

[3] Mr. Pickering to Mr. Pinckney, Jan. 16, 1797, American State Papers, i. 560.

[4] Maisonnave *v.* Keating, ii Gallison, 335; The Commercen, i Wheaton, 387 [followed in the Bénito Estenger, 176 United States Reports, p. 573, a case arising out of the Spanish-American War of 1898].

[5] England, 1806 (De Martens, Rec. viii. 584); France, 1800 (id. vii. 202); Columbia, 1824 (Nouv. Rec. vi. 996); Sweden, 1827 (id. vii. 279); and in identical terms with Central America, 1826; Brazil, 1828; Chili, 1832; Venezuela, 1836; Peru-Bolivia, 1836; Ecuador, 1839; New Grenada, 1848; Guatemala, 1849; Peru, 1851 and 1870; Italy, 1871. The treaty with Mexico was made in 1831 (Nouv. Rec. x. 338); and that with San Salvador in 1849 (ib. xv. 74).

Mexico and San Salvador contain the special stipulation that provisions destined to a besieged port are to be excepted from the usual immunity. It would seem, on the whole, that the United States have always recognised the English doctrine of contraband to be more in consonance with existing usage than that of France, but that they have wished in certain cases to limit the application of the rule by express convention.

The practice of the Baltic States is of less interest, because the events of the revolutionary wars tended greatly to reduce their maritime importance; but before the antecedent conditions had been altered, Denmark varied the definition of contraband to which she had bound herself by issuing in 1793 a proclamation of neutrality, in which horses, and 'in a general way, articles necessary for the construction and repair of vessels, with the exception, however, of unwrought iron, beams, boards and planks of deal and fir, are declared to be contraband[1].' The Second Armed Neutrality endeavoured to re-establish the doctrine of its predecessor; and part of the compromise which, after its destruction, was effected between the views of Russia and of England consisted in the recognition of the northern enumeration of prohibited articles; but in 1803 a fresh agreement was concluded between England and Sweden by which coined money, horses, ships, and manufactured articles serving immediately for their equipment, were declared liable to confiscation, while naval stores, the produce of either country, were to be brought in for pre-emption[2]. Since then the only treaties concluded by any of the Baltic States which materially deviate from the principles of the Armed Neutrality, are that made at Orebro between England and Sweden in 1812, which includes horses, money, and ships, and that signed between England and Denmark in 1814, by which naval stores as well as horses are declared to be contraband[3].

Second Armed Neutrality.

[1] v Wheaton, Appendix, 76.

[2] De Martens, Rec. viii. 91.

[3] De Martens, Nouv. Rec. i. 432 and 680. The other treaties defining contraband of war made by the Baltic powers during the last century

Great Britain.

Besides the treaties already mentioned, Great Britain has only twice entered into special agreements with reference to contraband since the beginning of the nineteenth century [1]; and as almost all her previous contracts have been dissolved by war, her practice is mainly to be sought in the decisions of her Prize Courts. These persistently carried out, through the whole of the Revolutionary and Napoleonic wars, the traditionary principles upon which England had always before acted, of classing as contraband not merely articles susceptible only of warlike employment, but also a large number of those *ancipitis usus*.

Opinions of modern jurists.

In presence of the foregoing facts some modern writers can assert, with curious recklessness, that England is the only power which for more than a century has refused to identify articles of contraband with munitions of war [2]. Kent, Wheaton, and Manning [3], on the other hand, state the results of custom with perhaps somewhat too exclusive a reference to English and American practice, and without sufficient endeavour to classify the objects which in a different measure and in their divers ways have been included among the prohibited acts.

are as follows: Denmark and Prussia, 1818 (De Martens, Nouv. Rec. iv. 534); Denmark and Brazil, 1828 (id. vii. 614); Sweden and the United States, 1827 (ib. 279); Prussia and Brazil, 1827 (ib. 470); Prussia and Mexico, 1831 (id. xii. 534).

[1] With Portugal in 1820, when munitions of war, sulphur, horses, money, and naval stores were classed as contraband; and with Brazil in 1827, when munitions of war and naval stores only were enumerated. De Martens, Nouv. Rec. iii. 211, and vii. i. 486.

[2] E. g. Hautefeuille, tit. viii. sect. ii. § 3. The process by which M. Hautefeuille arrives at his conclusions has the merit of boldness. He finds in the imaginary 'loi primitive,' to which he refers in every page with wearisome iteration, that contraband of war is 'expressly' confined to arms, &c. His assumption is readily supported by treaties, from the list of which those which conflict with his theory are excluded as destitute of authority; and he provides against the interference of unilateral acts by a like rejection of everything which militates against the simple dictates of the divine will. He is obliged, however, to admit that the divine law has not been strong enough to prevent the entry of saltpetre and horses into the established list of contraband.

[3] Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 24; Manning, chap. vii.

Among continental jurists two currents of opinion are visible. Some writers strive to reduce the list of contraband within the narrowest dimensions, notwithstanding the increased variety of material which is applicable more or less immediately to the purposes of warfare. Their works show a love for theoretic neatness, and some detachment from the practical aspects of the subject[1]. Others, recognising the difficulty of making a fixed and restricted list of contraband, and the improbability that assent to any such list would be generally given, or if given would be adhered to in circumstances of temptation, retain the principle of variability, while in most cases giving evidence of a healthy wish to confine its effects within very moderate limits[2].

[1] Gessner, 92-6, 109, 160; Hautefeuille, tit. viii. sect. ii. § 6; Kleen, De la Contrebande de Guerre, Paris, 1893, p. 43. M. Kleen, in a spirit of compensation for limiting contraband to completed munitions of war, imposes the severest penalties upon the neutral state which fails to prevent its subjects from supplying them to a belligerent. The belligerent must not seize a marine engine capable only of use in a battle-ship, but he may use reprisals against a neutral country that refuses to acknowledge liability in respect of a single case of rifles which may have reached his enemy.

[2] Ortolan, for example (Dip. de la Mer, ii. 190), while refraining from forcing usage into any definite conclusion, owns himself to be of the opinion of those 'qui pensent que la liberté de commerce des neutres doit être le principe général, et qu'il ne doit y être apporté d'autres restrictions que celles qui sont une conséquence immédiate et forcée de l'état de guerre entre les belligérants.' He considers, looking at the matter 'au point de vue rationnel : que les armes et instruments de guerre quelconques, et les munitions de toute sorte servant directement à l'usage de ces armes, sont les seuls objets qui soient généralement et nécessairement contrebande de guerre ; que les matières premières ou marchandises de toute espèce propres aux usages pacifiques, bien qu'elles puissent servir également à la confection ou à l'usage des armes, instruments ou munitions de guerre, ne sont point comprises régulièrement dans cette contrebande ; que tout au plus est-il permis à une puissance belligérante, eu égard à quelque circonstance particulière de ses opérations militaires propres à justifier cette mesure, de traiter comme contrebande telle ou telle de ces marchandises ; mais qu'une telle assimilation ne doit être qu'une exception extraordinaire, limitée au cas où ces marchandises formeraient véritablement une contrebande déguisée ; que les vivres et tous les objets de première nécessité ne peuvent en aucun cas et pour quelque motif que ce soit être rangés dans la contrebande de guerre.'

'L'idée de la contrebande,' says Heffter (Le Droit Int. § 160), 'est une idée complexe, variable selon les temps et les circonstances, et qu'il est difficile de déterminer d'une manière absolue et constante. . . . D'après les usages

That the weight of opinion is in favour of the latter view there can be no question [1]; and it will be seen that the more important states have given no reason to suppose that they are willing to tie their hands by hard and fast rules, whatever restriction in

internationaux universels, la contrebande est exclusivement limitée aux armes, ustensiles et munitions de guerre, en d'autres termes aux objets façonnés et fabriqués exclusivement pour servir dans la guerre, non pas aux matières premières propres à la fabrication des objets prohibés. . . . Il y a une autre classe d'objets qui, dans les traites seulement et dans les lois intérieures de plusieurs nations, sont indiqués comme objets de contrebande.' This includes horses, all raw materials suited for the manufacture of arms and munitions of war, naval stores, and gold, silver and copper, whether coined or in ingots. 'On doit ranger dans la même catégorie certains objets nouveaux que les progrès de la science ont appliqués de nos jours aux besoins de la guerre. Telles sont les machines à vapeur, la houille,' &c. . . . 'On ne saurait prétendre' that commodities of the latter class 'portent nécessairement le caractère de contrebande. C'est seulement dans le cas où, par leur transport vers l'un des belligérants, le commerce neutre prend le caractère manifestement hostile, que l'autre belligérant a le droit d'empêcher de fait.' M. Heffter's doctrine may be somewhat confused, but its results in practice are evident.

M. Bluntschli, after a commonplace enumeration of articles which are strictly contraband, says (§ 805) that 'le transport d'objets servant aussi aux besoins des particuliers, habillements, sommes d'argent, chevaux, bois de construction pour les navires, toile à voiles, plaques de fer, machines à vapeur, charbon de terre, navires de commerce, &c., est dans la règle autorisé. On ne pourra exceptionnellement envisager ces objets comme contrebande de guerre que si . . . on peut démontrer qu'ils étaient destinés à faire la guerre et transportés avec l'intention de prêter aide et assistance à l'un des belligérants. Les chevaux, par exemple, devront servir à remonter la cavalerie, les bois et le fer à construire des navires de guerre et à les blinder,' &c. As a comment upon this it may be worth while to quote some remarks which Dana makes with the strong common sense which distinguishes him. 'The intent of the owner,' he says, 'is not the test. The right of the belligerent to prevent certain things from getting into the military use of his enemy is the foundation of the law of contraband; and its limits are in most cases the practical result of the conflicts between this belligerent right on the one hand and the right of the neutral to trade with the enemy on the other.' Note to Wheaton, No. 226.

[1] The Institut de Droit International in 1877 resolved that '—sont toutefois sujets à saisie: les objets destinés à la guerre ou susceptibles d'y être employés immédiatement. Les gouvernements belligérants auront, à l'occasion de chaque guerre, à déterminer d'avance les objets qu'ils tiendront pour tels' (Annuaire for 1878, p. 112).

Among recent writers Geffcken, in Holtzendorff's Handbuch (1889), v. 719–24, ably and exhaustively discusses the question of contraband character. See also M. F. de Martens; Traité de Droit Int. iii. 351.

certain particulars it is possible that some of them, as for example Russia, may be anxious to place in their own interests upon the list of contraband[1].

[1] In Mr. Holland's British Admiralty Manual of Prize Law (1888) it is stated that 'it is part of the prerogative of the Crown during the war to extend or reduce the lists of articles to be held absolutely or conditionally contraband.' For the present the following goods are enumerated—

1. As absolutely contraband—Arms of all kinds and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also gun cotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, and ship timber, hemp and cordage, sailcloth, pitch and tar, copper fit for sheathing vessels, marine engines and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire-bars, marine cement and the materials used in the manufacture thereof, as blue lias and Portland cements, iron in any of the following forms—anchors, rivet iron, angle iron, round bars of from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheets, plate iron exceeding $\frac{1}{4}$ of an inch, and Low Moor and Bowling plates.

2. As conditionally contraband—Provisions and liquors fit for the consumption of army or navy; money; telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, &c.; coals; hay; horses; rosin; tallow; timber.

For recent conduct on the part of France, see postea, p. 662. Russia objected at the West African conference to coal being considered contraband in any circumstances whatever (Parl. Papers, Africa, No. iv. 1885, 132 and 119), but she adheres to the principle of variability, since she made no objection to the inclusion of other objects *ancipitis usus*, and in May 1877 the articles which were to be considered contraband during the war with Turkey, which was then opening, were defined by Ukase. It appears from an answer quoted by Geffcken (loc. cit.) as having been given by Prince Bismarck to a deputation of Hamburg merchants, that the latter considers it to be for belligerent powers to 'in jedem einzelnen Falle nach Massgabe der Oertlichkeit und ihrer Interessen diejenigen Waaren bezeichnen, welche sie während der Dauer der Feindseligkeiten als Contrebande zu behandeln beabsichtigen.'

[In 1896 the Institut de Droit International drafted a set of rules to govern international practice with regard to contraband of war. By this 'réglementation' it is proposed to do away with 'les prétendues contrebandes désignées sous les noms, soit de contrebande *relative*, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande accidentelle, quand lesdits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.' The right of pre-emption,

Contraband not restricted to munitions of war.

Upon the abstract merits of the question it is impossible to refuse sympathy to the more theoretical writers. They aim at giving the largest freedom that can be secured to the commerce of neutrals; in other words they aim at freeing the trade of persons who, taken in bulk, are probably injured by the mere existence of war, from additional injuries inflicted through the restraints imposed by belligerents for their own selfish objects. But it is useless to represent as law, or to propose as future law, rules which states are not ready to accept; and it is idle to expect them to adopt rules which do not correspond with belligerent exigencies.

If these exigencies be taken instead of theory, as a starting-point for definition of contraband, the proposition that contraband cannot be limited to munitions of war, and that the articles composing it must vary with the circumstances of particular cases, becomes the simple expression of common sense. There can be no question that many articles, of use alike in peace and war, may occasionally be as essential to the prosecution of hostilities as are arms themselves; and the ultimate basis of the prohibition of arms is that they are essential. The reason that no difference of opinion exists with respect to them is the fact that they are in all cases essential. But it may also happen, after a remote non-manufacturing country, such as Brazil, has suffered a disaster at sea, that to prevent the importation of marine engines would be equivalent to putting an end to the war, or would at least deprive the defeated nation of all power of actively annoying its enemy. Marine engines then become as essential as arms. In considering the matter logically therefore the mind must chiefly be fixed upon the characteristic of essentiality; and in determining under what circumstances the seizure of merchandise of double use can be justified the main difficulty is either to find a general test of essentiality, or in a given instance

however, is reserved to the belligerent in the case of objects *ancipitis usus* seized while on the road towards a port of his adversary.—Annuaire for 1896, p. 230.]

to secure adequate proof that delivery of particular articles would be essential to the prosecution of the war.

While the exigencies of belligerency must primarily control the definition of contraband, and therefore to a great extent settle the list of contraband merchandise, there is a point at which accepted law offers a barrier to further dictation on their part. Except to the limited degree which has been indicated in treating of belligerent rights, acts of war cannot be directed against the non-combatant population of an enemy state. Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population. In theory it is easy to distinguish between merchandise which, by its nature and the absence of a certain kind of destination, is presumably intended for civil use, and merchandise which, by its nature or clear destination, is obviously intended for use by the armed forces of the state. A general test is thus provided. In practice the difficulty need hardly be greater. Cases of permissible seizure might consequently be readily separated from those in which seizure is unwarrantable, could usage be set altogether aside. This however cannot with propriety be done. The policy of nations has, it is true, been governed by no principle; the wish to keep open a foreign market has generally been a motive quite as powerful as the hope of embarrassing an enemy; practice is thoroughly confused. Still practice cannot be devoid of authority, and it must be subjected to analysis in a spirit of willingness to give due value to any custom that may appear to have fairly established itself. On the other hand, in view of the exceptional confusion and arbitrariness by which practice is marked, it may reasonably be regarded as of secondary value, and appeal may in the first instance be made to principle. If an inquiry into the due range of contraband be conducted in this manner, it will be possible to classify broadly articles other than munitions of war according to the greater or less intimacy of their association with warlike operations, and consequently,

according to the less or greater urgency or peculiarity of circumstance under which a belligerent may fairly prevent their access to his enemy.

Horses. Saltpetre, sulphur, and the raw materials of modern explosives.

Horses, saltpetre and sulphur may be placed first as subjects of the widest usage. It has always been the practice of England and France to regard horses as contraband; in a very large number of treaties they are expressly included; in none are they excluded except in a few contracted by Russia, and in those between the United States and other American countries, the latter however confining the prohibition to cavalry mounts. M. Bluntschli treats this limitation as a matter of international rule, without explaining in what way horses used for artillery or transport are less noxious than those employed in the cavalry, or how it can be determined for which use they are intended [1]. Under the mere light of common sense the possibility of looking upon horses as contraband seems hardly open to argument. They may no doubt be important during war-time for agricultural purposes, as powder may be used for fireworks; but the presumption is certainly not in this direction. To place an army on a war-footing often exhausts the whole horse reserve of the country; the subsequent losses must be supplied from

[1] The Russian treaties are those of 1766 with England, and those of 1780–2 with Sweden, Denmark, Portugal, Prussia, Austria, and Holland. Bluntschli, § 805; Valin, Ord. de la Marine, ii. 264. See also Vattel, liv. iii. chap. vii. § 112; Kent, lect. vii; Manning, 355; Calvo, §§ 2451, 2461, who sustains the contraband character of horses; and on the other side Hübner, who makes a like distinction with Bluntschli, and Hautefeuille (tit. viii. sect. ii. § 6), who takes refuge from treaties in primitive law.

The military administration in Germany is apparently less inclined than the jurists of that country to regard the acquisition of horses by an enemy as unimportant. In 1870 Count Bismarck complained to Lord A. Loftus that the 'export of horses from England under existing circumstances provided the enemy of Prussia with the means of carrying on a war with a power in amity with Great Britain.' State Papers, No. 3, 1870, Franco-Prussian War. Horses are included in an Austrian ordinance of 1864, which in other respects limits contraband to munitions, &c., saltpetre, and sulphur. Calvo, § 2293. Prince Bismarck, it would appear, regarded the retention of saltpetre in the lists of contraband articles as being objectless under the conditions of modern war (see quotation in Geffcken, Holtzendorff's Handbuch, iv. 723).

abroad, and more necessarily so as the magnitude of armies increases. Almost every imported horse is probably bought on account of the government; if in rare instances it is not, some other horse is at least set free for belligerent use.

The amount of authority and of reason in favour of including saltpetre and sulphur is approximately the same as that which governs the case of horses. But there are no treaties in which these commodities are expressly excluded.

They are not now of so much importance as formerly, but the principle upon which saltpetre and sulphur are included of course covers also materials necessary to the manufacture of the various kinds of explosives which have been invented of late, and which are yearly increasing in number.

Materials of naval construction.

Materials of naval construction, e.g. ship timber, masts, spars of a certain size in a manufactured state, marine engines, or their component parts, sailcloth, cordage, copper in sheets, hemp, tar, &c., have been deemed contraband by less general consent. English usage bars all such objects from reaching the enemy, but does not treat them as being all equally harmful. Manufactured articles are looked upon with more suspicion than raw material; and where commodities are the staple produce of the exporting country and owned by persons belonging to it, the penalty of confiscation is relaxed, and they are subjected only to pre-emption[1]. The American rule on the subject is identical with that of England, and the Confederates also acted upon it during the Civil War[2]. In the course of a dispute with Spain in 1797, the details of which are unimportant, the government of the United States laid down that 'ship timber and naval stores are by the law of nations contraband of war,' and the

[1] Jonge Margaretha, i Rob. 193; Maria, i Rob. 373. So late as 1750 pitch and tar, the produce of Sweden, were confiscated by the English courts. The Apollo, iv Rob. 161; The Twee Juffrowen, iv Rob. 243.

During the Crimean War Sir J. Graham stated the opinion of the government that by the law of nations, timber, cordage, pitch, and tar could be dealt with as contraband of war. Hansard, 3rd series, vol. cxxxiv. 916.

[2] Dana's Wheaton, note No. 226; The Commercen, i Wheaton, 143; Ortolan, Dip. de la Mer, vol. ii. Appendix xxi.

courts give expression to a like view. The custom of France has now become fixed in an opposite sense[1]. The policy of the Northern States, which have always exported their timber and tar, can only be confirmed by the modern necessity of importing machinery[2]. The views of the South American world are probably indicated by its treaties with the United States, the tenor of which is thoroughly in consonance with the interests of the southern nations. Writers are divided into two classes, the members of which correspond to those whose diverse opinions as to horses have already been cited. In practice, therefore, the maritime authority of England and America is opposed by that of France, supported by a crowd of nations, the future nature or importance of the naval action of many of which cannot at present be foretold. Upon reasonable grounds it would appear that it must always be a matter of the highest and most immediate belligerent importance for a non-manufacturing state to import machinery in safety, and for a country poor in forests or in iron to be able to introduce ship timber and armour plates. It need hardly be pointed out that while the principle remains unaltered, under which materials apt for the construction of warships used reasonably to be confiscated, not only will the lists of noxious articles be found in the next maritime war to need large revision by the addition of new objects and the excision of others which have fallen out of use, but the relative importance of those which are continued from the old list will be found to have greatly changed. [In the Spanish-American War of 1898 the Navy Department of the United States, in their instructions to 'Blockading vessels and cruisers,' included among articles conditionally contraband 'Provisions when destined for an enemy's ship or ships, or for a place that is besieged.' The Spanish government enumerated as articles contraband of war: 'Cannons, machine guns, mortars,

[1] Pistoye et Duverdy, i. 445; Il Volante, ib. 409; La Minerve, ib. 410.

[2] The Swedish neutrality ordinance of 1854 only mentions as contraband munitions of war, saltpetre, and sulphur. Neut. Laws Commissioners' Rep., Appendix iv.

guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, saltpetre, sulphur, dynamite and every kind of explosive, articles of equipment like uniforms, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools and other articles, and whatever may hereafter be determined to be contraband.']

Ships.

The position occupied by vessels in modern practice has already been so fully discussed under the head of State Duties, that it does not seem necessary to recur to the subject.

Coal.

Coal, owing to the lateness of the date at which it has become of importance in war, is the subject of a very limited usage. In 1859 and 1870 France declared it not to be contraband; and according to M. Calvo the greater number of the secondary states have pronounced themselves in a like sense. England on the other hand, during the war of 1870, considered that the character of coal should be determined by its destination, and though she refuses to class it, as a general rule, with contraband merchandise, vessels were prohibited from sailing from English ports with supplies directly consigned to the French fleet in the North Sea. Germany went further, and remonstrated strongly against its export to France being permitted by the English government[1]. The claim was extravagant, but the nation which made it is not likely to exclude coal from its list of contraband. More recently, during the West African Conference of 1884, Russia took occasion to dissent vigorously from the inclusion of coal amongst articles contraband of war, and declared that she would 'categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition' as such[2].

The view taken by England is unquestionably that which is

[1] Calvo, § 2460; Bluntschli, § 805; Hansard, 3rd series, vol. cciii. 1094; State Papers, Franco-German War, 1870, No. 3.

[2] Parl. Papers, Africa, No. iv, 1885, 132.

most appropriate to the uses of the commodity with which it deals. Coal is employed so largely, and for so great a number of innocent purposes, the whole daily life of many nations is so dependent on it by its use for making gas, for driving locomotives, and for the conduct of the most ordinary industries, that no sufficient presumption of an intended warlike use is afforded by the simple fact of its destination to a belligerent port. But on the other hand, it is in the highest degree noxious when employed for certain purposes; and when its destination to such purposes can be shown to be extremely probable, as by its consignment to a port of naval equipment, or to a naval station, such as Bermuda, or to a place used as a port of call, or as a base of naval operations, it is difficult to see any reason for sparing it which would not apply to gunpowder. One article is as essential a condition of naval offence as is the other[1]. As will be seen directly, France has endeavoured within the last few years to treat as contraband an article so much more innocent in the circumstances than coal could be, that she at least must be regarded as estopped from further alleging its total exemption.

Provisions.

The doctrine of the English courts at the commencement of the last century with respect to provisions was that 'generally they were not contraband, but might become so in circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it[2].' Grain, biscuit, cheese, and even wine, when on their way to a port of naval equipment or to a naval armament, were condemned, and, as has already been seen, the same practice was followed by the courts of the United States[3]. In 1793 and 1795, the English government indefen-

[1] The above view is that which was taken by Lords Brougham and Kingsdown in 1861 in a discussion in the House of Lords upon the Proclamation of Neutrality issued by the English government at the outbreak of the American Civil War. Hansard, 3rd series, vol. clxii. 2084 and 2087. Coal is at present included by England in the list of articles conditionally contraband, see Admiralty Manual of Prize Law (1888), p. 20, and antea, p. 654.

[2] The Jonge Margaretha, i Rob. 193.

[3] The Ranger, vi Rob. 125; The Edward, iv Rob. 69. For the American practice, see antea, pp. 648 and 659.

sibly extended the application of the doctrine to the point of seizing all vessels laden with provisions which were bound to a French port, alleging as their justification that there was a prospect of reducing the enemy by famine. A serious disagreement occurred in consequence with the United States, which maintained that provisions could only be treated as contraband when destined for a place actually invested or blockaded; and the point remained wholly unsettled by the Treaty of 1794, which, while recognising that provisions, under the existing law of nations, were capable of acquiring the taint of contraband, did not define the circumstances under which the case would arise[1]. The excesses of the English government cast discredit on the doctrine under the shelter of which they screened themselves. Manning adopts it, but not without evident hesitation. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded; and MM. Ortolan, Bluntschli, and Calvo declare this to be undoubtedly the case[2]. Until lately no nation except England had pushed its practice even to the point admitted in the American courts, and England itself had long regarded its own doctrine of 1793 as wholly untenable; but in 1885 the doctrine was revived to its fullest extent by a country which has been in the habit of including a very narrow range of articles in its list of contraband. France, during her hostilities of that year with China, declared shipments of rice destined for any port north of Canton to be contraband of war. The pretension was resisted by Great Britain on the ground that though, in particular circumstances, provisions may acquire a contraband character, they cannot in general be so treated. In answer the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of 'the importance of rice in the feeding

[1] De Martens, Rec. v. 674.

[2] Manning, 361–72; Wheaton, Elem. pt. iv. chap. iii. § 24; Ortolan, Dip. de la Mer, ii. 191 and 216; Bluntschli, § 807; Calvo, § 2452. Phillimore (iii. §§ ccxlvi–lviii) seems to look upon the practice of the English and American courts as being the most authoritative part of a confused usage.

of the Chinese population' as well as of the Chinese armies. Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the non-combatant population. Lord Granville notified that Great Britain would not consider itself bound by the decision of any Prize Court which should give effect to the doctrine put forward by France; but no opportunity was afforded for learning whether the French courts would have upheld the views of their government, as no seizure was made during the short remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture[1].

The topic of the admissibility of provisions in general to the list of contraband of war may be put aside as one which is not open to serious argument. Further than this, it cannot be doubted for a moment, not only that the detention of provisions bound even to a port of naval equipment is unauthorised by usage, but that it is unjustifiable in theory. To divert food from a large population, when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies which in almost every case an army or a squadron could complete from elsewhere with little inconvenience, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of principle, and they have overlooked an exceptional and no doubt rare case, in which, as it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required

[1] Parl. Papers, France, No. i, 1885. Dr. Geffcken says (Holtzendorff's Handbuch (1889), iv. 723), 'man kann Lord Granville nur dankbar sein, dass er das gute Recht der Neutralen so entschieden gegen französische Willkür vertheidigt hat.' M. Calvo, in the last edition of his work (Droit Int. iv. 23), says, 'nous nous croyons fondés à poser en principe que le commerce des denrées alimentaires reste essentiellement libre en temps de guerre.'

by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness cannot be proved[1].

Clothing, money, metals, &c.

Money and unwrought metals, and in general, clothing and its materials, are of like character with provisions, and in principle may become contraband under similar conditions; but under modern conditions it would very rarely be necessary to consign money directly to an army or fleet in a neutral vessel; and though uniforms, soldiers' great coats, &c., may offer some difficulty, since their destination and their use for warlike purposes is obvious, they are not, on the other hand, of such necessity in ordinary circumstances that the presence or absence of a particular consignment can be expected to affect in any way the issue of hostilities[2].

[1] The general doctrine in the text as to the capture of provisions bound to any ports of naval equipment, and the exceptions from it, were both upheld by the British government in the course of the above-mentioned correspondence with France. See Lord Granville's note of the 27th Feb., 1885. Parl. Papers, France, No. i, 1885.

[2] Manning (p. 358) thinks that metals and money are not contraband. The United States have gone so far as to regard cotton as contraband of war when, in their view, it took the place of money. 'Cotton was contraband of war, during the late Civil War, when it was the basis upon which the belligerent operations of the Confederacy rested.' 'Cotton was useful as collateral security for loans negotiated abroad by the Confederate government, or was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed, and its sale interdicted, except under regulations established by, or under contract with, the Confederate government. . . . . Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare. In International Law, there could be no question as to the rights of the Federal commanders to seize it as contraband of war, whether they found it on rebel

Penalties affecting contraband.

In strictness every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband [1].

territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of sinews of war, arms or general supplies.' Mr. Bayard, Sec. of State, to Mr. Murnaya, June 28, 1886. Wharton, Digest, iii. 438.

[1] Phillimore, iii. §§ cclxviii–lxx. Rules for ascertaining the value of the merchandise seized, and for other matters of detail connected with the practice, were laid down in the treaty between Great Britain and the United States in 1794, and in that between the former country and Sweden in 1803. MM. Heffter (§ 161) and Calvo (§§ 2517–8) look upon pre-emption not as a mitigation but as an intensification of the privileges of a belligerent; but they start with assuming that it is only used with respect to articles not contraband of war. That much of the merchandise to which pre-emption was applied during the wars of the end of the eighteenth century was not rightly considered to be contraband, does not alter the fact that, being considered to be contraband, it was lightly dealt with. M. Heffter however seems to admit that pre-emption may be permitted on payment not merely of ordinary mercantile profit, but of such profit as would probably be realised if the voyage were completed. M. Ortolan (ii. 220–30) understands the theory of the English practice, but is debarred by his views as to the proper definition of contraband from recognising any occasions on which it could be exercised. M. Bluntschli (§§ 806 and 811) thinks that 'contrebande de guerre ne peut être confisquée que lorsque les neutres prêtent secours et assistance à l'adversaire, c'est-à-dire lorsqu'ils agissent en ennemis; la saisie ne pourra avoir lieu lorsque les neutres font simplement du négoce.' To use his own example, if coal is found to be on its way to a port where a belligerent fleet is at anchor, it may be detained on compensation being made to the owner, but it cannot be confiscated unless the intention of delivering it to the enemy's fleet can be proved. He is silent as to any different rule being applied to munitions of war. He does not state where the authority for this doctrine is to be found; but as its adoption would be tantamount to sweeping away the whole law of contraband, it can hardly be admitted on the word of a single writer, however distinguished he may be. An ostensible destination to a belligerent government agent or to an armed

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Effect of contraband on the vessel carrying it.

The injuriousness to a belligerent of contraband trade by a neutral results from the nature of the goods conveyed, and not from the fact of transport. This distinction prevents the penalty which affects contraband merchandise from being extended as a general rule to the vessel in which it is[1]. Some writers consider that the neutral vessel has even a right to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever contraband goods she has on board, unless their quantity is so great that the captor cannot receive them. The existence of any such general right would be difficult to prove; but a large number of treaties have established the practice between certain nations[2]; and it was followed by the Confederate States during the American Civil War. It can scarcely be believed however that its vitality could stand the

force would hardly ever be necessary; and it is needless to say that merchandise would in consequence never be open to condemnation. And as a market with a good profit would be certain, whether the adventure were captured or arrived at its destination, no check would exist by which the trader could be restrained. Finally, as the merchant would be without risk, the belligerent would be relieved from the necessity of paying war-prices for his goods.

[1] The ancient practice, except in France, where, until 1681, goods were only seized on payment of their value, was to confiscate both cargo and ship. The Neutralitet, iii Rob. 295. And to this Russia seems to adhere; Russian Declaration, 1854, quoted by Lawrence in note to Wheaton, 573. In some treaties the freedom of the ship is expressly stipulated, e.g. in that between Denmark and Genoa, 1789. De Martens, Rec. iv. 443.

[2] It is provided for in the treaties between Russia and Denmark, 1782 (De Martens, Rec. iii. 476); the United States and Sweden, 1783 (ib. 571); Austria and Russia, 1785 (id. iv. 78); England and France, 1786 (ib. 172); France and Russia, 1787 (ib. 212); Russia and Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 329); United States and France, 1800 (id. vii. 104); Russia and Sweden, 1801 (ib. 332); United States and Central America, 1825 (Nouv. Rec. vi. 834); United States and Brazil, 1828 (id. ix. 61); United States and Mexico, 1831 (id. x. 339); United States and Venezuela, 1836 (id. xiii. 558); United States and Peru, 1836 (id. xv. 119); United States and Ecuador, 1839 (Nouv. Rec. Gén. iv. 315); France and Ecuador, 1843 (id. v. 172); France and New Grenada, 1844 (id. vii. 620); France and Guatemala, 1848 (id. xii. 11); United States and New Grenada, 1848 (id. xiii. 653); United States and San Salvador, 1850 (id. xv. 74); the Argentine Republic and Peru, 1874 (id. 2e sér. xii. 448). Russia seems no longer to hold the views of which she was an apostle in the end of the eighteenth century; see last note and antea, pp. 647, 657.

rude test of a serious maritime war. Dana observes with great truth that 'as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all the papers and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law.' In face of these difficulties he is inclined to think that even the treaties can only apply to cases in which 'there is a capacity in the neutral vessel to insure the captor against a claim to the goods [1].'

The more common practice is to take the vessel with its cargo into a port of the captor, where the articles of contraband are duly condemned; but the vessel itself is ordinarily visited with no further penalty than loss of time, freight, and expenses [2]. If however the ship and the cargo belong to the same owners, or if the owner of the former is privy to the carriage of the contraband goods, the vessel is involved in their fate [3]. Ships have also

[1] Dana's Wheaton, note No. 230. Bluntschli (§ 810), Calvo (§ 2502), and Hautefeuille (tit. xiii. chap. i. sect. i. § i) elevate the practice into a neutral right. Ortolan (Dip. de la Mer, ii. 203) is more cautious. In the scheme of the Institut de Droit International for a Règlement des Prises Maritimes, it is provided that 'le navire arrêté pour cause de contrebande de guerre peut continuer sa route, si sa cargaison ne se compose pas exclusivement, ou en majeure partie, de contrebande de guerre, et que le patron soit prêt à livrer celle-ci au navire du belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du commandant du croiseur.' Ann. de l'Institut, 1883, p. 218.

[2] Wheaton, Elem. pt. iv. chap. iii. § 26; Phillimore, iii. § cclxxv; The Sarah Christina, i Rob. 242; Heffter, § 161.

[3] Wheaton, Phillimore, and Heffter, loc. cit.; Bluntschli, § 810. Ortolan (Dip. de la Mer, ii. 199) argues that it is immaterial whether the vessel and the cargo belong to the same person or not. In the usual theory, 'le fond de la pensée serait toujours de traiter le commerçant en ennemi, de dire: Nous tenons tes biens, quels qu'ils soient, nous les gardons. Mais nous le répétons, il n'est pas ennemi, il est commerçant; il ne s'agit pas d'actes d'un gouvernement qui romprait la neutralité, mais d'actes de particuliers qui exercent leur

been condemned for having on board articles contraband under a treaty to which their country was a party; and for the fraudulent circumstances of false papers and false destination[1].

On innocent goods in the same vessel.

The principle which, according to the English practice, governs the treatment of innocent merchandise found on board a ship engaged in the transport of contraband, is identical with that which affects the vessel itself. 'The law of nations,' said Lord Stowell, 'in my opinion is, that to escape the contagion of contraband, the innocent articles must be the property of a different owner[2].'

Within what time the penalty attaches.

It is universally admitted that the offence of transporting contraband goods is complete, and that the penalty of confiscation attaches, from the moment of quitting port on a belligerent destination; and a destination is taken to be belligerent if it is not clearly friendly; a vessel is not permitted to leave her course open to circumstances, and to make her destination dependent on contingencies. If in any contingency she may touch at a hostile port she is regarded as liable to capture; she can only save herself by proving that the contingent intention has been definitively abandoned[3].

English doctrine of continuous voyage.

During the American Civil War the courts of the United States gave a violent extension to the notion of contraband destination, borrowing for the purpose the name of a doctrine of the English courts, of wholly different nature from that by which they were themselves guided. As has already been stated[4], it was formerly held that neutrals in a sense aided

trafic.' It seems to me that M. Ortolan's reasoning is sound; but it may be doubted if the current practice is likely at present to be disturbed.

[1] The Neutralitet, iii Rob. 296; The Franklin, iii Rob. 224.

Ortolan argues (Dip. de la Mer, ii. 220-2), but not convincingly, against condemnation for fraud. He sums up his views by saying, 'Dans notre opinion la confiscation pour contrebande de guerre ne peut s'appliquer qu'aux articles prohibés et jamais au navire innocent ni à la cargaison innocente.'

[2] The Staadt Embden, i Rob. 31.

[3] The Imina, iii Rob. 167; Trende Sostre, cited in The Lisette, id. vi. 390 n.

[4] Antea, p. 634.

in the hostilities of a belligerent by taking advantage of permission given by him to carry on a trade which was forbidden to them in time of peace. Property engaged in such trade was therefore deemed to be confiscable. During the Anglo-French wars of the revolution traders foreign to France or Spain were permitted to trade between French and Spanish ports and French and Spanish colonies, commerce with the colonies in question having before the war been restricted to trade with foreign ports and the colony. To evade the liability to condemnation in the English courts which entering into the new trade involved, neutral merchants endeavoured to give an air of innocence to their ventures by making a colourable importation into some port from which trade with the colony or the home country was permissible. Thus a cargo taken on board at La Guayra was brought to Marblehead in Massachusetts, was landed, re-embarked in the same vessel with the addition of some sugar from the Havannah, and within a week of its arrival was despatched to Bilbao [1]. In this and in like cases the English courts condemned the property; but they were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colourable importation to the enemy country. The doctrine upon which the English courts acted was called by Lord Stowell the doctrine of continuous voyage.

American doctrine of continuous voyage.

By the American courts this idea of continuous voyage was seized upon and applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another, and were then condemned as carriers of contraband or for intent to break blockade. They were thus condemned not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole—but on mere suspicion of intention

[1] The William, v Rob. 385; and see the Maria, ib. 365, and the cases reviewed in the judgment [more particularly the Essex].

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to do an act. Between the grounds upon which these and the English cases were decided there was of course no analogy.

The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country. On the confession indeed of one of the judges then sitting in the Supreme Court they seem to have been due partly to passion and partly to ignorance. 'The truth is,' wrote Mr. Justice Nelson, ten years later, 'that the feeling of the country was deep and strong against England, and the judges as individual citizens were no exceptions to that feeling. Besides, the court was not then familiar with the law of blockade [1].'

[1] Letter to Mr. Lawrence of August 4, 1873, quoted by Sir Travers Twiss, Law Mag. and Rev. 4th Ser. iii. 31. [The American decisions cited by Mr. Hall are the Bermuda, iii Wallace 59, and the Springbok, id. v. 1. To these should be added the Peterhoff, v Wallace 28, in which case goods of a contraband character, whose primary destination was the port of Matamoras, on the Mexican shore of the Rio Grande, were condemned on the ground that they were intended to be carried inland into territory then forming part of the Southern Confederacy and consequently hostile. The court declared that the conveyance by neutrals to belligerents of contraband articles is always unlawful, and that such goods may always be seized during transit by sea. On the only occasion since the date of these cases (1863-65) in which a British government has been confronted with the question of contraband carried by a neutral it has followed the doctrine laid down in the Springbok, and as regards the liability to seizure in transit of contraband goods whose ultimate destination is a hostile territory its position is hardly to be distinguished from that of the American Prize Courts.

During the recent South African War it was matter of notoriety that the Dutch Republics received supplies of men, arms and munitions through the port of Lorenço Marques, on Delagoa Bay, which belonged to Portugal, a neutral power, and was connected by forty miles of railway with the Transvaal frontier. As neither the Transvaal nor the Orange Free State possessed any seaboard the prevention of this traffic by blockade was impossible, but the British government maintained that neutral ships on the high seas were subject to visit and search in cases where there was ground for suspecting that they carried contraband of war among the cargo or combatants among the passengers. In December 1899 and January 1900 three German vessels, the Herzog, the General, and the Bundesrath—the latter a mail steamer, and all belonging to the German East Africa Company—were seized in African waters on suspicion of carrying contraband of war and persons intending to join the Boer armies as combatants. The German government entered a strong protest, more particularly with regard to the Bundesrath as being a mail steamer; and though the circumstances

As a consequence of the doctrine that the goods are seized because of their noxious qualities, and not because of the act of

were eminently suspicious it did not appear, after search, that there was sufficient evidence either of the destination of the passengers or of the existence of contraband to justify further detention of the vessels or to send them before a prize court. Their release was ordered and compensation agreed upon for any losses incurred by German subjects. As the ships did not go before a prize court it became impossible to obtain a judicial ruling, and it remains to be seen whether, in similar circumstances, the English judges will feel themselves bound, as they did in Hobbs *v.* Henning, 18 C. B. N. S. 791, by the dictum of Lord Stowell in the Imina, that goods going to a neutral port cannot come under the description of contraband; or whether, in the words of Professor Holland (letter to the *Times*, Jan. 3, 1900), they will be prepared to make 'innovations which seem to be demanded by the conditions of modern commerce.'

Immediately on learning of the seizure of the Bundesrath, Count Hatzfeldt, the German Ambassador in London, was instructed to demand her release on the ground that 'whatever may have been on board the Bundesrath there could have been no contraband of war, since, according to the recognised principles of international law, there cannot be contraband of war in trade between neutral ports.' And in a letter to Lord Salisbury Count Hatzfeldt laid stress on a passage in the British Admiralty Manual of Prize Law which declared that 'a vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral,' and, that 'the destination of the vessel is conclusive as to the destination of the goods on board.' To this Lord Salisbury replied by pointing out that the Admiralty Manual, while stating in a convenient form the general principles by which naval officers are to be guided in the exercise of their duties, expressly refrained from treating of questions which would ultimately have to be disposed of by the Prize Court. The passage cited from it 'that the destination of the vessel is conclusive as to the destination of the goods on board,' had no application, Lord Salisbury contended, to such circumstances as had now arisen, and could not apply to contraband of war on board of a neutral vessel if such contraband was, at the time of seizure, consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country. The 'true view in regard to the latter category of goods is, as Her Majesty's Government believe, correctly stated in paragraph 813 of Professor Bluntschli's Droit International Codifié (French translation, 2nd edition): "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée."' Lord Salisbury concluded by saying that the British government were unable to agree that there were grounds for ordering the release of the Bundesrath without examination, but that they had sent instructions by telegram requiring the senior naval officer on the spot to carry out the examination with as little delay as possible, and to show in doing so every consideration for the owner and the innocent passengers. Parliamentary Papers, Africa, No. 1 (1900). As we have seen,

the person carrying them, it is held that so soon as the forbidden merchandise is deposited, the liability which is its outgrowth is deposited also, and that neither the proceeds of its sales can be touched on the return voyage, nor can the vessel, although previously affected by her contents, be brought in for adjudication[1]. Some cases have however been decided in the English courts which go further. A contraband cargo, for example, having been taken to Batavia, with fraudulent papers and a fraudulent destination to Tranquebar, the return cargo was condemned on the ground that 'in distant voyages the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, ab ovo usque ad mala.' And in a case in which contraband was carried, by means of false documents and suppression, to the Isle of France, whence the vessel went in ballast to Batavia, and subsequently sailed to various ports with more than one cargo before capture took place, it was even held that 'it is by no means necessary that the cargo should have been purchased by the proceeds of the contraband' carried on the outward voyage[2]. The doctrine of these cases is not approved of by Wheaton or by foreign jurists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes.

the examination proved futile, the compensation was duly paid and the incident closed. It is unlikely that the exact circumstances of the Bundesrath and her consorts will ever be repeated or that we shall again find ourselves at war with a civilised power possessing no seaboard. But should we in the future become involved in hostilities with a maritime power it is certain that the interpretation of the questions grouped generally under the term of 'continuous voyage' will assume grave importance. And I venture to think that the attitude of whatever British government may be in office will tend rather to the views expressed by Lord Salisbury than to those enunciated by Mr. Hall; and that the destination of the cargo, not merely the destination of the vessel, will be the criterion.]

[1] The Imina, iii Rob. 168; Wheaton, Elem. pt. iv. chap. iii. § 26; Calvo, § 2465; Heffter, § 161.

[2] The Nancy, iii Rob. 16; The Margaret, i Acton, 335.

CHAPTER VI

ANALOGUES OF CONTRABAND

In what the carriage of analogues of contraband differs from that of contraband.

With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the

belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them.

When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. If a neutral, who has been in the habit in the way of his ordinary business of carrying post-bags to or from a belligerent port, receives sealed despatches with other letters in the usual bags, or if he even receives a separate bundle of despatches without special remuneration, he cannot be said to make a bargain with the belligerent, or to enter his service personally, for belligerent purposes. He cannot even be said to have done an act of trade of which he knows that the effect will be injurious to the other belligerent; despatches may be noxious, but they may also be innoxious; and the mere handing over of despatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral accepting despatches in this manner cannot therefore be subjected to a penalty. Whether those which he takes under his care are exposed to seizure will be considered presently. When again a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him. The only questions to be considered are whether there is any usage compelling him to refuse to receive such persons if they are of exceptional importance, and consequently whether he can be visited with a penalty for receiving them knowingly, and whether, finally, if he is himself free from liability, they can be taken by their enemy from on board his vessel.

Carriage of despatches.

Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He renders himself liable to it only when there is reasonable ground for belief that he is aware of their connexion with purposes of the war. As the bearer of letters cannot be assumed to be acquainted with their contents, the broad external fact of their destination is taken as the test of their character, and consequently as the main ground for fixing him with or exonerating him from responsibility. Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral state. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them is therefore an innocent act[1]. Those on the other hand which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral state, may be presumed to have reference to the war; and the neutral is bound to act on the presumption. If therefore they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. Letters not addressed to persons falling within either of the above categories are *primâ facie* innocent; if they contain noxious matter they can only affect the vessel when other facts in the case show the knowledge of the owner or master[2]. Thus,

[1] The Caroline, vi Rob. 461; The Madison, ii Edwards, 226; Ortolan, Dip. de la Mer, ii. 240; Calvo, § 603. Comp. Letter of Marque of the Confederate States, ap. Ortolan, ib. Append. xxi.

[2] In the statement, issued by the Russian government in 1877, of the rules

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where official despatches of importance were sent from Batavia to New York, and were there given by a private person, enclosed in an ordinary envelope, to the master of an American ship, for transmission to another private person in France, the ship was released, on the oath of the captain that he was ignorant of the contents of the letters entrusted to him[1].

Carriage of persons in the

A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, either

by which it intended to guide its conduct during the war with Turkey, it is said that 'le transport de dépêches et de la correspondance de l'ennemi est assimilé à la contrebande de guerre.' Journal de St. Pétersbourg, $\frac{12}{24}$ Mai, 1877. No doubt it was not intended to fix the neutral who should unwittingly carry correspondence of the enemy government with the penalties attached to the carriage of contraband of war. It would however have been better had the intention of the Russian government been more clearly conveyed. Art. 34 of the scheme for a Règlement des Prises Maritimes of the Institut de Droit International lies open to a like criticism.

[1] The Rapid, Edwards, 228. The English courts have unfortunately sometimes given decisions inconsistent with the principle of this case, and have held that a vessel is not exempted from confiscation by having been violently pressed into the belligerent's service, so that the non-neutral act was involuntary, nor by deception on the part of the belligerent, so that the non-neutral act was unwittingly done. 'If an act of force exercised by one belligerent on a neutral ship or person is to be considered as sufficient justification for any act done by him contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If a loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him.' The Carolina, iv Rob. 259. Nor is it necessary that the master shall be cognizant of the service on which he is engaged. 'It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. If imposition has been practised, it operates as force; and if redress in the way of indemnification is sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, as it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender.' The Orozembo, vi Rob. 436. Sir R. Phillimore maintains the authority of these cases; iii. § cclxxii. It is no doubt proper to throw upon the neutral the onus of proving his innocence, and to sift the evidence which he adduces with the most jealous suspicion; but to punish him for the acts of another person, of which he has been the unwilling or unconscious subject, is as useless as it is wrong. The belligerent cannot be intimidated by losses inflicted on his victim.

service of the belligerent.

when the latter has so hired it that it has become a transport in his service and that he has entire control over it; or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war. In the case of the ship Friendship, a vessel was hired to bring home to France eighty-four shipwrecked officers and sailors. It was confiscated as a transport, because it appeared in evidence that the vessel was not permitted to take cargo, and that the French government had paid for the passage of the men; who were thus being carried, not as common passengers, but as a part of the French navy, from a port of the United States to a port in France. In another case a vessel sailed from Rotterdam to Lisbon, where it was ostensibly chartered by a Portuguese subject to carry cargo or passengers to Macao; no cargo was shipped, but after some time spent in fitting it for passengers with unusual care, three Dutch officers of rank embarked in it, not for Macao, but for Batavia. Lord Stowell, on the facts of the case, inferred that a contract had been entered into with the Dutch government before the vessel left Rotterdam, and condemned it [1].

In the transport of persons in the service of a belligerent, the essence of the offence consists in the intent to help him; if therefore this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

As a neutral vessel may be the bearer of despatches passing between a belligerent government and its diplomatic agents in

[1] The Friendship, vi Rob. 422; The Orozembo, ib. 433; Bernard, 224; Ortolan, Dip. de la Mer, ii. 234.

a neutral country, so also, and for the same reasons, the transport of diplomatic agents themselves is permitted.

Penalty incurred by the transport of analogues of contraband.

It will be remembered that in the case of ordinary contraband trade the contraband merchandise is confiscated, but the vessel usually suffers no further penalty than loss of time, freight, and expenses. In the case of transport of despatches or belligerent persons, the despatches are of course seized, the persons become prisoners of war, and the ship is confiscated. The different treatment of the ship in the two cases corresponds to the different character of the acts of its owner. For simple carriage of contraband, the carrier lies under no presumption of enmity towards the belligerent, and his loss of freight, &c., is a sensible deterrent from the forbidden traffic; when he enters the service of the enemy, seizure of the transported objects is not likely to affect his earnings, while at the same time he has so acted as fully to justify the employment towards him of greater severity [1].

Carriage of despatches in the ordinary way of trade.

Vessels not being subject to a penalty for carrying despatches in the way of ordinary business, packets of a regular mail line are exempted as of course; and merchant vessels are protected in like manner when, by municipal regulations of the country from the ports of which they have sailed, they are obliged to take on board all government despatches or letters sent from the post-offices [2].

Whether mail-bags ought to be exempt from search.

The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of despatches believed to be within them. But the

[1] Ortolan, Dip. de la Mer, ii. 234; Wheaton, Elem. pt. iv. ch. iii. § 25; Phillimore, iii. § cclxxii; Heffter, § 161[a].

[2] Lawrence, note to Wheaton, pt. iv. chap. iii. § 25; Calvo, § 2530; Ortolan, ii. 240. Hautefeuille exaggerates the immunities of neutrals carrying despatches; tit. viii. sect. v. § 5.

secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt now be shown in a naval war to mail vessels and their contents; and it may be assumed that the latter would only be seized under very exceptional circumstances. France in 1870 directed its officers that 'when a vessel subjected to visit is a packet-boat engaged in postal service, and with a government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board[1];' and it is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary manner through its post-offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it; and it is not difficult to imagine occasions when the absence of such power might be a matter of grave

[1] Rev. de Droit Int. xi. 582. A treaty between England and Brazil of the year 1827 provides that packets are to be considered king's ships until a special convention on the subject is concluded. De Martens, Nouv. Rec. vii. 486: see also the Anglo-Belgian postal convention, and that of 1869 between France and Italy. In a series of postal conventions between England and France it has been agreed, first, that packets owned by the state should be treated as vessels of war in the ports of the two countries; next, that vessels freighted as packets by the governments of the respective states should be so treated; and, finally, that lines subsidised by them should have the same privileges. De Martens, Nouv. Rec. xiii. 107; Nouv. Rec. Gén. v. 183; Hertslet's Treaties, x. 108. The conventions between England and France, it will be observed, do not provide for the treatment of packets on the high seas. [In the case of the Panama, 176 United States Reports, p. 535, the Supreme Court of the United States refused to listen to the contention that the fact of carrying mails exempted an enemy merchant ship from capture.]

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importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral government on board that no despatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

No usage has hitherto formed itself on the subject. During the American Civil War it was at first ordered by the government of the United States that duly authenticated mail-bags should either be forwarded unopened to the foreign department at Washington, or should be handed after seizure to a naval or consular authority of the country to which they belonged, to be opened by him, on the understanding that documents to which the belligerent government had a right should be delivered to it. On the suggestion of the English government, which expressed its belief 'that the government of the United States was prepared to concede that all mail-bags, clearly certified to be such, should be exempt from seizure or visitation,' these orders were modified; and naval officers were directed, in the case of the capture of vessels carrying mails, to forward the latter unopened to their destination [1].

Carriage of persons in the ordinary way of trade.

The effect of the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary way of trade depends upon the answer which has to be given to the question whether such persons can be assimilated to contraband of war. If they can be classed as a sort of contraband, they may be seized and brought in with the vessel on board of which they are found, and proof that they have been received with knowledge of their character will entail the same consequences to the ship as follow upon ordinary contraband trade. If they cannot be so classed, the vessel in which they are travelling remains a ship under neutral jurisdiction which has not been brought by the conduct

[1] See the correspondence in Bernard's Neut. of Great Britain, 319–23; Dana, note to Wheaton, No. 228.

of the persons having control over it within the scope of those exceptional rights in restraint of noxious trade which belligerents have been allowed to assume; the enemy of the belligerent travellers therefore is thrown back upon those ordinary rights which he possesses in time of peace; in other words, he can only seize the persons in question in the emergency of an immediate and pressing danger[1].

Case of the Trent.

The point came under discussion between England and the United States during the American Civil War. In 1861 Messrs. Mason and Slidell, who had been appointed diplomatic agents of the Confederate States at the Courts of St. James's and the Tuileries, came on board the English passenger steamer Trent at Havana, and sailed in her from there to St. Thomas's on their way to England. While passing through the Bahama Channel the vessel was boarded from the American frigate San Jacinto, and Messrs. Mason and Slidell were taken out of her and carried as prisoners to Boston, the Trent being allowed to continue her voyage. The English government demanded and obtained their immediate release, it being acknowledged by the United States that they had been unduly arrested. Lord Russell and Mr. Seward differed however in the view which they respectively took as to the reasons for which the capture was irregular.

Captain Wilkes, the commander of the San Jacinto, professed to regard Messrs. Mason and Slidell as embodied despatches. In the same spirit Mr. Seward, in an elaborate note addressed to Lord Lyons, declared them to be contraband, 'since the word means broadly, contrary to proclamation, prohibited, illegal, unlawful. All writers and judges,' he adds in an off-hand way, but without giving any proof of his assertion[2], 'pronounce naval or military persons in the service of the enemy contraband.' Mr. Seward then claimed that Messrs. Mason and Slidell were liable to capture. But he admitted that they were not properly

[1] Comp. antea, pp. 275 et seq.
[2] He refers to Vattel and Lord Stowell, but the passages which he paraphrases have no reference whatever to the point in question.

disposed of. If they were contraband of war, they and the vessel ought to have been sent in together for adjudication; a captor has no right to decide for himself whether particular things or persons are in fact contraband; to do so is the business of the courts, and a neutral state cannot be expected to acquiesce in the rough conclusions of a naval officer arrived at on the deck of the prize vessel. At this point Mr. Seward found himself confronted with an insuperable difficulty which he tried in vain to get over. If the captured persons had been really contraband, the courts would have had no difficulty in dealing with them whether the vessel were brought in or not. 'But Courts of Admiralty have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons; the courts can entertain no proceedings and render no judgment in favour of or against the alleged contraband men.' The presence of the vessel was necessary in order to place before the courts indirectly the question whether the men were contraband or not; and if that question, so raised, were settled adversely to the men, Mr. Seward acknowledged that the courts were incompetent to determine in what way they should be disposed of; that matter, he confessed, was 'still to be really determined, if at all, by diplomatic arrangement or by war.' Mr. Seward's own statement is conclusive against himself. The whole law of contraband, blockade, &c., is based upon the concession by the neutral state to the belligerent state and its courts of whatever jurisdiction is necessary for self-protection. To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them.

Lord Russell controverted the doctrine of Mr. Seward in a note which was also elaborate. He denied that the capture of Messrs. Mason and Slidell was simply irregular in its incidents, and maintained that they were not liable to capture at all; but

he rested the immunity which he claimed for them on the privilege of receiving diplomatic agents from belligerent states accorded by the practice of nations to neutral states, and on the necessity that contraband articles shall have a hostile, and not a neutral, destination; he even seems, by quoting without comment a passage from Bynkershoek, in which soldiers are classed with arms and other articles of use in war, to favour the view that at least persons who are in the military service of the state may be treated as contraband [1].

It is to be regretted that Lord Russell did not address himself to the refutation of the doctrine that persons can be contraband of war. For the reasons mentioned above, however, there need be no hesitation in rejecting it. In the words of Mr. Bernard, 'it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different.' If a vessel is so hired by a belligerent that he has entire control over it to the extent of his special needs, the ship itself is confiscable as having acquired an enemy character, and the persons on board become prisoners of war. If on the other hand belligerent persons, whatever their quality, go on board a neutral vessel as simple passengers to the place whither she is in any case bound, the ship remains neutral and covers the persons on board with the protection of her neutral character [2].

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix; but Bynkershoek is speaking rather of a general state duty to prevent its subjects from helping a belligerent than of the special question of contraband. In the next chapter, where he discusses what articles are contraband of war, he makes no mention of soldiers.

[2] Mr. Seward to Lord Lyons, Dec. 26, 1862, and Earl Russell to Lord Lyons, Jan. 23, 1862, ap. Bernard, 201 and 215. On the general doctrine see Bernard, 224; Bluntschli, § 817; Dana, note to Wheaton's Elem., No. 228; Marquardsen, Der Trentfall. The last-mentioned work may be consulted with advantage on the whole subject of the transport by neutrals of belligerent persons and despatches.

CHAPTER VII

CARRIAGE OF BELLIGERENT GOODS IN NEUTRAL VESSELS

Conflicting theories on the subject.

No branch of international law has been debated at such length or with greater keenness than those which refer to belligerent goods carried in neutral vessels, and to neutral goods in belligerent vessels. It is possible, and indeed probable, that the Declaration of Paris, to which most civilised states have adhered, has permanently secured an identical practice among the signataries to it, and that it will in time be definitively accepted by those states also which for the present have reserved the right to pursue their accustomed policy. But the terms of the Declaration are not strictly authoritative law, and it is therefore not yet superfluous to sketch, though more lightly than was formerly necessary, the history and the grounds of the rival doctrines which have been held upon the two subjects. Usually these subjects have been treated together, and the verbal jingle, 'Free ships, free goods; Enemy ships, enemy goods,' has been thought to express a necessary correlation, which has been equally supposed to exist between the contrary doctrines. The Declaration of Paris, in choosing from each system the part most favourable to neutrals, has at least restored their natural independence to two essentially distinct questions of law.

Two theories have been held, and two usages have existed, with respect to the treatment of belligerent goods in neutral vessels. In the simpler and primitive view they were enemy's goods, and therefore liable to seizure, wherever found outside the jurisdiction of a third state; according to a later and more artificial doctrine, the neutral vessel is invested with power to protect them.

Early usage.

The first of these doctrines is found in the *Consolato del Mare*, the rules of which embodied the customs authoritative in the western Mediterranean during the Middle Ages; and Louis XI, in writing to the King of Sicily, speaks of the principle as being in his time accepted beyond all question[1]. The French Ordonnances of 1538, 1543, and 1584, not only confiscated the hostile goods, but extended the penalty to the ship in which they were embarked, and though the courts appear to have avoided giving full effect to the law, their actual rules were not milder than those enforced by other nations[2]. It was not till 1650 that the principle of the immunity of goods carried in a neutral vessel was asserted or agreed upon. In that year a treaty was concluded between Spain and the United Provinces, in which it was agreed that the goods of the enemies of either party should be free from capture, when on board the ships of the other party, the latter being neutral; and in 1655 a treaty was made between France and the Hanse Towns, the language of which seems to convey the privilege[3], but its real meaning, as understood by one of the contracting parties, may probably be best read by the light of negotiations which took place some time before between France and the United Provinces. In 1646 a treaty had provided that for four years the Dutch government should be excepted from the operation of the Ordinances, and that 'their ships should free their cargo, notwithstanding the presence in it of merchandise, and even of grain and vegetables belonging to enemies, excepting always articles contraband of war.' On an attempt being made by De Witt in 1653 to take the plain

Practice in the seventeenth century.

[1] He says that it is a 'usus in hoc occidentali mari indelebiliter observatus, res hostium et bona, etiamsi infra amicorum aut confoederatorum triremes seu naves positae sint, nisi obstiterit securitas specialiter super hoc concessa, impune et licite jure bellorum capi posse;' quoted by Heffter, § 163.

[2] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7. Grotius gave his sanction to the principle of the French Ordonnances: 'Neque amicorum naves in praedam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis,' which of course would usually be the case. De Jure Belli et Pacis, lib. iii. c. vi. § vi. note.

[3] Dumont, vi. i. 571, and ii. 103.

meaning of these words as the ground of a permanent arrangement, it appeared that the French had merely understood the treaty of 1646 to preserve from confiscation the ship and neutral merchandise associated in its cargo with that of an enemy. It is not likely, as is remarked by Manning, that Louis XIV would grant larger immunities to the Hanse Towns than to Holland, and the treaty made with them in 1655 may therefore be no doubt interpreted in the same sense[1]. In 1659 a clause appears in the Peace of the Pyrenees, by which free ships are made to free goods, and during the remainder of the seventeenth century France concluded nine treaties, in which a like provision was contained[2]. But in the midst of these treaties the Ordonnance of 1681 proved how entirely they were exceptions to the general policy of the state, by re-enacting in all their severity the provisions of the law of 1584, and in 1661 and 1663 treaties were concluded with Sweden in which no stipulation inconsistent with it was contained[3].

The Dutch the promoters of the doctrine, Free ships, free goods.

The true promoters of the new principle were the Dutch, to whom the security of their carrying trade was of the deepest importance. They not only were the earliest people to stipulate for the freedom of enemy's cargo in neutral ships by a treaty of undoubted meaning, but they steadily kept it before their eyes as an object to be striven for, to such purpose that they induced Spain, Portugal, France, England, and Sweden to grant or confirm the privilege in twelve treaties between the years 1650 and 1700[4]. The only treaty of the century to which neither

[1] Dumont, vi. i. 342; Manning, 317.

[2] With Denmark, 1662 (Dumont, vi. ii. 439); Denmark, 1663 (ib. 463); United Provinces, 1662 (ib. 415); Portugal, 1667 (id. vii. i. 17); Spain, 1668 (ib. 90); Sweden, 1672 (ib. 166); England, 1677 (ib. 329); United Provinces, 1678 (ib. 359); United Provinces, 1697 (ib. ii. 389).

[3] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7. Treaties with Sweden, Dumont, vi. ii. 381 and 448.

[4] With Spain, 1650 (Dumont, vi. i. 571); Portugal, 1661 (ib. ii. 369); France, 1661 (ib. 346); France, 1662 (ib. 415); England, 1667 (id. vii. i. 49); Sweden, 1667 (ib. 38); England, 1674 (ib. 283); Sweden, 1675 (ib. 317); France, 1678 (ib. 359); Sweden, 1679 (ib. 440); England, 1689 (ib. ii. 236); France, 1697 (ib. 389).

the United Provinces nor France was a party was concluded between England and Portugal in 1652[1], but except when prevented by express convention, England maintained the confiscation of enemy's goods, and she confirmed her practice by several treaties[2]. At least ten treaties, dealing with the commercial relations of the contracting parties, the greater number of which were made between nations which were also parties to treaties giving expression to the doctrine of Free ships, free goods, permitted by their silence the common practice to continue, and manifested the absence of a fixed policy on the part of the countries which engaged in them[3].

Practice in the eighteenth century.

At the commencement of the eighteenth century, therefore, the new principle had made little solid progress; and one of the two nations which had concluded the largest number of treaties embracing it, was in no hurry to adopt it as a voluntary rule.

France.

The French Règlement of 1704 exaggerated the harshness of former law by rendering liable to confiscation the raw or manufactured produce of hostile soil, when the property of a neutral, except when it was in course of transport direct from the enemy's country to a port of the neutral state to which its owner belonged. It was not till 1744 that neutral vessels carrying enemy's goods were freed from confiscation, and it was only in 1778 that the freedom of the goods themselves was conceded by the Règlement of that year[4]. It must be presumed that the rules

[1] Dumont, vi. ii. 84. This treaty was confirmed in 1661 and 1703, so that the rule of 'Free ships, free goods' remained in force as between England and Portugal till 1810, when it was abandoned by the Treaty of Rio Janeiro. Hansard, cxlii. 491.

[2] With Sweden, 1654 (Dumont, vi. ii. 80); Denmark, 1654 (ib. 92); Sweden, 1661 (ib. 387); Denmark, 1661 (ib. 346); Denmark, 1670 (id. vii. i. 128).

[3] England and the United Provinces, 1654 (Dumont, vi. ii. 76); England and Brandenburg, 1661 (ib. 364); England and Sweden, 1661 (ib. 384); England and Denmark, 1661 (ib. 346); Sweden and France, 1661 (ib. 381); England and the United Provinces, 1662 (ib. 423); England and Denmark, 1669 (id. vii. i. 126); England and Spain, 1670 (ib. 138); England and Sweden, 1666 (id. vi. iii. 83); France and Sweden, 1672 (id. vii. i. 169).

[4] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7; Pistoye et Duverdy, i. 344 and 360.

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enforced by a country, apart from treaties, correspond to its views of justice or established usage. If, while maintaining these rules, it at the same time multiplies treaties in an opposite sense, the inference is not that it looks upon the law which it is content to administer as destitute of authority, but that its own interests are best served by inducing other nations to alter its provisions. France became the advocate of the principle of Free ships, free goods, but it is safer to appeal to her regulations than to her treaties as evidence of general rule, and it is not likely that those regulations would have been expunged from her international code if the maritime predominance of England had failed to consolidate itself.

Spain.

Spain imitated the policy of France, and while recognising the freedom of enemy's goods by treaty, it was not till 1780 that her private rules exempted either them or the neutral vessel from confiscation[1].

Great Britain.

England fettered herself by treaties with few states, and continued to give effect to the old practice of seizing neutral goods, while releasing the neutral vessel with payment of freight[2]. In maintaining this usage she was brought in 1780 into sharp collision with the neutral states.

First Armed Neutrality.

The First Armed Neutrality put forward the immunity of belligerent cargoes in neutral vessels as one of its doctrines; and the weakness produced by the American War prevented England from adopting any means for the vindication of her views. But the members of the league were not themselves proof against the temptation of war. In 1788 Sweden openly renounced the

[1] De Martens, Rec. iv. 270.

[2] The principal treaties concluded during the eighteenth century, down to the time of the First Armed Neutrality, in which the principle of 'Free ships, free goods' was contained, were those of Utrecht in 1713 between England, France, and the United Provinces (Dumont, viii. i. 348 and 379); between England and Spain, 1713 (ib. 409); Spain and the United Provinces, 1714 (ib. 431); the United Provinces and Russia, 1715 (ib. 470); Spain and the Empire, 1725 (ib. ii. 115); France and the United Provinces, 1739 (Wenck. Codex Juris Gentium, i. 424); France and Denmark, 1742 (ib. 621); Sweden and the Two Sicilies, 1742 (ib. ii. 143); Denmark and the Two Sicilies, 1748 (ib. 281); France and the United States, 1778 (De Martens, Rec. ii. 598).

principles of the Armed Neutrality while at war with Russia, and the latter power tacitly followed her example[1]. The treaties which were made between the establishment of the Armed Neutrality and the outbreak of the wars of the Revolution stipulate for the freedom of hostile goods[2]; but three months of hostilities had hardly passed, in 1793, when France declared enemy's goods on board neutral vessels to be good prize, the neutral ship being released, and freight being paid by the captors[3]. Russia had already denounced her treaty of 1787; and Great Britain, Russia, Spain, the Empire, and Prussia agreed that the contracting powers would unite all their efforts to prevent neutrals 'from giving, on this occasion of common concern to every civilised state, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea, or in the ports of France[4].' The general attitude of England in the matter was clearly defined by Pitt. 'I must observe,' he said, 'that the hon. gentleman has fallen into the same error which constitutes the great fallacy in the reasoning of the advocates for the Northern powers; namely, that every exception from the general law by a particular treaty proves the law to be as it is stated in that treaty; whereas the very circumstance of making an exception by treaty proves what the general law of nations would be if no such treaty were made to modify or alter it. The hon.

Practice during the French wars, 1793–1815.

[1] Manning, 336.

[2] United States and United Provinces, 1782 (De Martens, Rec. iii. 439); Denmark and Russia, 1782 (ib. 476); England, France, and Spain, 1783 (ib. 543); United States and Sweden, 1783 (ib. 568); United States and Prussia, 1785 (id. iv. 42); France and the United Provinces, 1785 (ib. 68); Austria and Russia, 1785 (ib. 76); England and France, 1786 (ib. 168); Russia and France, 1787 (ib. 210); Russia and the Two Sicilies, 1787 (ib. 236); Russia and Portugal, 1787 (ib. 327); France and Hamburg, 1789 (ib. 426); Denmark and Genoa, 1789 (ib. 442). But the United States distinctly asserted the doctrine that 'according to the law of nations, the goods of an enemy found on board the ship of a friend are liable to capture.' Messrs. Pinckney, &c., to the French Minister of Foreign Affairs, January 27, 1798; American State Papers, ii. 181. See also Mr. Jefferson to Mr. Morris, August 16, 1793; ib. i. 123.

[3] De Martens, Rec. v. 382.

[4] Ib. 409 and 440.

gentleman alludes to the treaty made between this country and France in the year 1787, known by the name of the Commercial Treaty. In that treaty it certainly was stipulated that in the event of Great Britain being engaged in war and France being neutral, she should have the advantage now claimed, and *vice versâ*; but the hon. gentleman confesses that he recollects that the very same objection was made at that time, and was fully answered, and that it was clearly proved that no part of our stipulation in that treaty tended to a dereliction of the principles for which we are now contending[1].'

The Second Armed Neutrality reasserted for a moment the principles of 1780, but one of the articles of the treaty concluded between England and Russia in 1801, to which Denmark and Sweden afterwards acceded, provided that the property of enemies on board neutral vessels should be confiscable. In 1807 Russia annulled the convention of 1801, and proclaiming afresh the principles of the Armed Neutrality, declared that she would never depart from them[2]; but in 1809 an ukase was issued under which 'ships laden in part with the goods of the manufacture or produce of hostile countries were to be stopped, and the merchandise confiscated and sold by auction for the profit of the crown. But if the merchandise aforesaid compose more than half the cargo, not only the cargo, but the ship also shall be confiscated[3].'

Thus at the general peace, not only had the ancient practice been steadily acted upon by the most powerful maritime state; but the advocates of the intrusive principle had permitted their allegiance to it to be not infrequently shaken, under circumstances which sufficiently prove their conduct to have been simply dictated in all cases by the varying interests of the moment.

Progress of the doctrine, Free ships,

Between 1815 and 1854 France gave proof of her continued preference for the doctrine of Free ships, free goods, by concluding several treaties in which it was embodied; and the United

[1] Pitt's Speeches, iii. 227–8.
[2] Ortolan, Dip. de la Mer, ii. 156.
[3] De Martens, Nouv. Rec. i. 485.

free goods towards general acceptance.

States, while fully accepting the English view as expressing existing law, entered into frequent engagements in a contrary sense[1]. The new principle, therefore, acquired a certain amount of additional strength; and at the same time no opportunities occurred for upholding the older usage by practice. Until the beginning of the Crimean War, however, no change took place in the relative legal value of the two principles. The original adherents of the newer doctrine had embraced it afresh; but it had not been admitted by the powers which before rejected it.

It is acted upon during the Crimean War.

But in 1854 it was felt that it was difficult for allied states to apply different legal theories in a common war, and an agreement for identical action was come to by Great Britain and France, under which the principle of the immunity of enemy's goods in neutral ships was provisionally accepted by the former.

Declaration of Paris.

On the conclusion of the Treaty of Paris the same principle was accepted by the parties to it in a Declaration, which was intended to form the basis of a uniform doctrine on maritime law, and to which all states not represented at the Congress were afterwards invited to accede. The only countries possessing a sea coast which, up

[1] 'The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:— 1. That a belligerent may take enemy's goods from neutral custody on the high seas; 2. That the carrying of enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. While the government of the United States has endeavoured to introduce the rule of Free ships, free goods, by conventions, her courts have always decided that it is not the rule of war; and her diplomatists and text-writers, with singular concurrence, considering the opposite diplomatic policy of the country, have agreed to that position.' Dana's Wheaton, note to § 475.

The treaties concluded by the United States are those with Sweden, 1827 (De Martens, Nouv. Rec. vii. 279); Colombia, 1824 (id. vi. 992); Central America, 1825 (ib. 832); Brazil, 1828 (id. ix. 60); Mexico, 1831 (id. x. 336); Chile, 1832 (id. xi. 442); Venezuela, 1836 (id. xiii. 556); Peru-Bolivia, 1836 (id. xv. 118); Ecuador, 1839 (Nouv. Rec. Gén. iv. 310); New Grenada, 1846 (id. xiii. 659); San Salvador, 1850 (id. xv. 73); Russia, 1854 (id. xvi. i. 572). Treaties have been concluded by France with Venezuela, 1843 (id. v. 170); Ecuador, 1843 (ib. 409); New Grenada, 1844 (id. vii. 620); Chile, 1846 (id. xvi. i. 9); Guatemala, 1848 (id. xii. 10).

Practice of the United States, and of Spain.

to the present time, have withheld their formal adherence to the Declaration are the United States, Spain, Mexico, and Venezuela. But the United States announced at the beginning of the Civil War [and in 1898] that they would give effect to the principle during the continuance of hostilities [1]. [In the latter year Spain, while reiterating that she was not bound by the Declaration of Paris, gave orders for the observation of the rules that (*a*) a neutral flag covers the enemies' goods, except contraband of war, and (*b*) neutral goods, except contraband of war, are not liable to confiscation under the enemies' flag [2].]

Although, therefore, the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which till lately enjoyed a superior authority.

[1] Dana's Wheaton, note to § 475. Hertslet, Commercial Treaties, xxi. 1073.
[2] Id. p. 837.

CHAPTER VIII

BLOCKADE

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In what blockade consists.

Blockade consists in the interception by a belligerent of access to territory or to a place which is in the possession of his enemy. As it is obviously a mode by which severe stress may be put upon the population subjected to it through the interruption of communication with the external world which it entails, it is an invariable concomitant of all warlike operations by which control is gained over avenues through which such communication takes place. The conditions however under which communication is interrupted by land and by sea are different, and they are such that for the purposes of international law blockade consists only in the interception of access by sea. On land it is enforced partly as a consequence of the possession by a belligerent of the rights of control which have been already mentioned, and partly through the material power of which he can avail himself at every moment within the range of his military occupation. Blockade on land therefore calls for no special rules for its maintenance; sovereignty in some cases and military occupation in others supply the requisite rights of control, and the material conditions of its exercise are simple. But at sea the rights of the neutral being equal to those of the belligerent except in so far as they are subordinated to the special needs of the latter, the neutral has *primâ facie* a right of access to the enemy; and when this right is ousted by the assertion of the special needs of the belligerent, it must be shown that the latter is in a position to render the assertion effective, the right which is set up by his needs being a bare one, like all other belligerent rights, and the conditions of maritime warfare being such that control over a space of water in which a naval force is stationed cannot be supposed to be effective as of

course. Maritime blockade therefore calls for special rules defining the conditions under which it can be set up and those under which it continues to exist.

Conditions of its due institution and maintenance.

It is agreed that for a maritime blockade to be duly set up and maintained—

1. The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have in some way been brought to the knowledge of the neutrals affected.
2. It must have been initiated under sufficient authority.
3. It must be maintained by a sufficient and properly disposed force.

It is endeavoured to give effect to these general rules by means of practices which enjoy very different degrees of authority.

How a neutral becomes affected with knowledge of a blockade.

As a blockade is not a necessary consequence of a state of war, but has to be specially instituted, it would evidently be impossible to assume that a neutral possesses any knowledge of its existence until the fact of its establishment has been in some manner notified or brought home to him. So far not only is the general rule as a matter of fact agreed upon, but it could not stand otherwise. But opinions differ widely as to whether it is sufficient in order to justify the belligerent in seizing the property of the neutral that the knowledge of the latter shall be proved, or whether a formal notification must be served upon him.

English and American theory.

According to the view which finds its expression in English and North American practice, and has been adopted also by Prussia and Denmark[1], the source of liability to seizure is knowledge of the fact that a blockade has been established, together with the presumption that an existing blockade will under ordinary circumstances continue. A neutral therefore who sails for a port with full knowledge that it is blockaded at the moment

[1] See an analysis of the Prussian Prize Regulations [which are now presumably in force throughout the German Empire] in Bulmerincq (Le Droit des Prises Maritimes, Rev. de Droit Int. x. 240), and of the Danish Regulations (ib. 212).

when his voyage is commenced, ought to expect that it will be in the same state when he arrives; and anything which can be proved to affect him with knowledge at the former time will render him liable to the penalties imposed for violation of blockade.

French theory.

On the other hand, according to the view which is identified with French practice, and which is also followed by Italy, Spain, and Sweden [1], the neutral is not expected to shape his course on any presumption with respect to the continuance or cessation of a blockade; and he is not injuriously affected by knowledge acquired at any time before he can experimentally test its existence as good on the spot which is subjected to it.

French practice.

Hence, although it has lately become customary for the French government at the commencement of a blockade to notify the fact of its existence to foreign governments as a matter of courtesy, their subjects are not considered to be affected by notice through them. Each neutral trader approaching the forbidden coast is individually warned by one of the blockading squadron, a vessel not engaged in the blockade being incompetent to affect the trader with notice, the fact of warning is endorsed on the ship's papers, with mention of the date and place of notification, and it is only for subsequent attempts to enter that the neutral is liable to seizure. The practice was consistently followed by France in blockading the Mexican ports in 1838, and those of the Argentine Republic in the same year; it has been equally respected during her recent European wars; and stipulations in accordance with it are found in many modern treaties concluded by her, as well as in a certain number of conventions between other states. It is also adopted by several modern continental writers; who argue that to sail for a blockaded place in the hope of finding the entry freed by the chances of war, by the effects of weather, or by some other cause, is in itself an innocent act, and therefore not to be punished because the hope fails to be

[1] For the Italian and Swedish rules see Bulmerincq (Rev. de Droit Int. x. 220 and 441); for the Spanish practice, Negrin, 213.

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justified by the circumstances existing at the moment of arrival[1].

English and American practice.

The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sails with the destination of a blockaded port from a place at which the fact of blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning[2]. But in practice notification of some sort is

[1] Ortolan, ii. 335-41. Calvo (§ 2581) considers that the French practice ought to be the accepted rule of law; Pistoye and Duverdy (i. 370) and Hautefeuille (tit. ix. chap. ii. sect. ii) hold that the special notification is necessary, and that a diplomatic notification ought also to be given.

For the French Regulations of 1870 see Bulmerincq in Rev. de Droit Int. x. 400.

The treaties in which France has inserted stipulations in conformity with her practice are those with Brazil, 1828 (De Martens, Nouv. Rec. viii. 60); with Venezuela, 1843 (Nouv. Rec. Gén. v. 172); with Ecuador, 1843 (ib. 411); with New Grenada, 1844 (id. vii. 621); with Guatemala, 1848 (id. xii. 11); with Chile, 1846 (id. xvi. i. 10); with Honduras, 1856 (ib. ii. 154); with Nicaragua, 1849 (ib. 191).

The treaties in which countries other than France have bound themselves by like provisions are those between the United States and Sweden in 1816 (De Martens, Nouv. Rec. iv. 258); the Hanseatic Towns and Mexico, 1828 (id. Nouv. Supp. i. 687); the United States and Sardinia, 1838 (id. xvi. 266); Austria and Mexico, 1842 (Nouv. Rec. Gén. iii. 448); the Argentine Republic and Peru (id. 2e Sér. xii. 448); Italy and Uruguay (id. xii. 664). The practice seems to have arisen out of the doctrine of the Second Armed Neutrality, in the treaties concluded between the members of which the principle was first laid down. De Martens, Rec. vii. 172, &c.

[2] The Columbia, i Rob. 156; The Adelaide Rose, ii Rob. 111, note; The Union, Spinks, 164. 'If a blockade *de facto* be good in law without notification, and a wilful violation of a legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, cannot be of importance.' The Franciska, on appeal, x Moore, 46. But capture on the ground of notoriety would be looked upon with disfavour. Dr. Lushington, in adjudicating in the first instance in the case of the Franciska, said, 'Unless the notoriety of the blockade be so great, that according to the ordinary course of human affairs the knowledge thereof must have reached all engaging in the trade between the ports so blockaded, a warning to each vessel approaching is indispensably requisite.' Spinks, 135.

always given. If the blockade is instituted under the direct authority of the government, the fact of its commencement is always notified to foreign states. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them. If therefore a vessel sails to a blockaded port at a time clearly later than that at which the general notification is matter of public knowledge, no special notification is required before seizure[1]. But the case is different when vessels sail before such time, or approach a port closed by a merely *de facto* blockade, which has been instituted on the authority of the officer commanding the belligerent force in the neighbouring seas, or which for some reason has not yet been the subject of a diplomatic notification. Knowledge of the fact cannot then be presumed, and vessels are consequently turned back with a like notice endorsed on their papers to that which is required under the French usage[2]. And a mitigation of the strict rule is introduced when a vessel sails with full knowledge of the existence of a blockade from a port at a great distance from the closed harbours. The presumption in favour of continuance of the blockade is of necessity weakened with a lapse of time sufficient for the completion of a long voyage; and it was held during the wars at the beginning of the nineteenth century that a vessel coming from America into European waters was not rendered liable to capture by mere destination to a blockaded port. Enquiry as to the continued existence or suspension of the blockade was under these conditions justifiable; but it was held that such enquiry ought to be made, not at the blockaded port, but at intermediate places, where fraud was less likely to be masked under enquiry than at the mouth of the blockaded harbour[3].

[1] The Columbia, loc. cit.; The Neptunus, ii Rob. 114; The Vrow Johanna, ii Rob. 109; Mr. Justice Story in The Nereide, ix Cranch, 440.

[2] Vrow Judith, i Rob. 151; The Neptunus, loc. cit.; Admiralty Manual of Prize Law (Holland), 1888, p. 34. A vessel may sail with the intention of enquiring whether a blockade *de facto* is continued or not, Naylor *v.* Taylor, iv Manning and Ryland, 531.

[3] The Betsey, i Rob. 334. The United States have stipulated for the

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The English practice to be preferred.

The practice of England and the United States is unquestionably better suited than that of France to the present conditions of navigation[1]. The electric telegraph and newspapers spread authentic news rapidly and universally; steam has reduced the length of voyages and rendered their duration certain; it can

mitigated practice of allowing a vessel to sail for a distant port notwithstanding the existence of blockade in treaties concluded in 1806 with England (De Martens, Rec. viii. 585); in 1816 with Sweden (id. Nouv. Rec. iv. 258); in 1828 with Brazil (id. ix. 62); in 1836 with Venezuela (id. xiii. 560); in the same year with Bolivia (id. xv. 113); in 1839 with Ecuador (Nouv. Rec. Gén. iv. 316); and in 1871 with Italy (Archives de Droit Int. 1874, p. 134). M. Calvo has misapprehended the effect of these treaties in adducing them as examples of the adoption of the French practice with respect to notification. He has shown an equal misapprehension of the English practice in treating as a middle term between it and that of France the Danish Regulations of 1864, providing that special notification is to be given to a vessel which, from the shortness of time which has elapsed since the issue of a general notification, has not had an opportunity of becoming acquainted with the existence of a blockade (§§ 2589–90). M. Ortolan appears also to have fallen into error with respect to the practice of the United States, in saying, after stating the French practice, that 'c'est ainsi également, qu'agissent les États Unis d'Amérique.' Mr. Lincoln's Proclamation of April 19, 1861, no doubt stated that vessels would be individually warned; but Commodore Prendergast, in notifying the actual commencement of the blockade of the Virginian coast in July of the same year, said only that 'those coming from abroad, and ignorant of the blockade, will be warned off;' and the principle that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel to capture, without special notice, was re-asserted with much emphasis by Chief Justice Chase in the case of The Circassian, ii Wallace, 151. It has always been a principle in American practice, and was affirmed by Mr. Justice Story in the case of The Nereide, ix Cranch, 440. In the case of The Hiawatha (ii Black, 675), which issued from a blockaded port during the civil war, it was contended that, under the Proclamation of April 19, a warning was necessary, but it was decided that it would be absurd to require a warning when the master of a vessel had actual previous knowledge. [And see the Adula, 176 United States Reports, p. 362. President McKinley by proclamation dated April 22, 1898, ordered that all neutrals' vessels approaching or attempting to leave a blockaded port 'without notice or knowledge' of the blockade should be duly warned by the commander of the blockading force, id. p. 391.] See also postea, pp. 709, 710.

[1] MM. Bluntschli (§ 832) and Heffter (§ 156) partially adopt the English practice in admitting that special notification to the neutral trader is unnecessary; but they hold that capture can only be effected during an actual attempt at violation on the blockaded spot itself. The same view is expressed in the proposed Règlement des Prises Maritimes of the Inst. de Droit Int. §§ 35–44. Annuaire de l'Institut, 1883, p. 218.

only be under rare circumstances, against the effect of which mitigations such as those introduced into English usage may easily provide, that a vessel will arrive innocently before a blockaded port. If capture for attempt to break a blockade is to be permissible at all, it must be morally permissible to capture under ordinary circumstances without individual notice, provided diplomatic, or other sufficient general, notice has been given; and if such capture is morally permissible, it is certainly to the advantage of neutral states to allow it to take place. Belligerents will not quietly suffer the results of commerce prejudicial to their warlike operations; and unless they are entrusted with weapons of sufficient strength to enable them to deal with it effectively, they will try, with more or less success, to throw responsibility upon the neutral states, to the confusion of legal distinctions which it is highly convenient to the latter to maintain, and to the vastly increased danger of national conflicts [1].

Authority under which a blockade may be established.

A blockade is considered to be an act of war which affects, of right, not only the subjects of a neutral state, but also persons and things partaking of the national character. Strictly, access to a blockaded place is forbidden to ships of war as well as merchant vessels. The establishment of a blockade is therefore so high an exercise of sovereign power that it can only be effected under the express or implied orders of the government of a country; and the general instructions given to the commander of a belligerent force do not necessarily imply competent orders. If however he is operating at a considerable distance from home, he is supposed to be invested with such portion of

[1] During the American Civil War Chief Justice Chase, in speaking of the rule under which sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects a vessel to capture, declared that 'we are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised into a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.' The Circassian, ii Wallace, 151.

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the sovereign authority as may be required for the exigencies of the service; and it has even been held that when an officer not possessed of adequate powers had taken on himself to commence a blockade, captures effected under it might be made retrospectively valid by a subsequent adoption of his act by the state. The principle therefore in practice goes little further than to forbid subordinate officers from creating or varying a blockade at their will[1].

Maintenance by a sufficient and properly disposed force.

The doctrine with regard to the proper maintenance of a blockade, which has been laid down by the English and American courts, which is approved of by English and American writers, and which is embodied in the policy of both countries, requires that a place shall be 'watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable[2].'

Practice of England and the United States.

Provided access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighbourhood of Monte Video; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of one hundred and twenty miles from the town by a ship in the Lyser Ort, a channel three miles wide, which forms the only navigable entrance to the gulf[3].

It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade.

[1] Phillimore, iii. § cclxxxviii; Calvo, § 2555; Bluntschli, § 831; The Rolla, vi Rob. 365; The Hendrick and Maria, i Rob. 148; The Franciska, x Moore, 46. [The Adula, 176 United States Reports, p. 361.]

[2] The Franciska, Spinks, 115; Phillimore, iii. §§ ccxciii–iv; Bernard, 245; Kent, Lect. vii; Wheaton, pt. iv. chap. iii. § 28; Mr. Mason's instructions to the naval forces of the United States, 1846, quoted by Ortolan, ii. 343. Among continental publicists M. Bluntschli accepts and repeats the English doctrine, § 829.

[3] The Franciska, loc. cit.

It is for the Prize Courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition. In some cases, where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus during the American Civil War, the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signalling distance. This amount and disposition of force seem to have been thought by the British government amply sufficient to create the degree of risk necessary under the English view of international law, although from the peculiar nature of the coast a large number of vessels succeeded in getting out and in during the whole continuance of the blockade[1].

This abstention from any pedantic interpretation of general rules extends to cases where, the force being adequate and the fact of blockade known, a ship enters owing to a momentary absence of a blockading vessel, not only when, as already mentioned, the absence is owing to weather, but even when it is caused by the chase of a prize. The blockade is not in these cases raised, and an endeavour to take advantage of such absence is looked upon as an attempted breach. On the other hand, the blockade ceases if an enemy's force succeeds, for however short a time, in driving off the squadron which is charged with maintaining it[2], or if vessels are diverted to other employment; and if a prize is pursued so far from the blockading station that a neutral ship on arriving near the entrance may fairly think

When a blockade ceases.

[1] Bernard, Neut. of Great Britain, chaps. x and xii.
[2] The Frederic Molke, i Rob. 87; The Columbia, i Rob. 156; The Hoffnung, vi Rob. 115; Vos and Graves v. The Un. Ins. Cy., ii Johnson (American), 187; Radcliff v. Un. Ins. Cy., vii Johnson, 53.

that the blockade is abandoned, it may be held to be at least so far impaired that the neutral so attempting to enter is relieved from the natural penalty of his act[1].

Opinions of continental writers.

The opinions held by the majority of modern continental writers as to the conditions under which a blockade is efficiently maintained, differ in several important respects from the principles which guide the practice of England and the United States. They may perhaps be summarised as follows. The immediate entrance to a port must be guarded by stationary vessels, in such number as either to render entrance impossible, or at least to expose any ships running in to a cross fire from the guns of two of them. Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel in attempting to enter[2]. As, for three quarters

[1] Bernard, 239. See, on diversion, the note of Lord Lyons to Mr. Seward, May 22, 1861. The Niagara, blockading Charleston, had been sent away to intercept a cargo of arms expected at another part of the coast, and the harbour remained open for at least five days. Lord Lyons took for granted that an interruption had occurred, but the government of the United States, in view of the effect understood by it to flow from a general notification, refused to admit that any cessation had taken place.

It was formerly held in the United States, and would, it may be presumed, be still held in England, that 'although acquisitions made during war are not considered permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror so long as he retains the possession and government of them' (Thirty Hogsheads of Sugar *v.* Boyle, ix Cranch, 195), and consequently that a blockade is raised by the capture and occupation of the blockaded place by the attacking force. But during the American Civil War, a majority of judges in the Supreme Court asserted the doctrine, to which reference has been already made (antea, p. 508), that 'The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city being itself hostile, the opposing enemy in the neighbourhood, and the occupation limited, recent, and subject to the vicissitudes of war;' Chief Justice Chase in The Circassian, ii Wallace, 135. Compensation for wrongful capture was subsequently awarded in this case by the Mixed Commission on British and American Claims (Parl. Papers, North Am. No. 2, 1874, p. 124).

[2] The opinions of the various writers are essentially identical, but differ from one another on some points. Heffter (§ 155) requires that vessels shall be 'stationnés en permanence et en assez grand nombre pour empêcher toute espèce de communication avec la place ou le port investi;' but he does not hold that temporary absence entails cessation of the blockade. Ortolan