of a century, by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labour under the disadvantage of being inconsistent with the most authoritative usage upon the subject. They are also much more rigid than the principles embodied in the Declaration of Paris, and accepted by the great majority of civilised nations. It is hardly necessary therefore to inquire upon what ground they are stated to represent existing law [1]. The signatary powers of the Declaration

(ii. 328) thinks that blockade of a harbour is not effective unless 'toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes, que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné ;' and considers (344) that if weather has caused the temporary absence of the blockading squadron, although the blockade is not raised, it is open to a vessel to attempt to enter, and if taken, to allege ignorance of the fact of blockade. Calvo (§ 2567) declares that the belligerent must have a sufficient force, so disposed as to become 'le maître de la mer territoriale qu'il occupe, et à pouvoir en interdire l'accès à tout navire étranger ;' apparently he requires that the ships shall be anchored. Hautefeuille (tit. ix. chap ii. sect. i. § 1) says that 'le blocus n'existe qu'autant que le belligérant qui attaque un port place devant ce port un nombre de bâtiments de guerre suffisant pour en commander les abords par leur artillerie ;' and holds (sect. iii. § 2) that interruption from any cause terminates the blockade. To Gessner (179) 'la définition de la première neutralité paraît exemplaire ;' a blockaded port is therefore one where there is, 'par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.' He exhausts the language of invective in assailing the existing doctrine and policy of England, and is fully satisfied with the American practice during the Civil War. It is not for me to attempt his extrication from the complicated inconsistencies in which he has thus involved himself. Pistoye and Duverdy (i. 365) confine themselves to cautious and accurate language. 'Il faut,' they say, 'que la place soit investie par des forces suffisantes pour en rendre l'entrée périlleuse aux navires qui voudraient s'y introduire.'

The proposed 'Règlement des Prises Maritimes,' adopted by the Institut de Droit International, provides that a blockade is to be considered effective 'lorsqu'il existe un danger imminent pour l'entrée ou la sortie du port bloqué, à cause d'un nombre suffisant de navires de guerre stationnés ou ne s'écartant que momentanément de leur station.' It adds that 'si les navires bloquants s'éloignent de leur station pour un motif autre que le mauvais temps constaté, le blocus est considéré comme levé.' Ann. de l'Institut, 1883, p. 218. The effect of the suggested rules would approach very nearly to the English practice.

[1] A few treaties contain stipulations in agreement with the views of the foreign writers whom I have quoted. I am not aware that any blockade has

of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that 'blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy[1].'

It may be remarked, apart from reference to existing law, and apart also from all question whether blockades ought to be permitted at every place where they are now lawful, that the experience of the civil war in America has proved the use of steam to assist so powerfully in their evasion, as to render it unwise to shackle the belligerent with too severe restrictions. If it is wished altogether to deprive blockades of efficacy, it would be franker and better to propose to sweep them away altogether.

ever been conducted under their provisions. In 1742 France and Denmark agreed that a blockaded port should be closed by two vessels at least, or by a battery of guns on land, and the same stipulation was made between Denmark and Genoa in 1789. The treaty between Holland and the Two Sicilies in 1753 prescribes that at least six ships of war shall be ranged at a distance slightly greater than gun-shot from the entrance, or else that the blockade may be maintained by shore batteries and other works. The First Armed Neutrality, in 1780, laid down that blockade must be effected with vessels stationary and sufficiently near to produce evident danger in entering. The Second Armed Neutrality put forward the same doctrine; but Russia, in her treaty with England in 1801, consented to substitute the words 'arrêtés ou suffisamment proches,' for 'arrêtés et suffisamment proches;' and the only treaty since concluded in which stringent stipulations are made is that between Denmark and Prussia in 1818, by which it was required that two vessels should be stationed before every blockaded port. Hautefeuille, tit. ix. chap. ii. sect. i. § 1; Gessner, 159; De Martens, Rec. vii. 263.

[1] With reference to the meaning of the Declaration of Paris, Lord Russell, in 1863, wrote as follows: 'The Declaration of Paris was in truth directed against what were once termed "paper blockades;" that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James' (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration.' Lord Russell to Mr. Mason, Feb. 10, 1863, ap. Bernard, 293.

Effect of cessation of blockade.

According to the English theory, as fully as by that adopted in France, the limitations imposed on neutral commerce by the right of blockade depend for their validity solely upon the fact that a blockade really exists at any given moment. A belligerent therefore has no power to subject a neutral to penalties from the time that a port ceases to be effectively watched, and the government of the United States was undoubtedly wrong in holding the opinion put forward by it in 1861, that a blockade established by notification continues in effect until notice of its relinquishment is given by proclamation [1]. It is no doubt the duty of a belligerent state which has formally notified the commencement of a blockade to give equal and immediate publicity to its discontinuance, but a vessel bound for or approaching a port at a time between the actual cessation of blockade and the public notification of the fact is not liable to confiscation. If a ship is captured under such circumstances, the utmost, but also the legitimate, effect of a notification is that the neutral, who has probably started with the intention of violating the blockade, and whose adventure has since become innocent from events with which he has had nothing to do, is bound to prove the existence of a state of facts which frees his property from the penalty to which it is *primâ facie* exposed. The presumption of the court will be that a regularly notified blockade continues to exist until that presumption is displaced by evidence [2]. In the case of a *de facto* blockade the burden of proof lies always upon the captor.

[1] Mr. Seward to Lord Lyons, May 27, 1861 ; ap. Bernard, 238.

[2] Bernard, 239. See also on the subject Phillimore, iii. ccxc, and The Neptunus, i Rob. 171 ; The Circassian, ii Wallace, 150; The Baigorry, ib. 480. The tenour of the instructions issued to naval officers by the French government in 1870 is given as follows by M. Bulmerincq (Rev. de Droit Int. x. 400) :—'Si les forces navales françaises étaient obligées, par une circonstance quelconque, de s'éloigner du point bloqué, les navires neutres recouvreraient le droit de se rendre sur ce point. Dans ce cas aucun croiseur français ne serait fondé à les entraver, sous prétexte de l'existence antérieure du blocus, s'il y a d'ailleurs la connaissance certaine de la cessation ou de l'interruption de ce blocus. Tout blocus levé ou interrompu doit être rétabli et notifié de nouveau dans les formes prescrites.'

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Conditions under which vessels lying in a port when it is placed under blockade can come out.

Neutral vessels lying in a belligerent port at the moment when it is placed under blockade are subjected to special usages with respect to which there is no difference of opinion. It would be obviously unjust to shut up the unoffending neutral in a common prison with the belligerent; on the other hand, the object of a blockade being to cut off all trade from the closed port, the operation would be to a great extent nullified if vessels within the harbour at the inception of the blockade were allowed to come out with cargo shipped after its commencement[1]. Hence, exit is allowed only under certain conditions, and it is necessary, if a vessel is to appear at the mouth of the port in a state according with these conditions, that she shall be informed beforehand of the fact that they have been imposed. A general notification is therefore sent to the authorities of the blockaded port, announcing the commencement of the blockade and specifying a time during which vessels may come out. It being certain that a notice affecting the narrow space of a particular port must of necessity become known to every person within it, the practice of most nations dispenses with further warning; and after a blockade has existed for a while, 'it is impossible for those within to be ignorant of the forcible suspension of their commerce,' so that, even without notice, warning to each ship is superfluous[2]. But the French perhaps extend the privilege of special warning to vessels issuing from a blockaded port with cargo laden after establishment of the blockade[3].

[1] It would seem however that Prussia and Denmark allow ships to come out with cargo shipped after the commencement of the blockade. Rev. de Droit Int. x. 212, 239.

[2] The Vrow Judith, i Rob. 152. In 1855 it was laid down that '*primâ facie* every vessel whatsoever, laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.' The Otto and Olaf, Spinks, 259.

[3] The Eliza Cornish, Pistoye et Duverdy, i. 387. The Instructions of 1870 however seem to be silent upon the point, and by expressly mentioning individual notification to ingoing vessels while keeping silence as to outcoming vessels suggest that individual notification would not now be given

The period which is allowed for the exit of ships is usually fixed at fifteen days[1], and during this time vessels may issue freely in ballast or with a cargo *bonâ fide* bought and shipped before the commencement of the blockade[2]. Probably fifteen days should be looked upon as a minimum period, many ports being so situated as to render exit from them within any given time more difficult than from those which have usually been the subject of the fifteen days' rule. In 1838, on establishing the blockade of Buenos Ayres, France allowed neutral ships to come out for forty-two days[3]. It does not appear what circumstances then demanded so exceptional an indulgence; but as sea-going vessels now ascend to Rosario, it is clear that if the Argentine ports were blockaded at the present day, a considerable time might elapse before the existence of a blockade was known to all neutral vessels, and that they might have great difficulty in reaching the mouth of the river within any short period. Even where a port on a navigable river is much nearer to its mouth than in the supposed case, special circumstances might often require an extension of time. When New Orleans was blockaded in 1861 the water on the bar of the Mississippi was unusually

in the latter case. Negrin believes the latter to be the French practice; p. 213.

A few exceptional treaties provide for special warning to vessels issuing with cargo laden after the beginning of the blockade. These have been concluded between the Hanseatic Towns and Mexico, 1828 (De Martens, Nouv. Supp. i. 684); the United States and Brazil, 1828 (Nouv. Rec. ix. 62); United States and Mexico, 1831 (id. x. 340); United States and Venezuela, 1836 (id. xiii. 560); United States and Bolivia, 1836 (id. xv. 120); France and Ecuador, 1843 (Nouv. Rec. Gén. v. 410); United States and Italy, 1871 (Archives de Droit Int. 1874, p. 134).

[1] This time was given in 1848 and 1864 by Denmark; by England and France during the Crimean War; by the United States during the Civil War; and by France in the war of 1870.

[2] The Vrow Judith, i Rob. 152; The Franciska, Spinks, 122; Heffter, § 157; Bluntschli, § 837. But a vessel must not enter in ballast to bring away a cargo bought before the commencement of a blockade. The Comet, Edwards, 32. A cargo which has been *bonâ fide* placed on board may be partially transferred to lighters for purposes of navigation, and may be re-shipped outside. The Otto and Olaf, Spinks, 257.

[3] De Martens, Nouv. Rec. xv. 503.

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low, and the commander of the blockading squadron extended the permitted time in favour of vessels of deep draught[1].

What acts constitute a breach of blockade.

The acts which constitute a violation of blockade necessarily vary with the theory which is held by the belligerent maintaining the blockade as to the conditions of its legality; and their nature has been already to a great extent indicated in discussing the effect of notification.

Of the French practice it is sufficient to say that, as it does not admit a presumption in favour of the continuance of a blockade, a distinct attempt to cross the actual barrier by force or fraud is, as a general rule, necessary to justify condemnation. Occasionally however an inference as to intention seems to be allowed, as in the case of a vessel captured before actually endeavouring to enter a blockaded port, but while making for it after having received in the course of her voyage a regular notification from a belligerent cruiser[2].

The English and American courts, on the other hand, in arguing from a presumption of continuance to the intention of the neutral trader, subject his property as a general rule[3] to confiscation on seizure at any time after sailing with a clear destination to a blockaded port. Where there is a doubt as to intention they submit to investigation all acts done from the commencement of the voyage. If it appears from these that, though anxious to go to the blockaded port, and sailing with that destination, the trader had no intention of braving the belligerent prohibition, his property will not be condemned. Thus a vessel has been held innocent which sailed from America for Hamburg with an intermediate destination to an English or neutral port

[1] Consul Mure to Lord John Russell, June 6, 1861, ap. Bernard, 242. [The United States in 1898 granted a period of thirty days to neutral ships with cargo. Proclamation of June 27. Hertslet, Com. Treat., xxi. p. 1079.]

[2] Calvo, § 2635. Ortolan (Dip. de la Mer, ii. 349 and 353) approves of the practice of the English courts with respect to vessels approaching a blockaded port on the pretext of enquiring whether the blockade still subsists. La Carolina, Pistoye et Duverdy, i. 381. The proposed Règlement des Prises Maritimes of the Inst. de Droit Int. adopts the French practice.

[3] For qualifications of the general rule, see antea, p. 694.

for enquiry; and in another case, although the ship's papers did not show in distinct terms at what place enquiry was to be made, she was released on fair grounds being afforded for the inference that an intention to enquire really existed[1]. But acts of doubtful character will, in the absence of full explanation, be interpreted against the trader. Thus vessels running for a port, known by them to be blockaded, under pretext of taking a pilot on board, because of falsely alleged unseaworthiness, have been held liable to seizure; and the enquiries which it is eminently proper to make at a place sufficiently distant from the blockaded harbour must not be effected at its very mouth[2]. It is not absolutely necessary, in order that a breach may be committed, that the vessel shall herself cross the line of blockade; thus if a vessel lying outside receives her cargo from lighters or vessels which have issued from a blockaded port, she becomes liable to capture[3].

During the American Civil War the courts of the United States strained and denaturalised the principles of English blockade law to cover doctrines of unfortunate violence. A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended the ship to violate the blockade if possible, notwithstanding that the design might have been

[1] The Despatch, i Acton, 163.

[2] 'The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say; "If you do not meet with the blockading force, enter. If you do, ask a warning and proceed elsewhere." Who does not perceive the frauds to which such a rule would be introductory?' The Irene, v Rob. 80. In The Cheshire, iii Wallace, 235, Mr. Justice Field says: 'If approach for enquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade;' and see The Hurtige Hane, ii Rob. 127; The Charlotte Christine, vi Rob. 101; The James Cook, Edwards, 264.

[3] Maria, vi Rob. 201; Charlotte Sophia, ib. 202 n. Of course a vessel taking on board cargo, at a port not under blockade, which has arrived from a blockaded port by canal or lagoon navigation, does not commit an infraction of the blockade; and conversely a vessel so delivering cargo is not liable to capture.

abandoned on the information received at the neutral port[1]; and goods sent from one neutral port to another within the same dominions with an intent, formed either at the time of shipment or afterwards, of forwarding them to a place under blockade were condemned, and carried with them to a common fate the vessel in which they were embarked, notwithstanding that their transhipment was intended, unless there was reason to believe that the owners of the vessel 'were ignorant of the ulterior destination of the cargo, and did not hire their ships with a view to it[2].'

A vessel which has succeeded in effecting a breach of blockade is not exonerated by her success from the consequences of her illegal act. If a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto;* the offence is not terminated until she reaches the end of the voyage, and the voyage is understood to include her return[3]; on this point, the breach having been in fact committed, the French doctrine can be, and perhaps is, in unison with that of England[4]. If the blockade is raised during the voyage, the liability to capture comes to an end, the existence of the offence being dependent on the continuance of the state of things which gave rise to it[5].

Penalty of breach or attempted breach.

As a general rule the penalty for a breach of blockade is the confiscation of both ship and cargo; but if their owners are different, the vessel may be condemned irrespectively of the latter, which is not confiscated when the person to whom it belongs is ignorant at the time of shipment that the port of destination

[1] The Circassian, ii Wallace, 135.

[2] The Bermuda, iii Wallace, 574. Comp. antea, pp. 668 et seq. It is sufficiently curious that any continental publicists should claim the United States as adhering to the French practice, in face of the extreme doctrine enforced in these and like cases.

[3] Wheaton, Elem. pt. iv. chap. iii. § 28. The right of capture on the return voyage was maintained by the United States courts during the civil war. Dana's Wheaton, note to § 523.

[4] Ortolan (Dip. de la Mer, ii. 354), Hautefeuille (tit. xiii. chap. i. sect. i. § 3), and Bluntschli (§ 836) refuse even in this case to admit the right to seize elsewhere than within the blockaded spot.

[5] The Lisette, vi Rob. 378; Ortolan, ib. 356.

is blockaded, or if the master of the vessel deviates to a blockaded harbour. If however such deviation takes place to a port the blockade of which was known before the ship sailed, the act is supposed to be in the service of the cargo, and the complicity of its owner is assumed [1].

Cases of innocent entrance of blockaded ports.

There are a few cases in which neutral property can be brought into or out of a blockaded port or town without the commission of a legal breach.

When a maritime blockade does not form part of a combined operation by sea and land, internal means of transport by canals, which enable a ship to gain the open sea at a point which is not blockaded, may be legitimately used. The blockade is limited in its effect by its own physical imperfection. Thus, during a blockade of Holland, a vessel and cargo sent to Embden, which was in neutral territory, and issuing from that port, were not condemned [2].

Again, if a vessel is driven into a blockaded port by such an amount of distress from weather or want of provisions or water as to render entrance an unavoidable necessity, she may issue again, provided her cargo remains intact [3]. And a ship which has been allowed by a blockading force to enter within its sight, is justified in assuming a like permission to come out; but the privilege is not extended to cargo taken on board in the blockaded port [4].

The right possessed by a belligerent of excluding neutral ships of war from a blockaded place is usually waived in practice as a matter of international courtesy; and for a like reason the minister of a neutral state resident in the country of the blockaded ports is permitted to despatch from it a vessel exclusively

[1] The Adonis, v Rob. 258; The Mariana Flora, vii Wheaton, 57; The Alexander, iv Rob. 93; The Panaghia Rhomba, Moore's P. C. Reps. xii. 180.

[2] The Stert, iv Rob. 65.

[3] The Charlotta, Edwards, 252; The Hurtige Hane, ii Rob. 127. The general principle is stated by Bluntschli, § 838.

[4] The Juffrow Maria Schrœder, iii Rob. 160.

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employed in carrying home distressed seamen of his own nation [1].

Blockade of river partly in neutral territory.

The right of a belligerent to blockade the territory of his enemy is sometimes complicated by the territorial rights of conterminous governments. If one bank of a river is within a neutral state, or if the upper portion of its navigable course is beyond the frontier of the hostile country, a belligerent can only maintain a blockade so far as is consistent with the right of the neutral to preserve free access to his own ports or territory, and with the right of other neutrals to communicate freely with him [2]. Thus a blockade of Holland was held not to be broken by a destination to Antwerp [3]. And during the American Civil War, the Courts of the United States conceded that trade to Matamoras, on the Mexican shore of the Rio Grande, was perfectly lawful; but the Supreme Court laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan territory; and in the case of vessels captured for being north of that line, refused, while restoring them, to allow their costs and expenses [4]. It is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent.

[1] Ortolan, Dip. de la Mer, ii. 329; Phillimore, iii. § cccxiii.

[2] Ortolan, ib. 332; Calvo, § 2601. [3] The Frau Ilsabe, iv Rob. § 6.

[4] The Peterhoff, v Wallace, 54; The Dashing Wave, ib. 170; The Volant, ib. 178; The Science, ib. 179. [In the case of the Peterhoff, the refusal to allow costs and expenses seems to have been based on the conduct of that ship's captain in throwing a suspicious package overboard at the moment of capture and on his conduct generally.]

CHAPTER IX

NEUTRAL GOODS IN ENEMY'S SHIPS

Conflicting theories on the subject.

THE question whether it is open to a neutral to avail himself of belligerent vessels for the maritime transport of goods in themselves innocent, has been, like the question of the effect of neutral transport upon belligerent merchandise, the subject of lively debate, and like it also it has now been reduced into insignificance by the Declaration of Paris.

Two doctrines are held on the subject. According to one, the neutral property retains its freedom notwithstanding its association with that of an enemy; according to the other, contact with confiscable property taints it so irredeemably as to subject it to the fate of the latter. The theoretic ground upon which the former doctrine rests is that neutral goods are *primâ facie* free; they can be captured only because of some assistance which a belligerent immediately or remotely derives from them in the conduct of his war; goods in themselves incapable of rendering him such assistance cannot change their nature because they are carried by him; and neutrals cannot therefore be expected to refrain from conveying their property to market by means which happen to be convenient to them. The second doctrine is really the offspring of a pretension to forbid all intercourse between neutrals and an enemy; but by attaching itself to a principle, which though arbitrary is not inequitable, and which serves the interests of neutrals, it has blinded the world to its true nature; and as part of the formula, 'Free ships, free goods; enemy ships, enemy goods,' it has been adopted into the policy of nations which have shown themselves intolerant of far less questionable usages.

Early usage.

The earliest custom in the matter agrees with the juster and less artificial view. The rules of the *Consolato del Mare*, which

enabled a belligerent to seize the property of his enemy wherever he found it, prohibited him at the same time from robbing his friend. While therefore an enemy's ship was subjected to confiscation, its neutral cargo remained free, and it was even provided that the owners of the cargo should be permitted to buy the vessel from the captain at a reasonable price, in order to avoid the inconvenience and loss of being carried into his ports[1]. An early usage to a like effect may probably have existed in the northern seas, for the Hollanders, during war with Lübeck and other Hanse Towns in 1438, ordered that goods belonging to neutrals found in an enemy's ship should not be made prize; and it is said that until the middle of the sixteenth century France observed a like rule[2]. But in 1584 the first of a series of edicts appeared in the latter country which established a national custom of peculiar harshness. It was ordered that 'if the ships of our subjects make a prize in time of war of enemy's ships, in which are persons, merchandise, or other goods of our said subjects or allies, the whole shall be declared good prize as if the whole belonged to our said enemies[3].'

Practices in the seventeenth century.

England, on the other hand, generally maintained the doctrine of the *Consolato del Mare;* but in the beginning of the seventeenth century its views do not appear to have been thoroughly fixed, for in 1626 a French negotiator, the Maréchal de Bassompierre, found the report of commissioners to whom certain points of maritime law had been referred by the English government to be in this point fully in accordance with the usage of his own country[4]. France again perhaps recurred for a time to the general practice by the Royal Declaration of 1650, which granted the freedom of neutral goods in enemy's ships; but she concluded a series of treaties from 1659 downwards, in which her

[1] See a translation of the text of the Consolato in Ortolan, Dip. de la Mer, ii. 68, or Heffter, § 163.

[2] Hübner, 1re partie, chap. i. § 8; Ortolan, ib. 100.

[3] Ortolan, ib. 101. 'Res non hostium non bene capitur ullibi' was the opinion of Albericus Gentilis, De Jure Belli, lib. ii. c. 22.

[4] Ortolan, Dip. de la Mer, ii. 114.

older custom was embodied, and as she formally re-enacted the confiscation of neutral goods by the Ordonnance of 1681, it may be doubted whether the Declaration of 1650 was ever acted upon, and whether therefore it forms a real exception to the settled policy of the country [1].

Whatever the practice of other countries may have been, their external policy was determined by the degree to which they were anxious to acquire or retain carrying trade in war time. It was impossible to obtain the freedom of belligerent goods committed to their care unless a corresponding advantage was offered to belligerents; hence the Dutch, who made it a cardinal object to secure the immunity of their flag, were obliged to buy the privilege by giving up their own merchandise when carried in a belligerent ship; and in all treaties which they concluded the fate of the cargo was determined by that of the vessel [2]. They were no doubt the more ready to make the concession that neutrals seldom require to make use of belligerent vessels to any large extent; and that they consequently gained a valuable privilege at a small price.

In the eighteenth century the history of the two doctrines continued to follow the line sketched in the previous period. The private custom of England preserved the ancient rule under which neutral goods are free. France, on the other hand, had retained and reiterated in her internal legislation the severities in which she stood alone, until Spain became her imitator under the Bourbon kings. In 1704, 1744, and 1778 the principle

In the eighteenth century.

[1] Valin, Ord. de la Marine, ii. 254. M. Ortolan (ii. 104) suggests that the Ordonnance of 1681 was intended only to apply to allies in a common war, and not to neutrals; and its language is not perhaps absolutely inconsistent with his construction, it being only specified that 'les marchandises de nos sujets et alliés qui se trouveront dans un navire ennemi seront de bonne prise.' But as the law was always administered on the assumption that neutrals were affected by its provisions, M. Ortolan's interpretation is no doubt the offspring of a patriotic wish to lessen so far as possible the contrast which exists between the historic doctrines of his country and those which she has adopted in recent times.

[2] Phillimore, iii. § clxxx; Manning, 319. See the Dutch treaties enumerated, antea, p. 686 n.

that goods become enemy under an enemy's flag was freshly asserted; and Spain, by Ordinances in 1702, 1718, and 1779 modelled her laws on the French Regulations in force at the respective dates[1]. Down to the time of the First Armed Neutrality a large number of treaties, for the same reason as in the preceding century, generally stipulated for the condemnation of neutral merchandise in belligerent vessels[2]; but they seem to have had little effect in changing the bent of opinion in the direction of the practice for which they stipulated. Writers so different as Vattel and Hübner could on this point find themselves in accord[3], and England was of one mind with the members of the Armed Neutrality. It was impossible for neutrals to ask more than England already spontaneously gave to them, and accordingly the programme of the Armed Neutralities contained no articles on the subject. But in the nineteenth century the confiscation of neutral goods reappears in the treaties made by France and the United States, set off as usual against the freedom of enemy's goods in neutral vessels; though at the same time the United States have always distinctly acknowledged that under international common law the goods of neutrals in enemy's vessels are free[4].

[1] Ortolan, Dip. de la Mer, ii. 108.

[2] See the treaties mentioned, antea, p. 688, note 2; except the treaty between England and Spain in 1713, which contains no stipulation in the matter. Sir R. Phillimore (iii. § clxxxi), adopting a computation made by Mr. Ward, says that thirty-four treaties from 1713 to 1780 make no mention of the principles, Free ships, free goods; Enemy ships, enemy goods.

[3] 'Les effets des peuples neutres, trouvés sur un vaisseau ennemi, doivent être rendus au propriétaire, sur qui on n'a aucun droit de les confisquer, mais sans indemnité pour retard, dépérissement, &c. La perte que les propriétaires neutres souffrent en cette occasion est un accident auquel ils se sont exposés en chargeant sur un vaisseau ennemi; et celui qui prend ce vaisseau, en usant du droit de la guerre, n'est point responsable des accidents qui peuvent en résulter, non plus que si son canon tue sur un bord ennemi un passager neutre, qui s'y rencontre pour son malheur.' Vattel, liv. iii. chap. vii. § 116.

[4] See the treaties enumerated, antea, p. 691 n. The Atalanta, iii Wheaton, 415. 'It is true that sundry nations have in many instances introduced by their special treaties another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms, friendly goods; but this is altogether the effect of particular treaties, controlling in special cases the

Present state of the question.

Thus while England and the United States were committed, apart from treaties, to the view that the goods of neutrals in course of transport by a belligerent are free, the minor maritime states were led by their interests to adopt the same doctrine; and France stood alone with Spain in the assertion that their confiscation was permitted by accepted usage. When therefore France, in compliance with the request of England, abandoned her national practice in 1854, Spain remained the only country which adhered to it in principle; and the Declaration of Paris has probably secured its abandonment beyond recall[1].

Liability of neutrals to incidental loss from capture.

It is to be noticed that though neutral property in enemy ships possesses immunity from confiscation, the neutral owner is not protected against loss arising incidentally out of the association with belligerent property in which he has chosen to involve his merchandise. Just as a neutral individual in belligerent territory must be prepared for the risks of war and cannot demand compensation for loss or damage of property resulting from military operations carried on in a legitimate manner; so, if he places his property in the custody of a belligerent at sea, he can claim no more than its bare immunity from confiscation, and he is not indemnified for the injury accruing through loss of market and time, when it is taken into the captor's port, or in some cases at any rate for loss through its destruction with the ship.

In 1872 the French Prize Court gave judgment in a case, arising out of the war of 1870–1, in which the neutral owners of property on board two German ships, the Ludwig and the Vorwärts, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though 'under the terms of the Declaration of Paris neutral goods on board an enemy's vessel cannot be seized, it only

general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it.' Mr. Pickering to Mr. Pinckney, American State Papers, i. 559.

[1] [For Spain's practical compliance with the principles of the Declaration of Paris in the war of 1898 see antea, p. 692.]

follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;' in the particular case 'the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity[1].'

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.

[1] Calvo, § 2817.

CHAPTER X

VISIT AND CAPTURE

Object of visit and capture.

VISIT is the means by which a belligerent ascertains whether a mercantile vessel carrying the flag of a neutral state is in fact neutral, and by which he examines whether she has or has not been guilty of any breach of the law. By capture he gives effect to his rights over neutral property at sea which has become noxious to him in any of the ways indicated in the preceding chapters, and puts himself in a position to inflict the appropriate penalty.

Who can visit.

As the right possessed by the belligerent of controlling intercourse between neutrals and his enemy is an incident of war, and as war can only be waged by or under the authority of a state, the rights of visit and capture must be exercised by vessels provided with a commission from their sovereign.

Who is liable to visit.

All neutral mercantile vessels are subject to visit upon the high seas, and within the territorial waters of the belligerent or his enemy. On the other hand, as the pretension to search vessels of war, which formed a grave matter of contest in the early part of the nineteenth century, can no longer be seriously urged, private vessels of the neutral state are the only subjects of the belligerent privilege. It is incumbent on all such vessels to be provided with certain documents for the proof of their neutral character, and of the innocency of the adventure in which they are engaged, and it is agreed that they are obliged as a general rule to produce these proofs on the summons of a duly authorised person.

Whether convoyed ships can be visited.

But it is a controverted point whether neutral merchant vessels are liable to be visited, and are bound to suffer the visit, when sailing under convoy of ships of war of their own nation. The

PART IV CHAP. X History of the question.

question was first mooted in 1653, when, during the war between England and the United Provinces, Queen Christina of Sweden issued a declaration, reciting that the goods of her subjects were plundered by privateers, directing ships of war to be always ready to convoy such vessels as might desire protection, and ordering the convoying ships 'in all possible ways to decline that they or any of those that belong to them be searched[1].' The Peace of Westminster, in 1654, by putting an end to the existing war, prevented any immediate occasion of dispute from arising, and no subsequent attempt seems to have been made by Sweden to act upon the policy of the directions. The United Provinces however, finding themselves in turn in the position of neutrals, shortly afterwards put forward like claims. In 1654, some Dutch merchant vessels under convoy of a man of war having been searched by the English, the States-General admitted that 'no reasonable complaints could be made,' although they 'were persuaded that such visitation and search tended to an inconveniency of trade;' but two years afterwards De Ruyter convoyed ships from Cadiz to Flanders laden with silver for the use of the Spanish troops in the latter country, and successfully resisted an attempt to visit made by the commodore of an English squadron. In the end the Dutch agreed that the papers of the convoyed ships should be exhibited by the man of war in charge, and that on sufficient ground a suspected vessel might be seized and carried into the belligerent port[2]. The compromise, no doubt, soon became a dead letter[3]; and nothing further was heard of the immunities claimed for convoyed ships until 1759, when the Dutch, who took improper advantage of a special

[1] Thurloe's State Papers, i. 424. [2] Thurloe, ii. 504; Calvo, §§ 2744-5.

[3] The article in the maritime code of Denmark of 1683, quoted by Ortolan (ii. 266) and Gessner (302) as affording another case in which exemption from visit was claimed in favour of convoyed ships, is really a direction to armed merchant vessels sailing together to resist visit whenever they are strong enough. It represents an attempt to get rid of visit altogether. Hautefeuille (tit. ix. chap. iii. sect. i) admits that 'la Hollande elle-même chercha par tous les moyens à exercer le droit de visite sur les navires convoyés toutes les fois qu'elle se trouva partie belligérante.'

privilege of trade with the French colonies which has been granted to them, and who besides carried on a large traffic in munitions of war and materials of naval construction with the home ports of France, fruitlessly endeavoured to cover their illicit transactions by reviving the pretension [1]. It was during the War of American Independence that the doctrine was first seriously urged. In 1780 orders were given by the Dutch government 'that a certain number of men of war should be ready for the future to convoy naval stores to the ports of France,' and the Count van Byland was directed to resist the visit and search of a fleet of vessels so laden, which were sailing in his charge. Some of the vessels were seized by an English force, and were carried into Portsmouth with the convoying ship, which had attacked that of the English commodore. In the lively recriminations which ensued Holland warmly maintained the proposition that convoyed merchantmen could not be searched; and when, a few months afterwards, it found itself at war with England, it was obliged in consistency as a belligerent to adopt the principle of which it had tried to reap the advantage as a neutral [2]. In 1781 a dispute arose between Great Britain and Sweden on the subject of six merchantmen under convoy which an English vessel had attempted to visit; and on an appeal being made by the latter power to Russia, the government of the Empress declared that it considered the principle of the immunity of convoyed vessels to be founded on the principles of the Armed Neutrality. It was also embodied before the end of the century in six treaties made by the Baltic powers, and in one between Holland and the United States [3]. It had therefore acquired such

[1] It appears from a Report of Admiral Boscawen that complaint was made by the Dutch government that he had caused certain merchantmen under convoy to be searched. He says that he acted upon 'certain advice that the Dutch and Swedes carried cannon, powder, and other warlike stores to the enemy.' Ann. Register for 1759, p. 266.

[2] De Martens, Nouvelles Causes Célèbres, i. 165; Lord Stanhope, Hist. of England, vii. 44; De Martens, iii. 281.

[3] United Provinces and United States, 1782 (De Martens, Rec. iii. 437); Russia and Denmark, 1782 (ib. 475); Sweden and the United States, 1783

consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing very defined and permanent interests. But the doctrine had no claim to the position assigned to it by Count Bernstorff, when, on the occasion of a dispute arising in the year 1800 out of the capture of some Danish vessels by an English squadron, he argued that the privilege of visiting convoyed ships did not exist at common law, because the right to visit at all being a concession made to the belligerent, it could only exist in so far as it was expressly conferred by treaty[1]. There can be no question that the practice of visiting convoyed vessels had been universal until 1781; and that frequent treaties, in specifying the formalities to be observed, without limiting the extent of the right, had incidentally shown that the parties to them regarded the current usage as authoritative.

Throughout the revolutionary wars England maintained the traditionary practice, and imposed her doctrine by treaty upon the Baltic powers. In consequence of the refusal of a Danish frigate, the Freya, to permit the search of her convoy, a second dispute occurred between England and Denmark, which was ended, under threat of an immediate rupture, by a convention under which the latter power engaged to suspend its convoys until future negotiations should have effected a definitive arrangement[2]. Immediately afterwards the Second Armed Neutrality laid down as one of its principles that the declaration of the officer commanding a vessel in charge of merchantmen should be conclusive as to the innocence of the traffic in which they were engaged, and that no search should be permitted[3]. But in the treaties concluded with England in 1801 and 1802, Russia,

(De Martens, Rec. iii. 571); Prussia and the United States, 1785 (id. iv. 43); Russia and France, 1787 (ib. 212); Russia and the Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 328).

[1] Count Bernstorff to Mr. Merry, ap. Ortolan, ii, Annexe E.

[2] August 29, 1800; De Martens, Rec. vii. 149.

[3] Conventions to this effect were signed between Russia and Denmark in Dec. 1800, and between Russia and Sweden and Russia and Prussia; De Martens, Rec. vii. 172, 181, 188.

Sweden, and Denmark abandoned the principle which they had striven to introduce, and consented that though visit was not to take place unless ground for suspicion existed, the belligerent commander should have the power of making it at his discretion, in presence, if required, of a neutral officer, and of carrying the suspected vessel into one of the ports of his country if he should see reason to do so[1]. In thus agreeing to limit the exercise of the right, the principle of which she preserved, England softened on her part the rigour of her usual practice, gaining, as the price of her concession, the full abandonment of the principle of the freedom of enemy's goods on board neutral ships, which had also been adopted by the Armed Neutrality. But the treaties concluded between England and the three other parties to this compromise in 1812 and 1814 placed matters on their old footing, and left the Baltic powers free to assert, and Great Britain to refuse, the immunity of convoyed vessels[2]. Since then France has accepted the principle of this freedom from visit in six treaties, all with American republics; and the United States have embodied it in thirteen treaties, of which all, with two exceptions, have also been entered into with states on the same continent[3]. But there has already been occasion to remark more than once that the treaties entered into by the United States afford little clue to the views entertained in that country; and on this point, as usually, English and American writers and judges are fully in

Modern practice.

[1] De Martens, vii. 264, 273, 276.

[2] De Martens, Nouv. Rec. i. 481 and 666, and iii. 227. In 1864 Denmark, Prussia, and Austria announced that they would not visit vessels under convoy; Calvo, § 1219.

[3] France and Venezuela, 1843 (De Martens, Nouv. Rec. Gén. v. 171); Ecuador, 1843 (ib. 409); New Grenada, 1844 (id. vii. 620); Chile, 1846 (id. xiv. i. 10); Guatemala, 1848 (id. xii. 10); Honduras, 1856 (id. xvi. ii. 154); United States and Sweden, 1816 (Nouv. Rec. iv. 258); Columbia, 1824 (id. vi. 1000); Central America, 1825 (ib. 835); Brazil, 1828 (id. ix. 63); Mexico, 1831 (id. x. 340); Chile, 1832 (id. xi. 446); Venezuela, 1836 (id. xiii. 560); Ecuador, 1839 (ib. 23); New Grenada, 1848 (Nouv. Rec. Gén. xiii. 663); Guatemala, 1849 (ib. 304); San Salvador, 1850 (id. xv. 77); Peru, 1870 (Nouv. Rec. Gén. 2e Série, i. 103); and Italy, 1871 (Archives de Droit Int. 1874, p. 136).

accord [1]. On the continent of Europe, Germany, Austria, Spain, and Italy, in addition to the Baltic powers and France, provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain on the other hand adheres to the practice upon which she has always acted [2].

Continental jurists are almost unanimous in maintaining the exemption from visit of convoyed ships, not only as a principle to be advocated, but as an established rule of law [3]. That it has any pretension to be so is evidently inadmissible; the assertion of it, and the practice, which have been described, are insufficient both in kind and degree to impose a duty on dissenting states; and it cannot even be granted that the doctrine possesses a reasonable theoretic basis. The only basis indeed on which it seems to be founded is one which, in declaring that the immunity from visit possessed by a ship of war extends itself to the vessels in her company, begs the whole question at issue [4]. It is more to the purpose to consider whether the privilege claimed by neutrals is fairly consistent with the interests of belligerents, and whether it would be likely in the long run to be to the advantage of neutral states themselves. It is argued that the commander of a vessel of war in charge of a convoy represents his government, that his affirmation pledges the faith of his nation, and that the belligerent has a stronger guarantee in being assured by him that the vessels in company are not engaged in any illicit traffic, than in examining for himself papers which may be fraudulent. But

Whether exemption of convoyed vessels from visit is expedient.

[1] Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 29; Dana, notes to Wheaton, § 526; Woolsey, Introduction to International Law, § 192. Justice Story says, 'The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance.' The Nereide, ix Cranch, 440. The judgment of Lord Stowell in the case of The Maria, i Rob. 340, is the recognised expression of English doctrine.

[2] Admiralty Manual of Prize Law (Holland), 1888, p. 2.

[3] Bluntschli (§§ 824–5) puts forward a doctrine as law which amounts to the compromise of 1801 between Russia and Great Britain, construed favourably for the neutrals.

[4] Ortolan, ii. 271.

unless the neutral state is to exercise a minuteness of supervision over every ship issuing from her ports which would probably be impossible, and which it is not proposed to exact from her, the affirmation of the officer commanding the convoy can mean no more than that the ostensible papers of the vessels belonging to it do not show on their face any improper destination or object. Assuming that the officials at the ports of the neutral country are always able and willing to prevent any vessel laden with contraband from joining a convoy, the officer in command must still be unable to affirm of the vessels under his charge, that no single one is engaged in carrying enemy's despatches or military passengers of importance; that none have an ultimate intention of breaking a blockade; or, if the belligerent nation acts on the doctrine that enemy's goods in a neutral vessel can be seized, that none of the property in course of transport in fact belongs to the enemy. If the doctrine is accepted, it would not infrequently happen that instances in which protection of a convoy has been abused will come afterwards to the knowledge of the belligerent to whose injury they have occurred; he will believe that the cases of which he knows are but a fraction of those which actually exist, he will regard the conduct of the neutral state with suspicion; complaints and misunderstandings will arise, and the existence of peace itself may be endangered. It cannot be too often repeated that the more a state places itself between the individual and the belligerent, the greater must be the number of international disputes. And belligerents will always look upon convoys with doubt, from the mere fact that their innocence cannot be tested. The neutrality of neutral nations is not always honest, and the temptation to pervert the uses of a convoy has not always been resisted; rightly or wrongly it will be thought, as it was thought in England during the French wars, that 'if there is any truth in the reasons stated for searching merchantmen not convoyed, it must be admitted that the presence of the convoy ship, so far from being a sufficient pledge of their innocence, is rather a circumstance of suspicion. If a neutral

nation fits out ships of war, and escorts all its trading vessels with them, we have a right to conclude that she is deviating from her neutrality [1].'

It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals. It is fortunate, in view of the collision of opinion which exists on the subject, that there is every reason to expect that the use of convoys will be greatly restricted in the future by the practical impossibility of uniting in a common body vessels of very different rates of speed, superior speed having become an important factor in commercial success [2].

Formalities of visit.

The exercise of the right of visit is necessarily attended with formalities, the regulation of which has been attempted in a large number of treaties without any definite arrangement as to the details having received universal assent [3]. Usually the visiting ship, on arriving within reasonable distance, hoists its colours and fires a gun, called the semonce or affirming gun, by

[1] Lord Brougham (1807); Works, vol. viii. 388.

[2] It is to be noted that in the scheme of the Institut de Droit International for a Règlement des Prises Maritimes the visit of neutral vessels convoyed by ships of war of their own state is prohibited. Ann. de l'Institut, 1883, p. 215.

[3] The following article of the Treaty of the Pyrenees (1659) has served as the model for a great number of more modern conventions: 'Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas plus près les français que de la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français, et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître s'il porte des marchandises de contrebande, et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquels passeports on devra donner entière foi et créance.' Dumont, vi. ii. 264. Few treaties prescribing formalities of visit have been made between European states during the present century, and in all the cases of such treaties concluded within the last forty years one of the parties has been a Central or South American State.

which the neutral vessel is warned to bring to, but the ceremony, though customary, is not thought to be essential either in English or American practice[1]. The belligerent vessel then also brings to at a distance which, in the absence of treaties, is unfixed by custom, but which has been often settled with needless precision. The natural distrust of armed vessels which was entertained, when privateers of not always irreproachable conduct were employed in every war, and when pirates were not unknown, dictated stipulations enjoining on the cruiser to remain beyond cannon shot; but the reason for so inconvenient a regulation has disappeared, and the modern treaties which repeat the provision, as well as those which permit approach to half range, are alike open to the criticism of M. Ortolan, that 'they have not been drawn by sailors[2].' The visit itself is effected by sending an officer on board the merchantman[3], who in the first instance examines the documents by which the character of the vessel, the nature of her cargo, and the ports from and to which she is sailing, are shown. According to the English practice these documents ought generally to be—

1. The register, specifying the owner, name of ship, size, and other particulars necessary for identification, and to vouch the nationality of the vessel.
2. The passport (sea letter) issued by the neutral state.
3. The muster roll, containing the names, &c., of the crew.

[1] The Marianna Flora, xi Wheaton, 48.

[2] Dip. de la Mer, ii. 256. Negrin (p. 229, note) takes the same view.

[3] Modern usage allows the master of the merchantman to be summoned with his papers on board the cruiser (The Eleanor, ii Wheaton, 262), and the regulations of the German and Danish navies order that this shall be done (Rev. de Droit Int. x. 214, 238); but Pistoye and Duverdy (i. 237) think the practice open to objections both from the point of view of the belligerent and of the neutral. The former may be easily deceived by false papers; and the latter is exposed to the less obvious risk that the documents necessary to prove the legitimacy of his adventure may be detained.

The proposed Règlement des Prises Maritimes of the Institut provides that 'le navire arrêté ne pourra jamais être requis d'envoyer à bord du navire de guerre son patron ou une personne quelconque, pour montrer ses papiers ou pour toute autre cause.' Ann. de l'Institut, 1883, p. 214.

4. The log-book.
5. The charter party, or statement of the contract under which the ship is let for the current voyage.
6. Invoices containing the particulars of the cargo.
7. The duplicate of the bill of lading, or acknowledgment from the master of the receipt of the goods specified therein, and promise to deliver them to the consignee or his order.

And the information contained in these papers is in the main required by the practice of other nations [1].

If the inspection of the documents reveals no ground of suspicion, and the visiting officer has no serious anterior reason for suspecting fraud, the vessel is allowed to continue its voyage without further investigation; if otherwise, it is subjected to an examination of such minuteness as may be necessary [2].

Capture

Capture of a vessel takes place—

1. When visit and search are resisted.
2. When it is either clear, or there is fair ground for suspecting, upon evidence obtained by the visit, that the

[1] For the papers which may be expected to be found on board the vessels of the more important maritime nations see Holland's Admiralty Manual of Naval Prize Law, pp. 52–9.

The Institut de Droit International proposes to require possession of the following papers as a matter of international legal rule:—

1. Les documents relatifs à la propriété du navire;
2. Le connaissement;
3. Le rôle d'équipage, avec l'indication de la nationalité du patron et de l'équipage;
4. Le certificat de nationalité, si les documents mentionnés sous le chiffre 3 n'y suppléent;
5. Le journal de bord. Ann. de l'Inst. 1883, p. 217.

[The modern practice of exercising the right of visit is fully expounded in the instructions drawn up by the Spanish Ministry of Marine and communicated to the British Foreign Office May 3, 1898. See *London Gazette* of that date and Hertslet Com. Treaties, xxi. p. 888.]

[2] The absence of due conformity to the forms of visit, and of attention to the evidences of nationality, prescribed by the regulations of the state to which the visiting ship belongs, is not sufficient to invalidate the capture if it be proved before the prize court that due cause of capture was in fact existing. La Tri-Swiatitela, Dalloy, Jurisp. Gén. Ann. 1855, iii. 73.

vessel is engaged in an illicit act or that its cargo is liable to confiscation.

3. When from the absence of essential papers the true character of the ship cannot be ascertained.

on ground of resistance,

The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

by neutral;

The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. 'I stand with confidence,' said Lord Stowell, 'upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations as now understood a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of confiscation[1].'

by belligerent in charge of neutral property.

But the rules accepted in the two countries differ with regard to property placed in charge of a belligerent. Lord Stowell, in administering the law as understood in England, held that the immunity of neutral goods on board a belligerent merchant-

[1] The Maria, i Rob. 377. Holland's Manual of Prize Law, pp. 43–4.

man is not affected by the resistance of the master; for while on the one hand he has a full right to save from capture the belligerent property in his charge, on the other the neutral cannot be assumed to have calculated or intended that visit should be resisted[1]. 'But if the neutral puts his goods on board a ship of force which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, and so far he adheres to the belligerent. . . . If a party acts in association with a hostile force, and relies on that force for protection, he is *pro hâc vice* to be considered as an enemy[2].'

Doctrine of the American courts.

The American courts carry their application of the principle that neutral goods in enemy's vessels are free to a further point, and hold that the right of neutrals to carry on their trade in such vessels is not impaired by the fact that the latter are armed. According to Chief Justice Marshall, 'the object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right to do so. He meddles not with the armament nor with the war;' and the belligerent suffers no injury from his act, for 'if the property be neutral, what mischief is done by its escaping a search?'

The same doctrine was applied by the government of the

[1] The Catherina Elizabeth, v Rob. 232.

[2] The Fanny, i Dodson, 448. Mr. Justice Story, dissenting from the majority of the Supreme Court, argued strenuously in favour of the view taken by the English courts. 'It is necessarily known to the convoyed ships that the belligerent is bound to resist, and will resist until overcome by superior force. It is impossible therefore to join such convoy without an intention to receive the protection of a belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. To render the convoy an effectual protection it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of an enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent, and performs as to him a meritorious service.' The Nereide, ix Cranch, 441.

Controversy between Denmark and the United States.

United States in a controversy with Denmark which sprung out of the use of English convoys by American vessels trading to the Baltic during war between Denmark and Great Britain. Large numbers of such vessels were in the habit, after receiving cargoes of naval stores in Russia, of assembling on the coasts of Sweden, where they met British men of war, by which they were protected until they were out of danger. As the nature of the cargoes exposed the intention with which this practice was carried on to extreme suspicion, the Danish government issued an ordinance in 1810, declaring all neutral vessels availing themselves of belligerent convoy to be good prize. Several stragglers were captured, without actual resistance being made, and were condemned by the Danish courts, it being considered that an intention to resist had been sufficiently manifested by joining the convoy. It was argued by the American government that though a neutral may not escape from visit by the use of force or fraud, he may use any means of simple avoidance; it was apparently implied that the act of joining a convoy, being open, could not be fraudulent; and it was urged that an actual participation in resistance must be required to involve the neutral in its consequences. A mere intention to resist, not carried into effect, had never, it was said, in the case of a single ship been considered to entail the penalty of confiscation; and the two cases in no way so differed as to call for the application of a different principle. The Danish government on its part seems in effect to have maintained that not only is a settled intention to resist equivalent to actual resistance, but that he who causes himself to be protected 'by an enemy's convoy ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantage attached to the character of a friend to him against whom he seeks protection.'

The United States, after a negotiation extending over twenty years, succeeded in obtaining a treaty, under which Denmark, while expressly declaring that its concession was not to be looked

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upon as a precedent, agreed to pay a sum *en bloc* by way of indemnity to the American subjects whose property had been seized [1].

Capture for fraudulent acts.

The occasions on which a neutral vessel may be seized for illicit acts affecting itself, or because its cargo is liable to confiscation, have for the most part been already specified [2]. But there still remains to be noticed, as affecting it with penalties, a class of fraudulent or ambiguous acts of the owner or master, consisting in—

1. The possession of false documents.
2. The destruction or concealment of papers.

False documents.

That a vessel is furnished with double or false documents is invariably held to be a sufficient reason for bringing her in for adjudication; and according to Russian practice, at any rate, a false passport, and in Spanish practice double papers of any kind, entail confiscation of both ship and cargo; but generally falsity of papers is regarded with leniency, and is only considered to be noxious when there is reason to believe that the fictitious documents were framed in order to deceive the capturing belligerent, and that they would therefore fraudulently oust the rights of the captors, if admitted as genuine. The ground of this leniency is that, apart from indications that they are directed against the interests of a particular belligerent, they are as likely to have been provided as a safeguard against the enemy of the captor as against the captor himself [3].

[1] Wheaton, Elem. pt. iv. chap. iii. § 32. Mr. Wheaton was the negotiator of the treaty, and is naturally prejudiced in favour of the doctrine which he was employed in pressing; but his annotator, Mr. Lawrence, appears to take a different view. Woolsey (Introd. § 193), Dana (note to Wheaton, § 535), and Kent (Comm. lect. vii) assert the English doctrine as unquestionable. Ortolan (ii. 275) adopts the same opinion, subject only to the reservation that if a neutral vessel meeting a belligerent convoy attaches itself to it, her conduct may be looked upon as an innocent ruse to escape the inconvenience of a visit, and not as implying an intention to resist. The contrary doctrine has no better defender than M. Hautefeuille, tit. xi. chap. iii. sect. 2.

[2] Comp. antea, pp. 667, 673, 693–5, 705, 710.

[3] Halleck, ii. 299; The Eliza and Katy, vi Rob. 192; The St. Nicholas, i Wheaton, 417; Rev. de Droit Int. x. 611; Negrin, 251.

By English practice captors are allowed expenses when they have been

The destruction or 'spoliation' of papers, and even, though to a less degree, their concealment, is theoretically an offence of the most serious nature, the presumption being that it is effected for the purpose of fraudulently suppressing evidence which if produced would cause condemnation. The French Regulations of 1704, repeated in 1744 and 1778, declared to be good prize all vessels, with their cargoes, on simple proof of the fact that papers had been destroyed, irrespective of what the papers were; but the severity of the rule has been tempered in practice, it being commonly required that the destroyed papers should be proved to be such as in themselves to entail confiscation [1]. In England and America a milder practice is in use. Spoliation or concealment of papers, 'if all the other circumstances are clear,' only affects the neutral with loss of freight; but it is a cause of grave suspicion, and may shut out the guilty person from any indulgence of the court, as for example, from permission to bring further proof if further proof be necessary. If the circumstances are not clear, if for example spoliation takes place when the capturing vessel is in sight, or at the time of capture, or subsequently to it without the destroyed papers having been seen by the captor, further proof would probably be shut out as of course, the natural inference from the circumstances being that they have been destroyed because their contents were compromising [2].

Duties of a captor.

In the absence of proof that he has rendered himself liable to

misled by false papers into capturing an innocent vessel, the papers being intended to deceive the enemy. The Sarah, iii Rob. 330.

[1] Pistoye et Duverdy, ii. 73, citing the case of La Fortune. But in the case of The Apollos, the rule was pressed with extreme rigour. A prize was wrecked at the entrance of the port of Ostend; at the moment when it grounded the captain snatched the ship's papers from the prize-master, and on getting to shore at once lodged them with the *juge de paix*. They established the neutrality of the ship and cargo, and there was no reason to believe that any of the number had been abstracted, but it being possible that in the confusion some might have been destroyed, the penalty of proved destruction was inflicted. Pistoye et Duverdy, ii. 81.

[2] The Rising Sun, ii Rob. 106; The Hunter, i Dodson, 487; Livingston v. The Maryland Ins. Cy., vii Cranch, 544; The Commercen, i Wheaton, 386; The Pizarro, ii Wheaton, 241; The Johanna Emilie, Spinks, 22.

penalties, a neutral has the benefit of those presumptions in his favour which are afforded by his professed neutrality. His goods are *primâ facie* free from liability to seizure and confiscation. If then they are seized, it is for the captor, before confiscating them or inflicting a penalty of any kind on the neutral, to show that the acts of the latter have been such as to give him a right to do so. Property therefore in neutral goods or vessels which are seized by a belligerent does not vest upon the completion of a capture. It remains in the neutral until judgment of confiscation has been pronounced by the competent courts after due legal investigation. The courts before which the question is brought whether capture of neutral property has been effected for sufficient cause are instituted by the belligerent and sit in his territory; but the law which they administer is international law.

Such being the position of neutral property previously to adjudication, and such being the conditions under which adjudication takes place, a captor lies under the following duties:

1. He must conduct his visit and capture with as much regard for persons and for the safety of property as the necessities of the case may allow; and though he may detain persons in order to secure their presence as witnesses, he cannot treat them as prisoners of war, nor can he exact any pledges with respect to their conduct in the future as a condition of their release. If he maltreats them the courts will decree damage to the injured parties [1].

2. He must bring in the captured property for adjudication, and must use all reasonable speed in doing so. In cases of improper delay, demurrage is given to the claimant, and costs

[1] The Anna Maria, ii Wheaton, 332; The Vrow Johanna, iv Rob. 35[1]; The San Juan Baptista, v Rob. 23; Lord Lyons to Earl Russell, and Mr. Seward to Mr. Welles, Parl. Papers, 1862, lxii. No. i. 119. By the German naval regulations members of the crew detained as witnesses are kept at the cost of the state until decision of the cause, after which they are handed over to the consul of their state to be sent home. Rev. de Droit Int. x. 239.

and expenses are refused to the captor. It follows as of course from this rule—which itself is a necessary consequence of the fact that property in neutral ships and goods is not transferred by capture—that a neutral vessel must not be destroyed; and the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell: where a ship is neutral, he said, 'the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value.' It is the English practice to give costs and damages as well; to destroy a neutral ship is a punishable wrong; if it cannot be brought in for adjudication, it can and ought to be released [1]. If a vessel is not in a condition to reach a port where adjudication can take place, but can safely be taken into a neutral port, it is permissible to carry her thither, and to keep her there if the local authorities consent. In such case the witnesses, with the ship's papers and the necessary affidavits, are sent in charge of an officer to the nearest port of the captor where a prize court exists.

3. In the course of bringing in, the captor must exercise due care to preserve the captured vessel and goods from loss or damage; and he is liable to penalties for negligence. For loss by fortune of the sea he is of course not liable [2].

[1] The Zee Star, iv Rob. 71; The Felicity, ii Dodson, 383; The Leucade, Spinks, 221.

[2] Restitution in value or damages are given for loss or injury received by a vessel in consequence of a refusal of nautical assistance by the captor. Der Mohr, iv Rob. 314; Die Fire Damer, v Rob. 357.

The principle that a captor must not wilfully expose property to danger of capture by the other belligerent by bringing it to England, when he may resort to Admiralty courts in the colonies, was admitted in the Nicholas and Jan, i Rob. 97, though in the particular case the court decided against the claimant of restitution in value on the ground that due discretion had not been exceeded.

CHAPTER XI

NEUTRAL PERSONS AND PROPERTY WITHIN BELLIGERENT JURISDICTION

General position of neutral persons and property within belligerent jurisdiction.

As a state possesses jurisdiction, within the limits which have been indicated, over the persons and property of foreigners found upon its land and waters, the persons and property of neutral individuals in a belligerent state are in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

So also, as neutral individuals within an enemy state are subject to the jurisdiction of that enemy and are so far intimately associated with him that they cannot be separated from him for many purposes, they and their property are as a general principle exposed to the same extent as non-combatant enemy subjects to the consequences of hostilities. Neutral persons are placed in the same way as subjects of the state under the temporary jurisdiction of the foreign occupant, acts of disobedience are punishable in like manner, and the belligerent is not obliged, taking them as a body, to show more consideration to them in the conduct of his operations than he exhibits towards other inhabitants of the country—he need not, for example, give them an opportunity of withdrawing from a besieged town before bombardment, which he does not accord to the population at large. Their property is not exempt from contributions and requisitions.

To a certain extent however, which is not easily definable, neutral persons taken as individuals are in a more favourable position, relatively to an occupying belligerent, than are the

members of the population with which they are mixed. As subjects of a friendly state, it is to be presumed until the contrary is shown that they are not personally hostile; as such subjects, living in a country under the government of the belligerent, they are entitled to the advantages of his protection and of the justice which he administers to his natural subjects, so far as the circumstances of war will allow. Hence he ought to extend to them such indulgences as may be practicable, and he is not justified in subjecting them to penalties on those light grounds of suspicion, which often suffice for him, perhaps inevitably, in his dealings with enemies.

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property passingly within a belligerent state. The right to use, or even when necessary to destroy, such property is however recognised by writers, under the name of the right of angary[1]; its exercise is guarded against in a certain number of treaties[2]; and when not so guarded

Right of angary.

[1] In the end of the eighteenth century De Martens said (Précis, § 269, ed. 1789) that 'it is doubtful whether the common law of nations gives to a belligerent except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it.' Azuni, on the other hand, treats it as a right existing in all cases of 'necessity of public utility,' and declares any vessel attempting to avoid it to be liable to confiscation. Droit Maritime, ch. iii. art. 5.

Of recent writers Sir R. Phillimore (iii. § xxix), and M. Heffter (§ 150), unwillingly, and M. Bluntschli (§ 795 bis) less reservedly, recognise the right.

[2] Stipulations forbidding the seizure of ships or merchandise in times both of peace and war for public purposes were not uncommon in the end of the eighteenth century, but they do not appear after the early years of the last century.

against, it has occasionally been put in practice in recent times with the acquiescence of neutral states. In a large number of treaties the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated[1]; and it is possible that a right to compensation might be generally held to exist apart from treaties.

The most recent cases of the exercise of the right of angary occurred during the Franco-German War of 1870–1. The German authorities in Alsace, for example, seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock, and appear to have kept the carriages, trucks, &c., so seized for some time. Another instance which occurred nearly at the same moment attracted a good deal of attention, and is of interest as showing distinct acquiescence on the part of the government of the neutral subjects affected. Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair in order to prevent French gun-boats from running up the river, and from barring the German corps operating on its two banks from communication with each other. The German commanders appear to have endeavoured in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was by a strange perversion of ideas 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some at least of the members of the crew appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted, and notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to

[1] These treaties are all made with Central or South American States.

which a despatch of Count Bismarck had already admitted their right. Count Bismarck on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage;' but he evidently felt that the violence of the methods adopted needed a special justification, for he went on to say, 'the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification [1].'

[1] D'Angeberg, Nos. 914, 920, 957; State Papers, 1871, lxxxi. c. 250. A considerable portion of the French expedition to Egypt in 1798 seems to have been carried in neutral vessels seized in the ports of France, De Martens, Rec. vii. 163; and compare an order of Napoleon for the seizure for that purpose of some vessels in Marseilles (Corresp. iv. 101).

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