The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.
SITUATION I

TRANSFER AND CAPTURE

States X and Y are at war. Other states are neutral. This war was declared as from March 16.

State X has a large merchant marine. The Blue Line of steamers runs between state X and state D. This line was owned by a citizen of state X till March 1, fifteen days before the declaration of war, when it was sold to a citizen of state D. The citizen of state D on March 18 sells the line to Mr. E, a citizen of state E.

(a) Vessels of war of state Y on March 20 seize ships of the Blue Line as enemy property.

(b) Vessels of war of state Y also seize, on March 21, on the high sea a cargo of flour on the Dale of the Blue Line, which had originally been consigned by a merchant of state X to a merchant of state D to be paid for on delivery. The flour was shipped on March 15 and on March 19, advance payment having been made, title to the flour was transferred by telegraph to the merchant of D.

(c) State E announces that if reparation is not immediately made for both the above acts, it will regard these as violations of neutral rights and convoy its merchant vessels, giving all convoying commanders orders to prevent visit and search by vessels of state X.

(d) State F, considering that neutral rights will not be respected, arms its merchant vessels and instructs them to permit no submarines to approach except on the surface, and in case of doubt to endeavor to sink submarines.

How far are all these acts lawful?
(a) The seizure of the ships of the Blue Line on March 20 as enemy property is not lawful. 

(b) The seizure of the cargo of flour as enemy property on the Dale on March 21 is lawful. The transfer by telegraph on March 19 was not a valid transfer as against state Y. 

(c) State E has a lawful right to convoy its merchant vessels. The right to convoy applies to innocent vessels only and does not imply a total denial of the right to visit and search. 

(d) The arming of neutral merchant vessels is not unlawful though since the London Naval Treaty of 1930, article 22, presumed unnecessary and undesirable. Since the treaty of 1930 the order in regard to sinking submarines would be unlawful for states parties to article 22. 

NOTES 

General.—Either state X or Y, or perhaps both states, conforming to international agreements and following recent practice has declared war on March 16. Other states are neutral. The laws of war and the laws of neutrality accordingly are operative from that date. Both X and Y are maritime states and X has a large sea-borne commerce. It is natural that the citizens of state X should take measures for the protection of their property so far as possible. It is also natural that state Y should endeavor to meet these measures as far as possible. A merchant vessel legally flying a neutral flag is not liable to the same treatment as a belligerent merchant vessel. Owners of vessels under a belligerent flag might transfer such vessels to a neutral flag with the object of escaping belligerent liabilities. Owners of such vessels might in the exercise of ordinary business judgment make a sale of vessels. The purchaser might be a neutral in need of vessels and the transaction in-
volving the change of flag might be of such a nature as would take place in time of peace, but a transaction which might be entirely valid as between the citizens of two states in time of peace might be questioned in time of war.

Pre-war period.—There has been an effort, particularly during the twentieth century, to limit the effects of the war to the period of hostilities and to make this period of war definite. This was evident in Hague Convention III relative to the opening of hostilities which in article 12 provided that the existence of a state of war should be notified to neutrals and should “not take effect in regard to them till the receipt of a notification.”

One of the objects of the Hague conventions was to protect international commerce against the surprises of war and to limit the effects of war to the period of hostilities. Manifestly it is not reasonable that merchants should be liable for consequences of the possible outbreak of hostilities at some period in the indefinite future. Belligerents should, nevertheless, not be deprived of a reasonable right to capture ships which, though under a neutral flag, have not been bona fide transferred to the neutral. In time of peace a merchant or other person may dispose of his property for any reason which seems good to him and the property is then liable to such treatment as property of like character of nationals of the state of the new owner. If the property has not in fact passed from the original owner, then it should be liable to the same treatment as property of like character of other nationals of the state of the owner.

The validity of transfer before the war of property from Mr. N, a national of state N having strained relations with state M, to Mr. D, a national of state D having no concern in these strained relations, would under ordinary circumstances be presumed.

Bill of sale by Mr. D. to Mr. E., that is, from one neutral citizen to another neutral citizen, may not be on board, but would give rise to suspicion only, and the bill
of sale of a citizen of X to a citizen of D would not be expected to be on board.

Transfers, Crimean War, 1854-56.—During the war between Great Britain and Russia several vessels were brought before the British courts on suspicion of unlawful transfer from Russian to a neutral flag. Several of these vessels, though condemned by the lower court, were restored by the higher court on the ground “that the sale was bona fide; that the property was entirely divested from the vendor, and vested in the vendee before the seizure; that the transfer was complete, and was not a fraud upon any just right of the belligerents.” In the middle of the nineteenth century it was generally considered that any transfer made in time of peace which would be a valid transfer from vendor to vendee would be valid in case war should subsequently break out and the ship should be captured, if the transfer had not been made while the ships were in transitus. The reasons for rejecting transfers in transitus in the courts of the middle of the nineteenth century as stated in the case of the Baltica, 1858, were two:

“The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers, until the voyage is at an end.

“The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure.”

(11 Moore P. C. 141)

For many years it had been held that ships transferred in transitus in time of war would not thereby be exempted from the liability of capture. Nor could vessels be law-
fully transferred from a belligerent to a neutral flag in a blockaded port.

Attitude of maritime states, 1908.—In preparation for the International Naval Conference, London, 1908–09, 10 maritime states were asked to submit their accepted rules upon the topics before the conference. One of the topics upon which such replies were submitted was that of transfer of flag. The replies generally considered transfers before the outbreak of war as valid unless there was evidence of bad faith which might be argued if the transfer was merely to escape the consequences of the war. The problem before the conference as stated in the general report was:

"An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is spared. It may therefore be understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or for the purpose of shielding the vessel from the risks to which she would have been exposed if she had retained her former nationality. This question naturally arises when the transfer is of a date comparatively recent at the moment at which the visit and search takes place, whether the transfer may actually be before, or after, the opening of hostilities. The question will be answered differently according as it is looked at more from the point of view of commercial or more from the point of view of belligerent interests." (1909 Naval War College, International Law Topics, p. 121.)

Articles of the Declaration of London.—After much discussion the International Naval Conference formulated articles in which transfer of flag of merchant vessels in accord with legal requirements of the respective states prior to the opening of hostilities would be presumed to be valid, though making additional proof necessary if the bill of sale was not on board and the transfer was made less than 60 days before the opening of hostilities. For transfers after the opening of hostilities the presumption was that the transfer was invalid, though in certain cases proof to the contrary might be entertained.
In general the aim was to avoid uncertainties by introducing specific regulations which might be understood by those engaged in maritime commerce and would not be left to court interpretation or verbal uncertainties save in exceptional cases. Such uncertainties were regarded as inevitable when the basis of legality was considered as resting on the proof of good faith of the parties to the transaction.

Time element in transfer.—At the time of the drafting of the Declaration of London, the period of 30 days, if transfer papers were on board, was regarded as establishing the validity of the transfer of a merchant vessel.

Fifteen days with present rapidity of communications may be equally adequate.

Changing aspects of transfer.—The question as to transfer of merchant vessels from a belligerent to a neutral flag was often raised during the World War. New problems and new complications would, of course, arise with changing means and methods of transportation and communication. In the early period the ownership and operation of a vessel by the owner or the partners of the owner sharing in the navigation and in the results of the venture made a transfer comparatively easy to follow. Later, corporate ownership of vessels and the distribution of stock in these corporations through many countries introduced factors which had to be considered. Further, the distribution and incidence of insurance might make the loss or transfer of a vessel a matter of concern to other states than those of the vendor and vendee. In other words, the transfer of the flag of a vessel of a belligerent might be a much less simple transaction than formerly, and the belligerents during the World War endeavored to meet some of the problems by new expedients and novel statements as to legal rights.

Rules of transfer in World War.—Several states in entering the World War issued regulations in regard to transfer of vessels which were essentially in accord with the rules of the Declaration of London. The German
ordinance of September 30, 1909, conformed in the main features to articles 55 and 56 of the Declaration of London, as did the Japanese regulations of 1914. The instructions for the Navy of the United States, June, 1917, provided:

"57. The transfer of a vessel from one flag to another is valid when completed previous to the outbreak of war in which the State of the vendor is a belligerent, provided the transfer is made in accordance with the laws of the State of the vendor and the State of the vendee." (1925 Naval War College, International Law Documents, p. 114)

"58. The transfer of a private vessel of a belligerent to a neutral flag during war is valid if in accordance with the laws of the State of the vendor and of the vendee, provided that it is made in good faith and is accompanied by a payment sufficient in amount to leave no doubt of good faith; that it is absolute and unconditional, with a complete divestiture of title by the vendor, and with no right of repurchase by him; and that the ship does not remain in her old employment." (Ibid, p. 116)

On December 26, 1914, under Argentine general orders, it was stated without restriction to any period whether before or after war, that:

"The transfer of colors shall be consented to under reserve of its being done upon a basis of absolute good faith, and in the knowledge that the Argentine Government will decline all intervention in behalf of those interested if it should afterwards result that they have not fulfilled this condition." (Ibid., 1917, p. 30.)

Others made special rules somewhat dependent upon geographical proximity to the belligerents.

Transfer of the Dacia.—The Dacia, a German merchant vessel which in late 1914 was unable to make regular voyages under the German flag owing to the control of the sea by the Allied fleets, was transferred to American registry. Americans contemplated the purchase of other German vessels similarly circumstanced, and considered in some cases employing these exclusively between British and American ports.

The original plan of the American shippers was to dispatch the Dacia with a cargo of cotton from Galveston,
Texas, to Bremen, Germany, but on advice of the Department of State it was decided to send the Dacia to Rotterdam. It was agreed that the Dacia should not stop at any port hostile to the British, and that it might be detained for examination of the cargo at a British port. The Secretary of State in a letter of January 13, 1915, to the British Ambassador said:

"... I now ask if it is not possible, in view of the particular circumstances of this case, for the British Government to consent not to raise the question of the transfer of the vessel for this particular voyage, it being understood that neither Government yields any principle involved and that such action is not to serve as a precedent hereafter. The Department is convinced that shipment of cotton in this case is in good faith and that shippers took space on the Dacia in the belief that the vessel having been transferred to the American flag, they could safely ship in the Dacia." (Foreign Relations, U. S., 1915, Supplement, p. 678.)

British attitude, early 1915.—While the British attitude had not been unchanging, in a Memorandum of the British Embassy of January 2, 1915, it was stated:

"The British Embassy has received information as to the reported purchase of the German ship Dacia, of the Hamburg-American Line, now lying at Port Arthur, Texas, as a result of the outbreak of war, by certain American citizens who have applied for the transfer of the ship to the American flag.

"Further information is to the effect that the purchase price is one third the nominal value, the principal purchaser is not by occupation an owner of ships, that he is interested in the metal trade and that the avowed object of the purchase is to dispatch the ship to a German port under the American flag.

"The circumstances are no doubt under the consideration of the competent department of the United States Government.

"In connection with this matter it becomes the duty of the British Embassy to point out that while it has been the British and American rule, under certain conditions, to accept as valid the transfer of vessels from a belligerent to a neutral flag after the declaration of war, it has also been the rule that such transactions justify the strictest enquiry on the part of the belligerent. This enquiry has been in the past based upon the nature of the purchase, the character and occupation of the purchaser, the composition of the crew, and above all the business on which the ship is engaged before and after the transfer."
"These considerations will no doubt be familiar to the State Department but in order to prevent any possible misunderstanding the British Embassy takes this opportunity to point out that His Majesty’s Government must reserve its rights as to the recognition of the validity of the transfer of the flag under these and similar circumstances.

Cecil Spring Rice."

(Ibid., p. 674.)

Soon the exigencies of the World War and particularly the case of the Dacia gave rise to questions in new forms. The British Ambassador in Washington in a note to the American Secretary of State on January 12, 1915, gave a somewhat full statement:

"Dear Mr. Secretary: You ask me what is the attitude of my Government with regard to the transfer of the flag after the outbreak of hostilities. I beg to state in reply that I have not received any detailed instructions from my Government on this question although in general they propose to follow the principles laid down in the Declaration of London.

"As however they have not ratified the declaration it may be argued that in considering the question they must be guided by the principle which (in common with your Government) they have professed in times past. These principles are, as you are aware, that the absolute prohibition of sales of ships during hostilities would be too severe a measure for a commercial nation, although such sales must always be regarded with suspicion. It has, I believe, been generally held that the validity of the sale is judged by its commercial character; the purchaser must prove a bona-fide sale and in general the ship must not be used to serve enemy purposes under a neutral flag.

"So far, I understand, 111 vessels, formerly foreign, have received American registry since the war began and of these 86 were British and 17 German.

"My Government has hitherto let such transfers pass without protest in cases where the vessel was bona fide owned by an American company before the war, so that the transfer does not involve a sale, and where the vessel does not carry an enemy crew and is not employed in carrying supplies to an enemy or to a neutral port which is used for supplying an enemy. Cases where the vessel was originally owned by a non-American owner are regarded with suspicion because of the possibility that the transfer of the flag is resorted to for unneutral purposes. In the case of the Sacramento in San Francisco, a transferred ship was
collusively seized by a German cruiser and emptied of her stores of coal for belligerent use. The *Dacia* has been sold by a German company to a German-American for one third her value and is reported to be destined to a German port. The *Stoya Romana* was a Roumanian ship which received American registry in the port of Bremen; has cleared from that port, nominally for America, but has not so far as I know yet arrived here. If loss or damage results to Great Britain as a consequence of the transfer of these ships it is to be presumed that a claim will be made against the United States Government.

"But cases must arise in which the transfer of the flag is of a purely commercial character and the purchase effected without any but commercial objects. It has not I believe been the rule to contest the validity of the transfer if the *bona fides* of the sale is proved and if the ship when she changes her owner is employed with a neutral crew in neutral trade and between neutral ports.

"The German Government has declared that it would withdraw its objections to the transfer of a ship from an enemy to the American flag in cases where the ship traded exclusively between America and Germany. I think it not improbable, though I do not write under instructions, that my Government would raise no further question if a transferred ship were to trade between any ports not serving as ports of supply to the enemy.

"There is however the further question of the liberation of interned ships as a consequence of transfer. That is the question as to whether a neutral performs an unneutral act if in the course of the war he releases a belligerent from the consequences of military operations. This question is of course both difficult and complicated and no doubt, should the occasion arise, would become the subject for discussion.

"I am (etc.)

(Ibid., p. 676.)

Cecil Sring Rice."

This note introduces a proposition indicating that there is a responsibility resting upon a neutral state to intern belligerent merchant vessels, and if these depart there may be a claim against the neutral state. Such a novel proposition would certainly open questions which would be "both difficult and complicated" and would also be without any sound basis of reason in international law.

The case of the *Dacia* became in some respects a test case, and was stated in a communication from the Secre-
AMERICAN PROPOSITIONS

Secretary of State to the American Ambassador in Great Britain on January 14, 1915, as follows:

"German steamship Dacia recently transferred to American register due to sail from Galveston with full cargo of cotton Friday or soon thereafter as possible. Owners have contemplated voyage to Bremen. Upon Department's suggestion owners of ship and cargo consent to send ship to Rotterdam direct with entire cargo of cotton which is sold for delivery in Germany by day certain. Shippers took space on Dacia after American registry in good faith, believing they could safely ship. Officers and crew entirely native American citizens. Vessel will go direct to Rotterdam, not touching at any enemy port, and return this country, agreeing to detention for examination of cargo. No other bottoms available for cotton and shippers threatened with disastrous loss if unable to use Dacia. Ship bought for half price due to natural causes from German ships lying idle. Please call on Grey at once and lay this situation before him in person and seek to have British Government consent not to raise question of transfer for this particular voyage on conditions above stated, neither Government waiving any principle involved and case not to serve as precedent hereafter. If arrangement consummated, Department will issue statement that arrangement is agreed to by Great Britain to facilitate this shipment of cotton and case not to serve as precedent and all prospective transferees of enemy vessels will be so advised. Freight rates on cotton are now practically prohibitive. Under recent restrictions of British Government, English ships practically denied transfer of register. Parties who purchased Dacia state they endeavored purchase British and French ships without success. Report earliest possible moment.

Bryan."

(Ibid., p. 678.)

While the British authorities replied that they would be willing to purchase the cargo of the Dacia, if brought to a British port, at the price it would realize at the German destination, the ship itself if coming under British authority would be brought before a prize court.

The British mentioned the sale of such ships as the Dacia as in effect "the liberation of interned ships during the course of hostilities."

The argument as presented by the British Secretary of State for Foreign Affairs is repeated by the American Ambassador in a communication of January 18, 1915:
"... My inquiry whether British Government would object to purchase and transfer of German interned ships to ply between American and British ports brought from Sir Edward Grey the most ominous conversation I have ever had with him.

"He explained that the chief weapon that England has against any enemy is her navy and that the navy may damage an enemy in two ways: By fighting and by economic pressure. Under the conditions of this war economic pressure is at least as important as naval fighting. One of the chief methods of using economic pressure is to force the German merchant ships off the seas. If, therefore, these be bought and transferred to a neutral flag this pressure is removed.

"He reminded me that he was not making official representations to the United States Government and for that reason he was the more emphatic. If the United States without intent to do Great Britain an injury, but moved only to relieve the scarcity of tonnage, should buy these ships it would still annul one of the victories that England has won by her navy. He reminded me of the fast-rising tide of criticism of the United States about the transfer of the Dacia and he declared that this has intensified and spread the feeling against us in England on account of our note of protest. He spoke earnestly, sadly, ominously, but in the friendliest spirit ... They (the English) regard the Dacia as a German ship put out of commission by their navy. She comes on the seas again by our permission which so far nullifies their victory. If she comes here she will, of course, be seized and put into the prize court. Her seizure will strike the English imagination in effect as the second conquest of her—first from the Germans and now from the Americans. Popular feeling will, I fear, run as high as it ran over the Trent affair; and a very large part of English opinion will regard us as enemies.

"If another German ship should follow the Dacia here I do not think that any government could withstand the popular demand for her confiscation; and if we permit the transfer of a number of these ships there will be such a wave of displeasure as will make a return of the recent good feeling between the two peoples impossible for a generation. There is no possible escape from such an act being regarded by the public opinion of this Kingdom as a distinctly unfriendly and practically hostile act." (Ibid., p. 682.)

On January 23, 1915, the President directed a reply to some of the notes recently received from the American Ambassador in Great Britain. This note pointed out some of the causes of irritation which British action
might cooperate in removing. Referring particularly to the Dacia, he said:

"The Dacia case has received a great deal of newspaper notoriety because of predictions as to what would be done with her. Breitung, seeing that there was a chance to profit by the high freight rates, decided to buy a ship. He first tried to buy an English ship and then a French ship but, as his correspondence shows, he failed to secure a ship from either country. He then bought the Dacia, paying for it about three fourths of what it cost fourteen years ago when it was built. He secured a cargo of cotton and intended to sail for Bremen. When he was informed that it would be wiser to go to Rotterdam he changed the route and planned to sail to Rotterdam. The inquiries which have come to the State Department have come from the owners of the cotton, rather than from the owner of the ship. The Government has had nothing to do with the transaction further than to make inquiries for interested parties. Whether the ship is taken into the prize court or not is a question between the British Government and the owner of the ship, but, if it is taken into the prize court the court will of course decide upon the evidence produced and so far as we know the evidence will support the bona fides of the transactions. If the evidence shows that the sale was made in good faith, the transfer cannot be objected to according to the rules recognized by both Great Britain and the United States. A change in these rules at this time could not be made by the United States and it would seem to be an inopportune time for Great Britain to change them. Great Britain fears that the Dacia might be made a precedent and that other German interned ships would be bought in case the Dacia sale was not contested. That is true and yet the precedent would only stand in case the sales were bona fide in which case they would come within the rules. The chief point presented in your despatch is that Great Britain is trying to bring pressure to bear upon Germany by preventing the sale of interned German ships. This is perfectly legitimate so long as the pressure is exerted according to the international law, but the pressure becomes illegitimate if well-settled rules are violated, and a well-settled rule would be violated if an attempt was made to prevent a bona fide sale.

"The point which should be made very clear to the British authorities as our view and purpose in the whole matter, if such purchases are made, is that as a matter of actual fact such purchases do not constitute a restoration of German commerce to the seas. Such ships would not and could not be used on the former routes or with the former and usual cargoes and would serve as German commerce in no particular. They would serve only the
trade of the United States with neutral countries and within the limits necessarily set by war and all its conditions. The withdrawal of so many ships from the seas is so far a curtailment of the commerce of the United States. The United States cannot in the circumstances sell articles to Germany which the rules of war or the circumstances now existing forbid. The owners of the ships bought from German owners cannot use them on the routes or to the ports which would serve their former owners as the carriers of German commerce. They would be used on new routes and for the release of American merchandise to new ports. They would represent an extension of American commerce, not a renewal of German. This cannot be justly or even plausibly regarded as an effort to relieve the present economic pressure on Germany or to recreate anything that Great Britain had a right to destroy. America must have ships and must have them for these uses. She will build them if she cannot find them for sale. The legitimate restoration of American commerce may be delayed but it cannot be prevented. It cannot be part of the purpose of the British Government to put an intolerable economic pressure on the United States, as might very easily be the result if its attitude as reflected in your note is maintained.” (Ibid., p. 685.)

The American Ambassador in Great Britain seemed to see more than the legal and political aspects of the case and said, “I cannot exaggerate the ominousness of the situation. The case is not technical but has large human and patriotic and historic elements in it.” (Ibid., p. 683.) The American Ambassador in his communication to the Secretary of State seemed even more concerned than the British Embassy had been on January 2, 1915, when in stating the British view upon transfer the legal attitude had been under consideration. In the early British communication in regard to the Dacia, there had been no suggestion that neutrals assumed responsibility for internment of merchant vessels or that they might not remain indefinitely and be the subject of mercantile transactions, and, liable to usual laws of prize, depart under any flag. French attitude, early 1915.—Questions had arisen in regard to transfer of vessels which, because of practical certainty that they would be captured if they went to sea, were still in neutral ports. The French Government had
indicated, in 1908-09, that it was in substantial accord with the view of the United States as expressed at the London Naval Conference, but that vessels tied up in neutral ports because of risk in going to sea were not in the categories under consideration. Of these vessels the French Ambassador in a letter to the American Secretary of State, January 16, 1915, said:

"My Government wishes your excellency's kind attention, which is known to be devoted to international justice, to be called anew to this problem. It trusts that you will readily admit that the contingency of flag transfers about which we cannot but be concerned and in which we could not acquiesce without breaking our own laws publicly announced even in time of peace, would, if it came to pass, be tantamount to supplying our enemies with financial means for carrying on the war and for escaping the consequences of the command of the sea gained by the Allied fleets, not without battles and losses. It appears no exaggeration to say that, in case a contingency so harmful to my Government's interests should, contrary to its firm hopes, become a reality, the purchase of German merchant ships in their present tied-up condition would amount to an act of assistance to our enemies. We take the proclamations of the President of the United States, as stated in my previous communication, to be a safe guaranty that he could not wish any such harm done to our country by his.

"Be pleased (etc.)

JUSSE R AND"

(Foreign Relations, U. S., 1915, Supplement, p. 681.)

On February 16, 1915, the Ambassador of France in Washington addressed a communication to the Secretary of State of the United States in regard to transfer of American-owned vessels sailing under a foreign flag and to be transferred to the American flag.

"Mr. Secretary of State: Referring to the communications which I have previously had occasion to make to your excellency on the subject of vessels sailing under a foreign flag but owned by Americans, which may be transferred to the American flag by virtue of the act of August 18, last, I have the honor to inform you that my Government wishes to make it clear that our recognition of such a transfer is to be understood in the sense hereinbelow stated, which, as your excellency will acknowledge, is in conformity with logic and practiced rules;

"1. The recognition of a transfer effected under the above-stated conditions presupposes, of course, that the transaction is
bona fide and that the vessel is not to be under the direction or in the service of enemy interests either before or after the transfer.

"2. Reliable reports which have reached the Government of the Republic show that the German Government has refused to recognize such transfers except when the vessels concerned were to serve German interests. The principle of equality which governs the relations between neutrals and belligerents prevents the Allied Governments from respecting, in such case, any trade that might be carried on with Germany under the American flag as long as that power does not, for its part, respect trade carried on with the Allied countries under absolutely similar conditions.

"3. Recognition of the transfer to the American flag of an enemy vessel under the special circumstances accepted by the Allied Governments may not and must not, by reason of the foregoing, be taken for granted and effective except when the vessel availing itself of it does not actually serve enemy interests by sailing or trading for the account of an enemy country.

"4. It is important to note that subjects of an enemy country who may be kept in the crew of the vessels transferred to the American flag would be liable to arrest as being subject to military service, in accordance with the decision jointly reached by the French and English Governments which was made public through insertion in the Journal officiel de la République française of the 3d of November last."  "JUSSEURAND." (Ibid., p. 690.)

The Russian Ambassador had, a few days previously, informed the Secretary of State that the Russian Government adhered to the French position.

Decision in case of the Dacia.—The Dacia was captured by the French auxiliary cruiser Europe on February 27, 1915. The Dacia was brought before the Consul des Prises and the decision was rendered August 3–5, 1915. The decision referred to the provisions of the Declaration of London and many other documents, but finally pronounced the Dacia good prize:

"Décide:

"Est déclarée bonne et valable la capture du vapeur Dacia, ensemble ses agrès, apparaux, armement et approvisionnements de toute nature, effectuée le 27 février 1915 par le croiseur auxiliaire de la République Europe, pour le prix en être attribué aux ayants droit conformément aux lois et règlements en vigueur;
“Seront restitués aux ayants droits les objets et effets, propriété personnelle du capitaine et de l’équipage, et ne constituant pas des articles de contrebande.”


**Corporate ownership.**—The liability of a merchant vessel to capture may in the case of ownership by a corporation depend upon the nationality of the actual owners and their relation to the employment of the vessel. Such was the condition in the case of the *Hamborn*, belonging to a company incorporated before the World War under the laws of the Netherlands though the control was wholly in German nationals and questions of Dutch law and international law were involved. This vessel was captured and brought before the British prize court where it was condemned, December 12, 1917 ([1918] p. 19.)

The case on appeal came before the Judicial Committee of the Privy Council which sustained the prize court decision and said:

“If the case turned on her user *de facto* at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *The Daimler Company, Limited v. The Continental Tyre and Rubber Company (Great Britain), Limited*, that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons, who are the active directors of the company and whose orders its officers must obey, or the control of those persons, who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the *Hamborn* Steamship Company except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam if not
altogether immaterial, at any rate cannot affect the result, since
the question is not one of trading with enemy subjects, resident
or carrying on business in a neutral country, but is one of the
character of an artificial *persona*, whose trade is carried on for
it under the supreme direction and control of enemies born.
Their Lordships agree with a passage of the President's judgment,
which sufficiently represents the true gist of his reasoning:

"'The centre and whole effective control of the business of the
*Hamborn* Steamship Company was in Germany. Having regard
to these facts, the vessel must be regarded in this Court as be-
longing to German subjects,'
in a claim by captors for condemnation." ([1919] A. C. 993.)

*Abrogation of Article 57, Declaration of London.*—
Article 57 of the Declaration of London read:

"Subject to the provisions respecting the transfer of flag, the
neutral or enemy character of a vessel is determined by the flag
which she has the right to fly.

"The case in which a neutral vessel is engaged in a trade which
is reserved in time of peace, remains outside the scope of, and
is in no wise affected by, th's rule." (1909 Naval War College,
International Law Topics, p. 131.)

This article aimed to safeguard the rights of belliger-
ents and of neutrals and recognized the difference be-
tween ownership of ships and ownership of cargoes.
The understanding was set forth in the general report,
presented to the conference on behalf of the drafting
committee, which said:

"The principle, therefore, is that *the neutral or enemy char-
acter of a vessel is determined by the flag which she has the right
to fly*. It is a simple rule which appears satisfactorily to meet
the special case of ships, as compared with other movable prop-
erty, and especially with merchandise. From more than one
point of view, ships have a kind of individuality; especially they
have a nationality, a national *character*. This nationality is
manifest in the right to fly the flag; it places the ships under the
protection and control of the State to which they belong; it
makes them amenable to the sovereignty and to the laws of that
State, and, should the occasion arise, to requisition. This is the
surest test of whether a vessel is really a part of the merchant
marine of a country, and therefore the best test for determining
whether she is neutral or enemy. It is, moreover, expedient to
rely exclusively upon this test, and to discard whatever is connected with the personal status of the owner.

"The text mentions: the flag which the vessel has the right to fly; that means, naturally, the flag which, whether she is actually flying it or not, the vessel has the right to display according to the laws which govern the port of the flag." (Ibid., p. 131.)

This article 57 had been operative during the early part of the World War and had in general seemed satisfactory, but after discussions upon the Dacia and other transfers, the British and French Governments gave notice of the abrogation of article 57 and the British Order in Council of October 20, 1915, also stated that, "In lieu of said article, British prize courts shall apply the rules and principles formerly observed in such courts."

The French explanation of its attitude in annulling the rule that the "neutral or enemy character of a vessel is determined by the flag which she has the right to fly" is stated somewhat definitely in a report to the President of the Republic.

"PARIS, October 23, 1915.

"SIR: Among the rules of international maritime law, formulated by the declaration signed at London February 26, 1909, which was not ratified, but which is being actually applied by the decree of November 6, 1914, during the present war with certain reservations, consisting in some additions and modifications, the ruling inscribed under Article 57 of this declaration establishes an absolute presumption of the neutral or enemy character of vessels according to the flag the vessel has a right to carry.

"Experience has proved that such a strict rule is in practice capable of leading to inexact solutions. It may happen that for commercial purposes, during a time of peace, vessels were regularly registered under a flag which has become an enemy one by reason of the war, while in reality the interests vested in the ownership of these vessels belong to nationals of a third country which may be neutral or Allied. Conversely vessels registered under a neutral flag may as a matter of fact represent enemy interests.

"The reunion of capital in the form of societies renders these combinations particularly easy to realize thanks to the real personality, legally capable of holding property, and to the nationality
which the law recognizes and accords to societies independently of the personality or the nationality of the individuals who own interests in it.

"One of the objects which a belligerent may legitimately pursue on the high seas according to international law is to annihilate by capture the mercantile marine of the enemy. If by attacking neutral interests represented by a vessel registered under the enemy’s flag the belligerent deviates from the aforementioned aim and finds himself accused of violating the liberty of neutral commerce, his right to act legitimately is directly injured by the employment of registration under a neutral flag covering enemy interests with a protection which nothing justifies.

"If these views, which have also struck our Allies, appear to you to be well founded, I have the honor to submit for your approbation the following draft of a decree.

Rene Viviani,
The President of the Council and
Minister for Foreign Affairs.

Victor Augagneur
The Minister of Marine.

(Foreign Relations, U. S., 1915, Supplement, p. 180.)

The purpose of the annulment of article 57 by the Allied Powers was to enable the prize courts to look beyond the right to fly the flag to the actual ownership of the vessel which might be a corporation, the stock of which was for the most part enemy-rather than neutral-owned. That the owner should bear the legitimate risk of loss in case of capture seemed a logical conclusion, and ownership which might in time of peace be advantageous to all, might in time of war, if carried by a neutral flag, escape such liability. British subjects who owned vessels or shares in vessels under neutral flags had realized the liabilities. Even though this might be the situation in regard to belligerent ownership and even though article 57 of the Declaration of London might not be operative, this did not imply that belligerent merchant vessels remaining in neutral ports for whatever reason were ipso facto "interned", in the technical meaning of that term, as some of the communications had implied.

Internment.—For maritime relations the doctrine of internment was comparatively recent, applied particu-
GOODS IN TRANSIT

larly during and since the Russo-Japanese War, 1904–05. Internment implied a detention of a vessel of war in a neutral port pending some agreement as to its disposition. The neutral authorities assumed reasonable responsibility for the maintenance of this detention. The belligerent vessel of war might be detained at a naval station, the crew might be similarly detained, and the officers were usually placed on parole. Sometimes essential parts of the machinery and of the guns were removed from the vessel. Vessels of war of a belligerent were ordinarily permitted to remain in a neutral port only 24 hours without becoming liable to internment.

No such restrictions rested upon belligerent merchant vessels in neutral ports. These vessels could, so far as the neutral was concerned, go and come at pleasure subject to the usual commercial restrictions. If a merchant vessel of a belligerent preferred to remain in port rather than to depart, there was no law or custom to the contrary. There was no 24-hour rule of sojourn.

Transfer of goods in transit.—From early days of maritime trade transfer in time of peace of goods in transit was a common and well recognized practice. It was sometimes maintained:

“that a mere delivering of the bill of lading is a transfer of the property;” * * * “When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy’s country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted in transitu; and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the
time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.” (The Vrow Margaretta (1799), 1 C. Robinson Reports, 336.)

This transfer in transitu having taken place before the war and without intention to avoid the consequences of the war was valid. The burden of proof of liability to capture in cases of transfers in transitu rests upon the captor.

If a transfer in transitu was made because of the imminence of the war, the sale was regarded as invalid by the captor of the goods. Sir William Scott in 1804 in the case of the Jan Frederick said:

“"The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases: Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on Belligerent rights:—I cannot but think that the same fraud is committed against the Belligerent, not indeed as an actual Belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a Belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis: In other words, both are done for the purpose of eluding a Belligerent right, either present or expected. Both contracts are framed with the same animo fraudandi, and are, in my opinion, justly subject to the same rule.” (The Jan Frederick (1804), 5 C. Robinson Reports, 128.)

In this case Sir William Scott also says “the same rule of law is to be applied to such contracts in transitu, made in anticipation of war, as are applied to similar contracts in time of actual hostilities.” It has been maintained that the element which invalidates the transfer is the “attempt to defeat the rights of belligerent captors.” (The Southfield [1915], 1 B. & C. P. C., p. 332.) Refer-
ring in this case to “contemplation of war” and to war as “imminent”, Sir Samuel Evans said in its proper meaning imminent is “threatening or about to occur.”

In the extended opinion in the case of the Kronprinzessin Margareta, the Parana, etc., among other pronouncements, it was laid down in 1920 that:

“The rule against recognizing transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purposes of a judicial determination. Its application assumes that the circumstances of the shipment, and the dealings with the shipping documents and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee, which in other Courts not bound by such a rule would be valid and enforceable. With sham transactions Courts of Prize would deal in another fashion; with incomplete transactions insufficient to transfer rights, no Court would deal at all. The expression ‘mere paper transaction’, sometimes used, does not imply that something unreal or ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right, if any, which he may be entitled to acquire in consequence.”

(1 A. C. [1921] 486.)

Convoy.—The Naval War College carried on a discussion upon the subject of convoy in 1911 soon after the publication of the unratified Declaration of London. This discussion was with view to calling attention to some of the existing special treaty provisions in regard to protection of neutral vessels. The right of convoy has been a subject of controversy for nearly 300 years and the applicability of convoy as a right remains undetermined. In the War College discussion of 1911, it was shown that there seemed to be a tendency to accept convoy as a right. Great Britain had generally opposed
though occasionally by treaty had agreed to the practice, and in the British Admiralty Manual of Prize Law of 1888 had asserted in regard to visit and search,

"No vessel is exempt from the exercise of these powers on the ground that she is under the convoy of a neutral public ship."

In the memorandum setting forth the British views in preparation for the London Naval Conference of 1908–09, it was said:

"7. A neutral vessel is not entitled to resist the exercise of the right of search by a belligerent war-ship on the ground that she is under the convoy of a war-ship of her own nationality; forcible resistance by her or by the neutral war-ship to the exercise of the right of search is ground for condemnation of both ship and cargo."

(Correspondence and Documents respecting the International Naval Conference. Misc. No. 4 (1909), Cd. 4554, p. 4.)

In support of this position, citations were given to the case of the Maria, 1799 (1 C. Robinson Reports, 340), and the Etsabe (4 C. Robinson Reports, 408).

Sir Edward Grey in his letter to Lord Desart, the British Plenipotentiary, however, said:

"18. The question of the right to visit, search, and seize neutral ships when under convoy is one on which there has been a clear divergence between the old continental system and the British doctrine. That doctrine has however not been enforced in any recent war. In 1854 the right to visit ships under convoy was specifically waived, owing to the difficulty inherent in naval co-operation with an allied Power which did not recognize that right. Nor have His Majesty's Government since attempted to exercise it. The situation was radically changed by the Declaration of Paris, which put an end to the right formerly enjoyed of seizing enemy goods other than contraband, under whatever flag carried, and His Majesty's Government are now desirous of limiting as much as possible the right to seize for contraband, if not eliminating it altogether. In proportion as the lists of contraband are reduced—and there is good ground for hoping that this will be successfully done in a large measure—the value of the right to seize for contraband automatically diminishes. Whilst accordingly, on the one hand, the importance to a belligerent of the right to seize vessels under convoy has lost most of its value, the principle of exemption is, on the other hand, favourable to neutral trade, and in conformity with the spirit of British policy. This is therefore one of
the cases where, owing to the force of changing circumstances, the original British contention has practically lost its importance, so that its specific abandonment would effect no substantial alteration in the actual situation, and may very well be admitted to be little more than the formal acknowledgment of a now generally accepted rule.” (Parliamentary Papers, Misc. No. 4, International Naval Conference. (1909), Cd. 4554, p. 25.)

Declaration of London on convoy.—While there were differences of view among the 10 naval powers participating in the International Naval Conference of 1908–09, the conciliatory attitude of Great Britain made agreement upon the question easier than had been expected and agreement occasioned much satisfaction to the Conference. This was particularly true because many states had treaties according respect to convoys. The treaties between Continental European states and American states generally recognized the right of convoy.

Article 61 of the Declaration of London was as follows:

“Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search.” (1909 Naval War College, International Law Topics, p. 139.)

of this article the general report says:

“If neutral Governments allow belligerents to visit and search vessels sailing under their flag, it is because they do not wish to assume the responsibility for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation changes when a neutral Government consents to assume that responsibility; the right of visit and search has no longer the same ground.

“But it follows from the explanation of the rule given respecting convoy that the neutral Government undertakes to give the belligerents every guarantee that the vessels convoyed shall not take advantage of the protection which is accorded to them in order to do anything contrary to neutrality, for example, to carry contraband of war, to render unneutral service to the belligerent, to attempt to violate blockade.” * * *
"A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it binds more fully the responsibility of the commander. This declaration has for its aim to make visit and search unnecessary by the mere fact that this would afford to the cruiser the information which the visit and search itself would have supplied." (Ibid., p. 139.)

In order that the commander of the visiting vessel may be even more secure in his opinion as to the innocence of the vessels under convoy, article 62 provided:

"If the commander of the belligerent ship of war has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must state the result of such investigation in a report, of which a copy is furnished to the officer of the ship of war. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels."

(Ibid., p. 141.)

If the commander of the visiting cruiser is not then satisfied, he may protest and there would be resort to diplomatic settlement. If the convoying commander withdraws his protection the merchant vessel cannot complain because "She has deceived her own Government, and has tried to deceive the belligerent."

Of this Article the report of the British Delegates to Sir Edward Grey said:

"In pursuance of the directions contained in section 18 of our general instructions, we intimated to the Conference that Great Britain was willing to recognize the immunity from visit and search of neutral vessels under convoy, as one of the now generally accepted principles of international law. This attitude on our part naturally smoothed the way for the adoption of the rules comprised in chapter VII of the Declaration. Some controversy arose as to the procedure to be prescribed in cases where it was found that the officer commanding the convoy had been deceived, and that contraband was in fact carried on board a vessel or vessels under his convoy. The solution adopted, as embodied in article 62, vindicates in every respect the freedom from belligerent interference of the convoying officer. It is he who alone is to investigate any allegations made against a particular vessel or vessels forming
part of his convoy, and only if he is satisfied of their truth is he called upon to withdraw his protection from the offending vessels. These provisions seem to us to be the logical deductions to be drawn from the principle of immunity if once admitted, and we therefore agreed to them. It may be well to point out that any failure on the part of the commander of the convoy to carry out the obligations imposed upon him under Article 62 could not be redressed by resort to the International Court, which would have no jurisdiction in such a matter. The injured belligerent would have to seek his remedy by way of diplomatic representation.”

(Parliamentary Papers, Misc. No. 4, International Naval Conference (1909), Cd. 4554, p. 100.)

As the British Government seemed to have in 1909 taken the position in regard to convoy that generally prevailed, the question was considered practically settled and rules in regard to naval warfare were drawn accordingly.

Attitude of the United States in 1914.—In reply to a question raised in early August 1914 as to whether the United States would “look with favor on furnishing escorts for fleets of grain-carrying steamers destined for France”, the Secretary of State said:

“DEPARTMENT OF STATE,
WASHINGTON, August 8, 1914.

Referring to telegram from Wichita Mill and Elevator Company, wheat and provisions are classed as conditional contraband of war under generally accepted principles of international law, and therefore subject to capture and confiscation by belligerent vessel if destined for a belligerent government, its army or navy, or its port blockaded or held by military forces; if not so destined they are not contraband of war. Holland is not now at war and wheat and foodstuffs destined for use in that country not considered contraband of war. Persons are free to sell or ship foodstuffs from United States in ordinary commercial transactions without violating United States neutrality laws. Pending passage of bill before Congress, foreign boats referred to may not be registered in United States. This Government could not well furnish escort for fleet of grain steamers as such escort might involve United States in serious complications.

W. J. BRYAN.”

(Foreign Relations, U. S., 1914, Supplement, p. 274.)
Of course any action may involve complication as may inaction, but in August 1914, there was a general belief in Europe that the United States would maintain the neutral rights of its citizens, but would not interfere with the belligerents. Many suggestions were made both by belligerents and neutrals in regard to convoying, but in general convoying of neutral merchant vessels was not common.

_Swedish proclamation, 1915._—The King of Sweden by proclamation of October 29, 1915, stated that the purpose of convoying was to “afford” Swedish merchant ships protection against search and detention by warships of foreign powers.

“4. Merchant ships which carry contraband of war, or which may reasonably be suspected of intending to render assistance contrary to the laws of neutrality to a neutral power, may not under any circumstances be included in the convoy.

“5. In order to prevent merchant ships referred to in Section 4 being included in the convoy, such measures of control as are considered suitable may be taken with regard to ships for which convoying has been applied for.” (Foreign Relations, U. S. 1915, Sup. p. 628; 1918 Naval War College, International Law Documents, p. 154.)

_Armed neutral merchant vessels._—While neutral merchant vessels were as a general rule armed against “pirates and thieving robbers” in early days, such arming was not common after the middle of the nineteenth century. The Declaration of Paris of 1856 in stating “Privateering is and remains abolished” was thought to put an end to the need of armed merchant vessels. There had been many bilateral treaties before this date forbidding privateering, as the treaty between the United Provinces and Sweden, 1675; between the United States and Prussia, 1785; and some of these early treaties made the penalty for privateering the same as for piracy.

The words “piracy” and “privateering” were often used without clear distinction and sometimes the conduct of pirates and of privateers were very similar, and each word had varying meanings.
Piracy has had many definitions in the municipal laws of states. In general piracy from the international point of view is an unauthorized act of violence or depredation for private ends or showing, as was formerly said, *animus furandi* and committed outside any national jurisdiction.

A privateer is usually commissioned by a letter of marque and reprisal or by some other authorization permitting a vessel to prey upon the property of a foreign state or of the citizens of that state.

There may be reason for questioning the grounds for arming private vessels of belligerents in time of war and this question has been much discussed. The arming of neutral merchant vessels would be on grounds distinct from those supporting the arming of belligerent merchant vessels, and during recent wars piracy and privateering would not be among these grounds.

Defense has been a usual ground for the use of force. Convoy has been resorted to as a method of defense against unlawful interference with neutral rights. In convoy there is a responsible state agency acting in defense of the neutral rights with a presumption that these rights are clearly understood by the commander of the convoy and that he is acting under instructions from his state.

The arming of neutral merchant vessels would put a responsibility upon the master of the vessel for which he presumably had not been trained and in the exercise of which much would be left to chance.

The treatment of armed neutral merchant vessels during the World War gave rise to discussion but there was no uniform opinion upon the subject.

*Attitude of belligerent toward armed neutral merchant vessels.*—There was uncertainty on the part of Great Britain even in regard to the armed British merchant vessels, and in a message of Ambassador Page to the Secretary of State on January 5, 1917, this uncertainty is somewhat fully presented.
"The British Government does not appear to know exactly where they stand with our Government with regard to the arming of British merchantmen. In spite of our general pronouncement to the effect that merchantmen may properly be armed for defensive purposes they do not know how this would work out in practice or whether our authorities have laid down specific rules as to what constitutes defensive armament or what such rules might be. They understand in a general way that there is to be a limitation in number and in calibre of guns and that they should be mounted at the stern, failing which that ships might be classed as warships.

"The British authorities look for a recrudescence of submarine activity off the American coast as soon as the Allies' reply to the President's note is made public, and they feel it their duty to see to it that their ships are adequately armed to meet this menace since from time immemorial it has been the undisputed right of merchantmen to arm for defense. In old times it was not thought unusual for a merchant man to be armed not merely with bow and stern chasers but with broadsides as well, and the necessity for this sort of armament is greater to-day than ever before, for, whereas in old times a hostile cruiser would be sighted on the horizon and the merchantman would take to flight using her stern chasers for defense, today a hostile submarine might suddenly appear on the surface a mile ahead of the merchant ship and if the latter mounted guns only at the stern she would be in no position to defend herself. So much for the number and position of guns.

"With regard to the calibre, the Admiralty has knowledge that the new German submarines carry comparatively heavy guns with a range of something like 8,000 yards. A merchantman with guns of less range might just as well be totally unarmed.

"A point which seems to me to be of some importance is that the British Admiralty holds that there is nothing in the question as to whether British merchantmen are armed for defense or offense. Whatever the armament might be a merchantman to-day could be armed only for defense, since there is nothing afloat against which she could take the offensive. She can not be armed for the purpose of seeking out and destroying less heavily armed enemy merchant ships since none such is at present on the high seas, and it is not reasonable to suppose that a merchant ship, being without armor—no matter how numerous or how heavy her guns might be—could possibly be so rash as to attack an enemy man-of-war, but a heavy and mobile armament obviously seems necessary for merchantmen to meet the present submarine menace, and, if there is any danger of British merchant ships being re-
fused clearance papers in American ports because of this, they may have to give up using American ports whenever possible."

(Foreign Relations, U. S., 1917, Supplement I, p. 546.)

This position seems to indicate a policy on the part of the British Government which in some respects would be out of accord with the American Department of State memorandum of September 19, 1914 (1916 Naval War College, International Law Documents, p. 93), but the practice of the authorities of the United States had been liberal in construing the memorandum of September 19, 1914.

The Ambassador of the United States in Germany reported on January 21, 1917:

"At 7:30 yesterday evening Count Montgelas of the Foreign Office called on me and said that the following note had been sent to the embassies and legations of several neutral nations, particularly Spain and Norway, but was not sent to the United States because that country did not seem to be arming its merchant vessels, that Von Stumm, Undersecretary of State, had asked him, Montgelas, to give me a copy. Montgelas further said that Germany had never receded from the position it took concerning armed merchant vessels in the German note of February, 1916.

"The note verbale is as follows, and is in French. I send translation and will send original French tomorrow in open cable:

"'According to information worthy of belief which the Imperial Government has received from a neutral country, the British Government has endeavored quite recently to decide the neutral shipowners engaged in transportation on its order to arm their ships with cannons. Likewise the armament of these neutral ships has been called for in the most energetic manner by English public opinion."

"'In view of these proceedings the German Government thinks it ought to call the attention of the neutrals to the fact that under existing conditions, neutral armed merchant ships run the risk of being taken for armed enemy merchant ships and of being in consequence attacked, these latter ships maneuvering often under a neutral flag to lay trap for German submarines. Moreover neutral ships of commerce which may make use of their temporary armament will be treated as pirates by the German naval forces."
"'The Imperial Department for Foreign Affairs leaves it to the (space for name of legation) to communicate the preceding to its government by telegraph. Berlin, the (------------------), to the Legation of (------------------)." (Ibid., p. 91.)

**Action of the United States, 1917.**—On March 12, 1917, while the United States was neutral, the Department of State gave to all foreign embassies and legations the following:

"The Department of State has the honor to state for the information of the ------------------ Embassy that in view of the announcement of the Imperial German Government of January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas, would be sunk without any precautions being taken for the safety of the persons on board, and without the exercise of visit and search, the Government of the United States has determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board." (Foreign Relations, U. S., 1917, Supplement I, p. 171.)

**Armed neutral merchant vessels in foreign neutral waters.**—Immediately after the arming of neutral merchant vessels, questions arose as to the status of such vessels in foreign neutral waters. Some states had prohibited the entrance of armed vessels without limiting the prohibition to merchant vessels of belligerents.

In early March 1917 the Department of State of the United States sent to Spain, Norway, Sweden, and The Netherlands a query as to whether those governments prohibited "the entrance and departure of merchant vessels armed for defensive purposes." (Ibid., p. 550.)

The replies were as follows:

Spain, March 4, 1917,

"Minister of Foreign Affairs states there are no restrictions against entrance or departure from Spanish ports of merchant vessels armed for defense only and no intention to change such." (Ibid, p. 551.)

Norway, March 6, 1917,

"The Minister for Foreign Affairs informs me that the Norwegian Government does not object to merchant vessels armed
defensively entering and leaving Norwegian ports, but that such vessels are subject to examination by naval authorities." (Ibid, p. 551)

Sweden, March 6, 1917,


The Netherlands, March 10, 1917,

"Minister of Foreign Affairs informs me Dutch Government has treated armed merchantmen as war vessels since declaration of neutrality at beginning of war and they are not permitted to enter territorial waters except under stress of weather, etc. No distinction is made for vessels armed for defensive purposes. This refers to belligerent vessels. Dutch Government has arrived at no conclusion regarding armed neutral vessels. Minister for Foreign Affairs will inform me of any action which may be taken in this regard." (Ibid, p. 552)

These replies do not cover the attitude toward armed neutral merchant vessels and further questions were raised particularly in regard to the treatment of neutral merchant vessels which had been armed privately and those which had been armed and furnished gun crews by a government.

Later the American Ambassador in Spain informed the Secretary of State in a telegram of March 18, 1917, that,

"Spanish Government now acting under regulation promulgated about two years ago which permits merchant vessels carrying one cannon for defensive purposes to enter Spanish ports as merchant vessels. No distinction is made between neutral and belligerent vessels nor between merchant vessels armed by private owners or by Government authorities. Merchant vessels armed with more than one cannon have frequently entered Spanish ports within last two years and if armament is obviously for defensive purposes only Minister of State informs me the number of cannon is ignored. Minister further states that no modification of this regulation is now contemplated, but that at any moment circumstances may demand a change of policy, in which event the Embassy will be promptly informed." (Ibid, p. 554)
The Minister to Sweden, in a telegram to the Secretary of State March 21, 1917, said:

"Foreign Minister told me to-day he was authorized give verbal Swedish neutrality rules. Contained no mention of armed merchant vessels, and that for the present Swedish Government was unable make any definite decision, but reserved the right to treat each case separately later in conference. I drew from Foreign Minister the statement that for the present armed American merchant vessels, whether armed by the Government or by the owners, would be allowed freely to enter and depart from Swedish ports as heretofore. In reply to my inquiry the Minister for Foreign Affairs confidentially stated that Sweden did not care to set a precedent on this question at present, but preferred to await developments, and that in not definitely committing themselves at present, Sweden obviated what might lead to some embarrassment with neighboring countries. I learned to-day from high Swedish official that Danish representative will make similar reply." (Ibid, pp. 554-55.)

The reply of the Netherlands was embodied in a communication of March 22, 1917:

"By virtue of the Royal Decree of July 30, 1914, the presence of war vessels or vessels assimilated thereto belonging to foreign powers within the territorial waters of the Netherlands is not permitted.

"Armed merchant vessels fall within the category of vessels without any distinction being made between the case where the owner of the ship has furnished her with armament on his own authority and the case where the foreign government has placed a military force on board the vessel for her protection.

"The Royal Decree does not apply to the colonies of the Netherlands." (Ibid., p. 555.)

These replies do not show any clear unanimity of opinion as to what should be the rule of treatment of armed neutral merchant vessels.

(a) Transfer of vessels before war.—In case of a transfer before war the nationality of a ship was presumed to be that of the flag it had a right to fly. The right to fly the flag might be questioned, but, when proven that was till the World War and by most states during the World War regarded as conclusive as to the
nationality of the vessel. Good faith in the transfer would, of course, be essential. It would be difficult to assume that transfer 15 days before the outbreak of war in accord with the law of the vendor and in accord with the law of the vendee could be proven invalid, and a purchaser would be justified in resting his title on conformity to law without even raising the question of intent or good faith in such a case.

Of course an entirely different type of question arises in case of transfers after the outbreak of war.

(b) Seizure of flour on the Dale.—The Dale, a vessel of the Blue Line, had sailed before the outbreak of war and the title to the flour was in the merchant of state X and was to be paid for by the merchant of state D on delivery. The merchant of state D after the declaration of war, by a change in terms of the original transaction, does obtain title to the flour by telegraph. The flour is of enemy origin and enemy goods, and a transfer, which would have been valid in time of peace is not valid in time of war. The transfer is not valid and the flour is liable to capture and condemnation.

(c) Convoy.—Many of the rules issued by maritime states subsequent to 1909 and before 1915 embodied in some form, so far as convoy was concerned, Articles 61 and 62 of the Declaration of London. This was true of the French instructions of 1912; the Japanese regulations of 1914; the Italian decree of 1915; and the instructions of the United States of 1915 and 1917.

The use of convoy was therefore considered lawful and probable at the outbreak of the World War, though of course the right of convoy would not extend to the protection of vessels engaged in unlawful undertakings. The legality of the conduct of vessels under convoy is vouched for by the commander of the convoy, and if a commander of a vessel of war of either of the belligerents questions the conduct of a vessel under convoy the matter should be investigated in good faith.
(d) Merchant vessels and submarines.—Article 22 of the London Naval Treaty of 1930 is as follows:

"The following are accepted as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

"The High Contracting Parties invite all other Powers to express their assent to the above rules." (1930 Naval War College, International Law Situations, p. 159.)

The significance of this article in its relation to submarines and armed vessels was discussed quite fully at the Naval War College in 1930. The questions involved in Situation I, 1930, were, however, mainly in regard to relations of belligerent submarines and merchant vessels of belligerents, and the rights of belligerents in regard to one another are under consideration, but Article 22 of the London Naval Treaty of 1930 applies not only to belligerents but also to neutrals, and a neutral would have even less justification for disregarding its provisions and in a lawfully conducted war no justification.

SOLUTION

(a) The seizure of the ships of the Blue Line on March 20 as enemy property is not lawful.

(b) The seizure of the cargo of flour as enemy property on the Dale on March 21 is lawful. The transfer by telegraph on March 19 was not a valid transfer as against state Y.
(c) State E has a lawful right to convoy its merchant vessels. The right to convoy applies to innocent vessels only and does not imply a total denial of the right to visit and search.

(d) The arming of neutral merchant vessels is not unlawful though since the London Naval Treaty of 1930, article 22, presumed unnecessary and undesirable. Since the Treaty of 1930 the order in regard to sinking submarines would be unlawful for states parties to article 22.