International Law Situations
WITH SOLUTIONS AND NOTES

SITUATION I

GOODS ON NEUTRAL MERCHANT VESSEL

States X and Y are at war. Other states are neutral. A cruiser of X meets a private merchant vessel flying the flag of state Z. The papers of the vessel show that port O in state Y is the last port of call for the merchant vessel. The vessel has the following cargo: One-sixth raw molasses and one-sixth petroleum, consigned to port P in state N; one-eighth iron ore and one-eighth fancy goods, consigned to port Q in state R; one-eighth fancy shoes for ladies, one-eighth golf suits for men, one-sixth valuable art-rug specimens for national museum, consigned to port O.

The master of the merchant vessel of state Z maintains that his vessel and cargo are not liable to seizure because of ratio and list of goods, consignment to neutral ports, geographical location of ports with reference to belligerents, and because the papers on board include a certificate of innocent character of goods from authorities of Z as well as a letter of assurance from the consul of Y at the port of departure.

Are these grounds sufficient to exempt the merchant vessel from liability to seizure?

SOLUTION

The contentions of the master are not grounds sufficient to exempt the merchant vessel from liability to seizure.

NOTES

General.—While the subject of contraband has often been discussed at this Naval War College, it will be con-
convenient to have a brief statement in regard to the development of the principle in connection with this situation. Details as to other aspects of contraband may be found by reference to the General Index, International Law Publications, Naval War College, 1901–1920.

Definition.—Contraband implies the existence of the idea of neutrality. The development of the idea of neutrality is comparatively recent. Grotius gave only scant reference to the subject and his great work first issued in 1625 was entitled "Law of War and Peace.”

While not using the term "contraband,” Grotius in 1625 gave a classification of articles of commerce which has served as a basis for the generally recognized distinctions. He enumerates:

1. Those things which have their sole use in war, such as arms.
2. Those things which have no use in war, as articles of luxury.
3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships.

(De Juri Belli ac Pacis, III, I, 5.)

Grotius further says, in regard to the conditions under which articles of the third class may come:

In the third class, objects of ambiguous use, the state of war is to be considered. For if I cannot defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this—as if I were besieging a town or blockading a port, and if surrender or peace were expected, he will be bound to me for damages; as a person would who liberates my debtor from prison, or assists his flight to my injury; and to the extent of the damage his property may be taken, and ownership thereof be assumed for the sake of recovering my debt. If he have not yet caused damage, but have tried to cause it, I shall have a right by the retention of his property to compel him to give security for the future by hostages, pledges, or in some other way. But if, besides, the injustice of my enemy to me be very evident, and he confirms him in a most unjust war, he will then be bound to me not only civilly, for the damage, but also criminally, as being one who protects a manifest criminal from the judge who is about to inflict punishment, and on that
ground it will be lawful to take such measures against him as are suitable to the offense, according to the principles laid down in speaking of punishment; and therefore to that extent he may be subjected to spoliation. (Whewell's translation, Grotius, De Jure Belli ac Pacis, III, 1, 5.)

The positions here taken by Grotius in regard to what is now termed "conditional contraband" would not now be sustained even though his classification of contraband should be generally approved.

Early practice.—The classification made by Grotius was in no way his invention, for distinctions had been made much earlier than 1625, and Grotius stated the practice which had grown up among nations. A treaty of Great Britain and Holland (1625) uses the word "contraband." A British proclamation of 1625 mentions that commerce with the enemy in the following articles is prohibited—

any manner of graine, or victualls, or any manner of provisions to serve to build, furnish, or arme any shipps of warr, or any kind of munition for warr, or materials for the same, being not of the nature of mere merchandize.

A British proclamation made a few months later is detailed. In this "His Majestie" denounces as prohibited articles—

ordinance, armes of all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kinds, hempe, saile, canvas, danuice pouldavis, cables, anchors, mustes, rafters, boate ores, balcks, capraves, deale board, clap board, pipe staves, and vessels and vessel staffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sorts, all provisions of shipping, and all munition of warr, or of provisions for the same, according to former declarations and acts of state, made in this behalf in the tyme of Queen Elizabeth, of famous memorie.

The practice before the days of Grotius had recognized goods as liable to penalty, such as arms, and as free from penalty, such as articles of luxury. Grotius endeavors to make clear that a third class should be recognized, a class of use both for peaceful and for war-like purposes.
Later attitudes.—As maritime commerce developed and as international trade became more and more important the demand for clear definitions of contraband became more imperative. From 1780, the time of the armed neutrality, neutrals were more positive in their assertion of their claim that property under neutral flags should be respected, and the definition of contraband became clearer. Even before this date the doctrine “free ships, free goods” had received strong support and had been embodied in treaties, but attempts to relieve commerce from interference became more frequent when steam and other forces removed the barriers of space.

This is evident in the case of the controversy in regard to coal, which became important during the Crimean War (1854–1856) through the introduction of steam power in vessels of war. The Declaration of Paris mentions but does not define contraband. Great Britain maintained that coal was an article *ancipitis usus* and conditional contraband. Though Secretary Cass in 1859 regarded the inclusion of coal as contraband as having “no just claim for support in the law of nations,” in the Civil War, however, the Government of the United States considered coal as conditional contraband. Germany in 1870 maintained that the export of coal from Great Britain to France should be prohibited, and France reasserted her declaration of 1859 that coal under no circumstances should be considered contraband.

Hall said regarding coal as conditional contraband:

The view taken by England is unquestionably that which is most appropriate to the uses of the commodity with which it deals. Coal is employed so largely, and for so great a number of innocent purposes, the whole daily life of many nations is so dependent on it by its use for making gas, for driving locomotives, and for the conduct of the most ordinary industries, that no sufficient presumption of an intended warlike use is afforded by the simple fact of its destination to a belligerent port. But on the other hand, it is in the highest degree noxious when employed for certain purposes; and when its destination to such purposes can be shown to be extremely probable, as by its con-
LATE CLASSIFICATIONS

Assignment to a port of naval equipment, or to a naval station, such as Bermuda, or to a place used as a port of call, or as a base of naval operations, it is difficult to see any reason for sparing it which would not apply to gunpowder. One article is as essential a condition of naval offense as is the other. (Hall’s Int. Law, 8th ed., p. 786.)

Different classifications.—The classification of articles carried to a belligerent would if determined by the enemy generally be strict; if determined by a neutral liberal. Both would admit that articles solely of use for purposes of war should be contraband and usually that articles which could not be of use in war should be free. Many states, particularly in continental Europe, would make no further classification than to say all articles which may be used in war are contraband and others are free.

These differences shown by various states have usually been due to the benefits or injury which might accrue to the respective countries. The same state has at different times maintained inconsistent positions. Russia in 1884 declared she would never recognize coal as contraband, but it was included in the absolute contraband list in the Russo-Japanese War in 1904–5.

Against this inclusion Great Britain protested vigorously. In 1915 Great Britain and Russia issued identical lists of contraband including fuel in conditional contraband.

There seemed to have been growing up during the latter half of the nineteenth century a considerable support for the idea of contraband by nature and contraband by destination.

The essential elements of contraband of war were well stated by Historicus:

In order to constitute contraband of war, it is absolutely essential that two elements should concur—viz. a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Innocent goods going to a belligerent port are not contraband. Here there is a hostile destination, but no hostile quality. Hostile goods, such as munitions of war, going to a neutral port are not contraband. Here
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there is a hostile quality, but no hostile destination. (Historicus on International Law, p. 191.)

The United States, Great Britain, and Japan have usually divided the articles which might be used in war into those solely for such use and those which might be used for war purposes or for peace purposes, such as foodstuffs. The great difficulty was the assignment of certain articles to the proper category. Chief Justice Chase in the case of the Peterhoff in 1866 stated a simple fact when he said:

The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable. (5 Wallace, p. 28.)

Mr. Balfour said in 1904:

I could not give a list of things which are or are not contraband of war, nor could any international lawyer fulfill any such demand.

There had been many attempts to determine the list of contraband by treaty agreements between two or more states. A treaty between the United States and Prussia of 1799, revised in 1828, provides in Article XIII that:

All cannons, mortars, fire-arms, pistols, bombs,grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles, and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel or passenger ought to have, and in general whatever is comprised under the denomination of arms and military stores, of what description so ever, shall be deemed objects of contraband. (VIII U. S. Stat. p. 162.)

During the Russo-Japanese War of 1904–5 there were many diplomatic controversies in regard to the contraband list. In these controversies the United States and Great Britain took important parts. Russia was brought to admit the principle of conditional contraband as applying to certain articles: The British ambassador wrote to the Russian foreign office on October 9, 1904:

The principle of conditional contraband has already been recognized by the Russian Government, and it only remains to
extend its application to coal, cotton, and other articles which may be used for peaceful or warlike purposes according to circumstances. Such a measure would be consistent with the law and practice of nations and with the well-established rights of neutrals. While maintaining the rights of a belligerent, the rights of neutrals would be respected, and the source of a serious and unprofitable controversy would be removed. (Parliamentary Papers, Russia, No. 1 [1905], p. 24.)

The American position early in the nineteenth century regarding coal as conditional contraband only is well stated in the note of Mr. Choate to Lord Lansdowne of June 24, 1904:

MY LORD: Referring to our recent interviews, in which you expressed a desire to know the views of my Government as to the order issued by the Russian Government on the 28th of February last, making "every kind of fuel, such as coal, naphtha, alcohol, and other similar materials, unconditionally contraband," I am now able to state them as follows:

These articles enter into great consumption in the arts of peace, to which they are vitally necessary. They are usually treated not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as "conditionally contraband"; that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may rather be classed with provisions and foodstuffs of ordinary innocent use, but which may become absolutely contraband of war when actually and especially destined for the military and naval forces of the enemy. * * * The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent states of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolutely contraband of war, simply because they are shipped by a neutral to a non-blockaded port of a belligerent, would not appear to be in accord with reasonable and lawful rights of a neutral commerce. (1904, Foreign Relations, U. S., p. 334.)

International consideration.—Three years later, at the Second Hague Conference, the British representative proposed the entire abolition of contraband, but no agree-
ment could be reached by the 44 States attending, though a tentative list of absolute contraband received general approval but was not formally adopted.

It remained for the International Naval Conference at London in 1908–9 attended by representatives of the 10 naval powers, to agree upon contraband lists which were then regarded as generally satisfactory. This conference in the Declaration of London, signed February 26, 1909, fixed upon a list of absolute contraband, a list of conditional contraband, and an absolutely free list. Article 22 of the Declaration of London, the list approved at The Hague in 1907, includes as absolute contraband 11 categories, all of which are primarily of use for war except beasts of burden. Article 24 contains 14 categories of conditional contraband, food and fuel being the most important. Article 28 contains 17 categories of articles not to be declared contraband. Among the most important of these are raw cotton, wool and other textiles, rubber, metallic ores. The Declaration of London was not ratified and its provisions as to contraband were not adopted in the World War.

Destination.—When in early days goods were either absolutely contraband or else free, all contraband goods bound direct for a belligerent country were liable to capture and other goods were free. The destination was usually easily determined and the liability was correspondingly clear. With the introduction of the conditional contraband list the matter of destination became much more important, for these articles, such as food and fuel, in 1909 were liable to capture not when bound to the belligerent country, but only when bound for the military forces, or for places which were clearly serving to support the military forces. In general, goods whatever their nature were exempt from capture if having a neutral destination. Goods of noncontraband nature were exempt whatever their destination. Goods of the nature of conditional contraband were liable to capture if destined to a military port or to military forces, but
otherwise exempt. Goods of a warlike nature were liable to capture if bound for the enemy's country.

War and commerce.—The fundamental principle was that the fact of existence of war between states did not create a condition of belligerency for outside parties. The fact that France and Germany were at war did not create a hostile relation between Italy and either of the belligerents. The relations of Italy remained as before and Italy would be on terms of friendship with both belligerents. The Italian commerce should be free as in time of peace except for restraints necessary for legitimate operations of war. The belligerents should be permitted to carry on the hostilities without interference except for such restraints as would be necessary in order that the legitimate commerce of neutrals might be maintained.

Since the state of war is admitted as legitimate, the exercise of belligerent rights is legitimate. The exercise of these rights implies the right to perform such acts as are necessary to reduce the enemy to submission, provided these acts do not impair generally accepted neutral rights. Here is always the point of conflict. What is legitimate for the neutral and what is legitimate for the belligerent?

The risk which the belligerent runs is that the contraband may be used against him. The risk which the owner of contraband runs is loss through capture. The risk which the carrier runs is loss of freight, of delay for purpose of bringing in the contraband for adjudication, and if vessel and contraband have the same owner the risk that both may be condemned. Liability begins only with knowledge.

George V of Hanover in the middle of the nineteenth century seemed to wish to extend the penalty for carrying contraband and provided by law for a $500 fine or six months' imprisonment. This penalty was to be ap-
plied also to the carrying of troops, dispatches, or couriers.

**Neutrality and equalization.**—It has often been maintained that neutrality implied merely impartiality. It has also been maintained that it involved equal rights and privileges for both belligerents. In a note of June 29, 1915, from the Austro-Hungarian Ministry of Foreign Affairs to the United States, it was intimated that the Government of the United States should take measures to equalize commercial relations between the United States and both belligerent parties. To this the United States replied on August 12, 1915:

The Government of the United States has given careful consideration to the statement of the Imperial and Royal Government in regard to the exportation of arms and ammunition from the United States to the countries at war with Austria-Hungary and Germany. The Government of the United States notes with satisfaction the recognition by the Imperial and Royal Government of the undoubted fact that its attitude with regard to the exportation of arms and ammunition from the United States is prompted by its intention to "maintain the strictest neutrality and to conform to the letter of the provisions of international treaties," but is surprised to find the Imperial and Royal Government implying that the observance of the strict principles of the law under the conditions which have developed in the present war is insufficient, and asserting that this Government should go beyond the long recognized rules governing such traffic by neutrals and adopt measures to "maintain an attitude of strict parity with respect to both belligerent parties."

To this assertion of an obligation to change or modify the rules of international usage on account of special conditions the Government of the United States can not accede. The recognition of an obligation of this sort, unknown to the international practice of the past, would impose upon every neutral nation a duty to sit in judgment on the progress of a war and to restrict its commercial intercourse with a belligerent whose naval successes prevented the neutral from trade with the enemy. The contention of the Imperial and Royal Government appears to be that the advantages gained to a belligerent by its superiority on the sea should be equalized by the neutral powers by the establishment of a system of nonintercourse with the victor. The Imperial and Royal Government confines its comments to arms and am-
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munitition, but if the principle for which it contends is sound, it should apply with equal force to all articles of contraband. A belligerent controlling the high seas might possess an ample supply of arms and ammunition, but be in want of food and clothing. On the novel principle that equalization is a neutral duty, neutral nations would be obligated to place an embargo on such articles because one of the belligerents could not obtain them through commercial intercourse.

But if this principle, so strongly urged by the Imperial and Royal Government, should be admitted to obtain by reason of the superiority of a belligerent at sea, ought it not to operate equally as to a belligerent superior on land? Applying this theory of equalization, a belligerent who lacks the necessary munitions to contend successfully on land ought to be permitted to purchase them from neutrals, while a belligerent with an abundance of war stores or with the power to produce them should be debarred from such traffic.

Manifestly the idea of strict neutrality now advanced by the Imperial and Royal Government would involve a neutral nation in a mass of perplexities which would obscure the whole field of international obligation, produce economic confusion, and deprive all commerce and industry of legitimate fields of enterprise, already heavily burdened by the unavoidable restrictions of war. (Spec. Sup. Amer. Jour. Int. Law, vol. 9, July, 1915, p. 166.)

**Liability for contraband.**—This liability is always conditioned by the destination of the goods. Sir William Scott, the English judge, in pronouncing in 1799 on a cargo of cheese on board the *Jonge Margaretha* bound from Amsterdam to Brest, gives a statement which is almost modern:

But the most important distinction is whether the articles were intended for the ordinary uses of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place; and although it is possible that
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the articles might have been applied to civil consumption—for it being impossible to ascertain the final application of an article ancipitis usus—it is not an injurious rule which deduces both ways in the final use from the immediate destination, and the presumption of a hostile use founded on its destination to a military port is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which a supply of these articles would be eminently useful. * * * I think myself warranted to pronounce these cheeses to be contraband. (1 C. Rob., p. 188, 189.)

Delivery of goods.—There are in many treaties clauses permitting the master of a merchant vessel to deliver to a belligerent articles of contraband and then to proceed. One of the earliest of these was in 1667 between Great Britain and the United Netherlands. The United States made such a treaty with Sweden as early as 1783 which is still in force. The clause relating to the delivery of contraband in the Prussian treaty, 1799, was important in the World War and involved in the negotiations with Germany in regard to the American vessel, the William P. Frye, which was sunk by the German cruiser Prinz Eitel Friedrich on the high seas on January 28, 1915. This clause is in part as follows:

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors, and it shall further be allowed to use in the service of the captors, the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the
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Goods supposed to be of contraband nature he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage. (S U. S. Stats. 162, 168; also U. S. Treaties and Conventions, 1776-1909, vol. 2, p. 1729.)

Doubtful destination.—Destination is not always easy to prove, but in case of reasonable doubt the belligerent is justified in bringing in a vessel supposed to be engaged in carriage of contraband. This doubt may be due to irregularity of the vessel’s papers or to other reasons. The commander of the belligerent ship can not act in a judicial capacity and in case of doubt should send a vessel to the prize court.

As conditional contraband was liable to capture only when bound for the military forces or use, it is not always easy to determine the course of action to be taken by a belligerent commander. The Declaration of London of 1909 endeavored to render such destination more clear and provided in article 34 that:

There is presumption of the destination referred to in Article 33 if the consignment is addressed to enemy authorities, or to a merchant, established in the enemy country, and when it is well known that this merchant supplies articles and material of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy; this presumption, however, does not apply to the merchant vessel herself bound for one of these places and of which vessel it is sought to show the contraband character. (1909, N. W. C. Int. Law, Topics, p. 83.)

According to article 35 the ship’s papers were to be “conclusive proof of the voyage of the vessel as also of the port of discharge of the goods.” Great Britain, France, and Russia in 1914 greatly extended the liability by pronouncing liable to capture goods of the nature of conditional contraband bound for a neutral port if consigned “to order,” to a consignee in enemy’s territory, or if it is not clear to whom the consignment is made. The burden of proof of innocent character of the cargo
is placed upon the owners of such goods, and if an enemy is drawing supplies for its forces from a neutral country even more stringent rules may be applied.

*Contraband lists.*—It was thought in 1909 that a list of contraband and regulations for its capture which would be satisfactory for many years had been drawn, but in 1914 the greater maritime powers showed a disposition to depart from its provisions and arbitrarily to establish lists which should be for their presumed and temporary advantage. Clearly it would have been better for the world and probably for the belligerents themselves to abide by some general agreement which had been drawn by representatives of the great maritime powers in a time of peace. Controversies raged in regard to the treatment of cotton, food, and other articles. Neutral states were irritated by restraints on trade. It is evident that an equable adjustment of belligerent and neutral rights would have been far better even in time of hostilities and that to maintain the principles of justice is not merely expedient but an evidence of farseeing statesmanship.

*British and continental views.*—The British Royal Commission of Supply of Food and Raw Material in Time of War in 1905 says in regard to the difference between the British and continental points of view in regard to contraband that:

All discussions as to the nature of the goods which may be treated as contraband start with the threefold distinction between things which are useful only in war, things which are useless for war, and things which are useful both in war and in peace. As to articles of the first class, there is practically no difference of opinion. Cannon, bayonets, uniforms and ammunition, for instance, are admitted on all hands to be contraband of war; the sole question being whether only finished articles are of this character, or whether the character is shared also by their component parts, and by machinery for putting them together. Articles of the second class, e. g., a piano or a portrait by Gainsborough, are as obviously “innocent.” It is as to the third class of articles, *res ancipitis usus*, that controversies have arisen:
and here two opposing schools of opinion have to be reckoned with. According to what may be called the "Continental school," the term "contraband" covers only articles the use of which is exclusively warlike; while according to what may be called the "British school," which is also that of the United States, the list of contraband is an elastic one, comprising not only such "absolutely" contraband articles as would be included in the first category mentioned above, but also articles which are "conditionally" or "relatively" contraband with reference to the special character of the war. It would appear, however, that the opposition between the Continental and British views is not unlikely to end in a reasonable compromise. Already Continental lists tend to include the materials out of which, and the machinery by means of which, arms and ammunition are manufactured; while the "conditional" contraband of the British school is admittedly restricted to articles indicated as noxious by special circumstances, and it is subjected only to the mitigated penalty of pre-exemption instead of to confiscation. (Vol. I, p. 23, sec. 96.)

**Ratio.**—With reference to the ratio of contraband in a vessel's cargo, the question is usually as to its effect upon the liability of the vessel. There have been differing doctrines as to the proportion of contraband that would make the vessel liable to confiscation. The Declaration of London reached an agreement which seemed generally acceptable, in 1909.

**Article 40**

*The confiscation of the vessel carrying contraband is allowed if the contraband forms, either by value, by weight, by volume or by freight, more than half the cargo.*

It was universally admitted, however, that in certain cases the condemnation of the contraband does not suffice, and that condemnation should extend to the vessel herself, but opinions differed as to the determination of these cases. It was decided to fix upon a certain proportion between the contraband and the total cargo.

But the question divides itself: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which ranged from a quarter to three quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to
theoretical objections, and also encourages practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods sufficiently bulky, or weighty in order that the volume or weight of the contraband may be less. A similar remark may be made as regards the value or the freight. The consequence is that it suffices, in order to justify condemnation, that the contraband should form more than half the cargo according to any one of the points of view mentioned. This may seem severe; but, on the one hand, proceeding in any other manner would make fraudulent calculations easy, and, on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture, which is true in each of the cases specified. (General Report, 1909, Naval War College, p. 89.)

This point of view was upheld by belligerents generally in the World War as equitable. It was affirmed that ignorance could not be rationally affirmed if more than half the cargo was contraband.

In the case of the Hakan, there was raised in the British prize court several questions. These were:

First, apart from any Resolutions or Articles of the London Conference, what was the rule of the law of nations affecting a vessel which in the circumstances of this case was carrying a cargo consisting wholly of contraband destined for the enemy? Secondly, was the Order in Council adopting Art. 40 of the Declaration of London so contrary to such a rule that the Order was invalid; or was it sufficiently consistent with such a rule, or did it so mitigate the rule in favour of the enemy, that it acquired validity, in accordance with the doctrine stated by the Privy Council in the Zamora? Or, thirdly, did the acts of the representatives of the various Powers at the Conference, and the subsequent action and practice of their States, bring into existence, by a sufficiently general consensus of view and assent, a new or modified rule of the law of nations upon the subject, to which effect ought to be given in their Prize Courts at the present day, apart from any Order in Council?

As to the first, having regard to the decrees and practices of the nations for the last 100 years, I should feel bound to declare that the rule which prevailed before the relaxation introduced a century or more ago should be regarded as valid at the present day. This means that the so-called well-established rule in favour of a contraband-laden ship contended for by the claimants does not exist. In the days of the relaxation referred to, the ship
was subject to confiscation in many respects, which were sometimes called exceptions. It has always been held that if any part of the contraband carried belonged to the owner of the ship, the ship itself was subject to the penalty of confiscation, as was the contraband. According to our most recent writers, the vessel suffered if her owner was privy to the carriage of the contraband goods, whether they belonged to him or not (see Westlake, p. 291; Hall, p. 666). In the present day, even more than in the past, the owner must be taken to know either directly or through the master how this vessel is laden, or to what use she is put. * * *

Secondly, it follows, from what I have stated, that the provisions of Art. 40 were a limitation or mitigation of some of the rights of the Crown; and the result of the decision in the Zamora is that accordingly the provisions in the Order in Council are valid.

Thirdly, although there is no formal instrument binding as an international convention, I think that the attitude and action of the most important maritime States before and since 1908 have been such as to justify the Court in accepting as forming part of the law of nations at the present day a rule that neutral vessels carrying contraband which by value, weight, volume or freight value, forms more than half the cargo, are subject to confiscation, and to condemnation as good and lawful prizes of war. ([1916] P. 226.)

On appeal to the judicial committee of the privy council, it was said in 1917:

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo. ([1918] A. C. 148.)

Department of State, 1915.—Early in 1915 Senator Stone, of the Senate Committee on Foreign Relations, summarized complaints and charges which had come to him on the observance of neutrality by the United States. These he submitted to the Secretary of State under 20 heads. The replies to some of these show the attitude of the Department of State at the time:

(4) Submission without protest to British violations of the rules regarding absolute and conditional contraband as laid down
GOODS ON NEUTRAL MERCHANT VESSEL

in The Hague conventions, the Declaration of London, and international law.

There is no Hague convention which deals with absolute or conditional contraband, and, as the declaration of London is not in force, the rules of international law only apply. As to the articles to be regarded as contraband, there is no general agreement between nations. It is the practice for a country, either in time of peace or after the outbreak of war, to declare the articles which it will consider as absolute or conditional contraband. It is true that a neutral Government is seriously affected by this declaration as the rights of its subjects or citizens may be impaired. But the rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade and there is no tribunal to which questions of difference may be readily submitted.

The record of the United States in the past is not free from criticism. When neutral this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

The United States has made earnest representations to Great Britain in regard to the seizure and detention by the British authorities of all American ships or cargoes bona fide destined to neutral ports, on the ground that such seizures and detentions were contrary to the existing rules of international law. It will be recalled, however, that American courts have established various rules bearing on these matters. The rule of "continuous voyage" has been not only asserted by American tribunals but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port "to order," from which, as a matter of fact, cargoes had been transshipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore can not consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore.

(5) Acquiescence without protest to the inclusion of copper and other articles in the British lists of absolute contraband.

The United States has now under consideration the question of the right of a belligerent to include "copper unwrought" in
its list of absolute contraband instead of in its list of conditional contraband. As the Government of the United States has in the past placed "all articles from which ammunition is manufactured" in its contraband list, and has declared copper to be among such materials, it necessarily finds some embarrassment in dealing with the subject.

Moreover, there is no instance of the United States acquiescing in Great Britain's seizure of copper shipments. In every case, in which it has been done, vigorous representations have been made to the British Government, and the representatives of the United States have pressed for the release of the shipments.

(6) Submission without protest to interference with American trade to neutral countries in conditional and absolute contraband.

The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed that superiority our trade has been interrupted and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country. The department's recent note to the British Government, which has been made public, in regard to detentions and seizures of American vessels and cargoes, is a complete answer to this complaint.

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(8) Submission to British interference with trade in petroleum, rubber, leather, wool, etc.

Petrol and other petroleum products have been proclaimed by Great Britain as contraband of war. In view of the absolute necessity of such products to the use of submarines, aeroplanes, and motors, the United States Government has not yet reached the conclusion that they are improperly included in a list of contraband. Military operations to-day are largely a question of motive power through mechanical devices. It is therefore difficult to argue successfully against the inclusion of petroleum among the articles of contraband. As to the detention of cargoes of petroleum going to neutral countries, this Government has, thus far successfully, obtained the release in every case of detention or seizure which has been brought to its attention.

Great Britain and France have placed rubber on the absolute contraband list and leather on the conditional contraband list. Rubber is extensively used in the manufacture and operation of motors and, like petrol, is regarded by some authorities as essential to motive power to-day. Leather is even more widely used in cavalry and infantry equipment. It is understood that both rubber and leather, together with wool, have been embargoed by most of the belligerent countries. It will be recalled that the
United States has in the past exercised the right of embargo upon exports of any commodity which might aid the enemy's cause. (Senate Doc. No. 716, 63d Cong., 2d sess.)

*Parliamentary discussion of contraband, 1916.*—The British Government in 1916 was much concerned with determining what should be classed as contraband and there were differences of opinion. Mr. Leverton Harris, who had been directly associated with the administration, said in January, 1916:

I do not think it ought to be assumed that everything which reaches Germany or Austria benefits those countries or assists them to win the War. That was rather the line, I think, taken by the right hon. Gentleman opposite (Sir H. Dalziel). I know there are many people in this country who would like to see every conceivable commodity stopped from reaching our enemies. Personally I do not agree with them. On the contrary, I think there are many goods which have reached, and may to-day, be reaching Germany and Austria which are doing those countries a considerable amount of harm, and giving their Governments a great deal of anxiety. It would be very instructive and interesting if some expert could prepare a list of articles which are being imported, or are in the habit of being imported, into enemy countries, and classify them according to their military or economic value. Such a list would obviously start with such things as shells and other munitions; next you would find the raw materials or semi-manufactured articles which have a certain military value; then you might place food supplies, beginning possibly with such articles as lard, oil, and other fatty substances which are so much needed in Germany at the present moment; then you would come to articles which are used for the purposes of manufacture or commerce; and lastly, you would come to articles of pure luxury, the list ending perhaps with something like diamond necklaces or very expensive pictures. Everybody is agreed that it is essential to do everything we can to stop from going to Germany or Austria those articles which will appear at the top of the list—that is to say, articles of any military value or of any value as an economic food for the population in enemy countries. On the other hand, the importation into Germany or Austria of such articles as appear at the bottom of the list does not prolong the War for one minute; in fact, I suggest that such importation does material harm to our enemies and may shorten the War. Articles of luxury, such as jewels, and so on, have to be paid for like everything else, and they have to be paid for either
by exchange operations or else in gold or by the export of securities, with the result that we see at the present time—the very great depreciation in the value of the mark. The difficulty one has to face is in regard to the classes of articles that fall in the centre of the list, such articles, for instance, as tea or cocoa. I have changed my mind more than once about tea. Tea, I think, does not possess any very great military value, although I understand it is an alternative ration. It is certainly found that whilst we in this country are trying to keep certain classes of these goods away from Germany, the German Government also is endeavoring to check their sale. The German Government is doing all it can to prevent certain classes of articles, which are more or less luxuries or not necessities, from coming in from abroad and having to be paid for by the export of gold or securities. (Parliamentary Debates, Commons [1916], LXXVIII, p. 1309.)

This I will say in conclusion: The vital thing is to succeed in stopping German commerce. I believe we have a perfect right to do that by every principle of international law. I believe it is perfectly legitimate for a belligerent to cut off all commerce from his enemy and to destroy and injure it by economic pressure exerted to the fullest extent quite as much as by any military operation. I am sure it is not only a legitimate and effective but that it is also a humane method. I am quite sure that since this country has the power to exercise it this country ought to do so to the full. With that I think we ought to combine absolute respect for the rights of other nations. We ought to set an example of law-abiding and just treatment even of the smaller nations, and I believe myself that that policy, which I am convinced is right and in accordance with the best principles of British conduct in the past, is also the wisest and effective policy if we desire to carry out the main object of all these operations, namely, the destruction of the power of the enemy. (Ibid. p. 1816.)

British statement, 1916.—Lord Robert Cecil, Under-secretary of State for Foreign Affairs, replying to a question in the House of Commons, March 9, 1916, said:

I have constantly told the House that, in my view, the Declaration of London is an instrument which has no binding force whatever. The position with regard to this country is that certain parts, only certain parts, were selected at the outbreak of the War by the Government of the day as embodying what they believed to be the principle of international law
applicable to belligerent conditions, and believing that to be the case they have agreed, and they think it a convenient form, to refer to the Declaration of London as embodying it. But the Government never intended—at any rate, this Government does not intend—to be bound by the Declaration of London, apart from and so far as it differs from the principle of international law which prevailed at the outbreak of the War. I very much doubt, and it is very much doubted by lawyers, whether the issue of an Order in Council that the Government intend to adopt the Declaration of London would bind the Prize Court, and it is a matter of great doubt, in point of fact, if that Declaration contained principles and doctrines which were not in accordance with the principles of international law. But I can not make it too clear whether that is so or not, the policy of the Government is to abide by the principles of international law whether they are in favour of or against us, and to adhere to them, and them only, and it is only so far as the Declaration of London embodies those principles that they have any intention of being bound by its provisions. (Parliamentary Debates, Commons [1916], 80 H. C. Deb. 5 s., p. 1813.) * * * If they are changes in principles, they ought not to be made, but if they are merely applying the principles to new conditions, that is not a change. All English lawyers are profoundly familiar with that. It is just as the ordinary growth of case law. You have your principle of law which is applied to the particular circumstances of each case, and the rulings thereupon being made make new definitions of the principle of law, which none the less always existed before those decisions. That is what I intended to convey, and that is, I think, the only sound view. (Ibid. p. 1814.) * * *

I am not quite sure what is meant by this phrase of a “real blockade.” I do know that such legal opinion as I have been able to consult agrees with my own impression that to make any Declaration of Blockade, as we should have to do under the ordinary rules of international law, defining the limits and showing where the line of blockade was to be, if we attempted to do anything of that kind I think we should find ourselves in much greater legal difficulties than we find ourselves in at the present time. I do not see that we should get anything whatever by doing so. My hon. and gallant Friend said, “Why not apply the doctrine of continuous voyage?” We have applied it and worked it, and it is the very foundation of the whole of the action which we have taken. You can not blockade an enemy through a neutral country except by the operation of that doctrine. Our plan is to arrest all commerce of Germany, whether going in or
coming out, whether it comes through a neutral port or a German port; that is the whole object and the whole difficulty of our position. We have to discover for certain what is German and what is neutral commerce. I can not understand what more you can do by blockade. (Ibid. p. 1815.) * * *

British contraband list, 1916.—On April 13, 1916, the British foreign office issued a list of articles declared contraband of war, saying:

The list comprises the articles which have been declared to be absolute contraband as well as those which have been declared to be conditional contraband. The circumstances of the present war are so peculiar that His Majesty's Government consider that for practical purposes the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy Government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same, and our treatment of them must be identical. (Par. Papers, Misc. No. 12 [1916].)

This list enumerated about 170 articles arranged alphabetically from "acetic acid and acetates" to "zinc."

Lists of contraband and categories.—The attempt to make lists of articles which may be declared contraband of war has in earlier wars, as in the World War, led to many controversies. Grotius, in 1625, however, enumerated the categories within which articles absolutely contraband, conditional contraband, and free articles might fall, though, as previously stated, not using the term "contraband." The practice of publishing lists of contraband has made it necessary to make frequent additions and changes in the list, which make the administration of the laws in regard to contraband difficult for the belligerent and the observance difficult for the neutral.

While the Instructions for the Navy of the United States Governing Maritime Warfare of June, 1917,
referred to a contraband list, it was a classification by categories, leaving a reasonable freedom for both belligerent and neutral. Article 24 of these rules is as follows:

The articles and materials mentioned in the following paragraphs (a), (b), (c), and (d), actually destined to territory belonging to or occupied by the enemy or to armed forces of the enemy, and the articles and materials mentioned in the following paragraph (e) actually destined for the use of the enemy Government or its armed forces, are, unless exempted by treaty, regarded as contraband.

(a) All kinds of arms, guns, ammunition, explosives, and machines for their manufacture or repair; component parts thereof; materials or ingredients used in their manufacture; articles necessary or convenient for their use.

(b) All contrivances for or means of transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof; materials or ingredients used in their manufacture; instruments, articles or animals necessary or convenient for their use.

(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers and other articles, machines, or documents, necessary or convenient for carrying on hostile operations.

(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery or other articles necessary or convenient for their manufacture.

(e) All kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture.

In a list of articles of contraband of war it is customary to name clothing of military character. In modern warfare the important supply for a belligerent may be clothing of all kinds, as the supply of one kind of clothing may make it possible by substitution to supply another to the armed forces because almost any kind of clothing may be used for certain services where the combatants are not brought into immediate contact.

British decisions in World War.—The doctrine of continuous voyage received attention from time to time in the British courts during the World War. The conditions of commerce were such as to make transportation through neutral countries common. An elaborate statement on the subject was made by Sir Samuel Evans in the
case of the *Kim*, the *Alfred Nobel*, the *Bjornsterjne Bjornson*, and the *Fridland*, decided in September, 1915. He said:

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. * * *

The argument still remains good, that if shippers, after the outbreak of the war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out "to order" simpliciter, but to branches or agents of the shippers. That circumstance does not, in my opinion, make any material difference. (The *Kim* [1915], p. 215; see also 1922 Naval War College, p. 50, 96–98.)

In the case of *Bonna* in 1918, the question was as to the condemnation of 416 tons of coconut oil shipped on a Norwegian steamship and seized in a Bristol port. The Crown contended that it rested on the claimants who were neutral—

to establish that the destination of the oil was neutral; and, further, that the oil was subject to condemnation on the ground
either (1) that it, and the margarine for the manufacture of which it was acquired, should, in the circumstances, be deemed to have an enemy destination; or (2) that such margarine, when manufactured, would to the knowledge of the claimants be consumed in Sweden in substitution for Swedish butter to be supplied to Germany. (The *Bonna* [1918], p. 123; see also 1922 Naval War College, p. 172.) * * *

Statistics were given in evidence to show the increase of the importation into Sweden of raw materials for margarine and of the production and sale of margarine, and to show the simultaneous increase of the export of butter from Sweden to Germany. They were interesting, and beyond doubt they proved that the more margarine was made for the Swedes the more butter was supplied by them to the Germans; and that when by reason of the naval activity of this country the imports for margarine production became diminished, the Swedish butter was kept for consumption within Sweden itself and ceased to be sent to the enemy. (Ibid. p. 175.)

**Consignments.**—In early times the place to which goods of the nature of contraband were to go was much more a matter of vital concern to a belligerent than the person of the consignee. Gradually the person to whom the goods are consigned has become a more important factor in determining the ultimate destination of such goods. During the World War, when the means of transportation were so highly developed, there arose many questions in regard to consignments.

In 1921, on appeal, a case was brought before the judicial committee of the privy council and Lord Parmoor stated:

The appellants are an import and export company claiming on behalf of Enrique Rubio, who was the shipper and consignor of certain boxes of Valencia oranges seized on the Norwegian steamships *Norue*, *Grove*, and *Hardanger*, during December, 1915, while on voyages from Valencia, in Spain, to Rotterdam, in Holland. The amount involved is not considerable, but it was stated that the case had been selected as a test case which would govern a number of other cases. * * *

The consignee named in the bill of lading covering the oranges shipped on the *Norue* was A. J. de Graaf, and the consignee named in the other two bills of lading, covering the oranges shipped on the *Grove* and *Hardanger*, was Van Hoeckel. * * *
The contention of the appellants is that the destination of the voyage was Rotterdam, and that if the voyage had been carried through without interruption the oranges would in the ordinary course of business have been offered to local dealers at public auction, thereby becoming part of the common stock of a neutral country, to whatever consumers they might ultimately be sold. It was said that if this contention is not accepted, and it is held that the anticipation that a large proportion of the oranges may go for consumption in Germany is sufficient to make them contraband, the consequence is that goods within the category of conditional contraband would be liable to seizure and condemnation wherever there was anticipation that they might be largely sold to enemy customers. * * *

Their Lordships are unable to hold that the mere fact that goods will be offered for sale by auction at the port of arrival is in itself conclusive of the innocency of their destination. It would appear to them to be too wide a generalization that whatever the special conditions may be, the goods could never be condemned as contraband, if once it is established that they would be offered at public auction in a neutral market. (1921 A. C. 765.)

On other grounds it was decided that at the time of seizure there was a substantial interest in the consignment held by a German firm and the judgment of the prize court that the oranges were lawful prize was affirmed.

Position of Admiral Rodgers.—Writing in 1923, Admiral W. L. Rodgers, United States Navy, took the point of view that modern trade systems call for changes in international law.

Blockade and contraband both operate against the organized belligerent effort of the hostile government. But new developments of international trade and transportation are rendering it possible that adherence to the old rules makes it increasingly difficult for a belligerent to disorganize and disrupt the national life of the enemy, yet this is a legitimate and humane method of practicing war.

The basis of principle of the chief rules now current were established before commerce and transportation assumed their present great scale through the agency of steam power. The size of nations, their power and their complexity have become so great that the old rules of contraband and blockade need great:
modification. Present-day practice, however, by certain great powers, is in accord with present world conditions, no matter how loud conservative outcry may be against current practice. Great Britain's position of maritime preponderance for over a century has given her a singularly clear insight into the workings of international law. As we now wish to rival Great Britain in our merchant trade, we can not fail to find our national advantage in accepting the views of international law which she has so consistently maintained.

The position of the United States administration of the day, representing the nation, has varied according to requirements and interest of the nation, (or of special class interests), as it was either belligerent or neutral. Other nations vary in the same way.

In time of our neutrality we have stood for neutral rights of trade and freedom of the seas. In time of our belligerency we have stood for the rigor of the game, extension of contraband lists, continuous voyage, etc. In the Civil War our stand on continuous voyage was a forward step for belligerent privilege. Our views of immunity for private property during that war were different from those we urged before and after that period when other peoples were at war and the United States was neutral. (17 Amer. Jour. Int. Law [Jan. 1923], p. 7.)

Opinion of Sir Erle Richards.—The late Sir Erle Richards, who often during the World War maintained before British courts the rights of neutrals, said:

The particular items which can properly be included in lists of contraband must depend to some extent on the particular circumstances of each war, but it seems certain that belligerents must have the right to determine those lists in the first instance. An attempt to enforce fixed lists of contraband, irrespective of any future advance in chemistry, was made at the London Conference; but the agreement there arrived at was found to be wholly impracticable, and was abandoned by every one of the belligerent Powers. The scheme of the Declaration of London was to have three lists: the first of articles which might be treated as absolute contraband, the second of articles which might be treated as conditional contraband, the third of articles which could never be declared contraband at all. But these lists proved to be wholly inappropriate, and the war had not long been in progress before it was found that some articles in the third or free list were essential to the manufacture of munitions: raw cotton, rubber and metallic ores, for instance, were found to be of such importance in munition making that they were declared
to be absolute contraband, although in 1909 it had been agreed that they should never be declared contraband at all. The Allies refused to be bound by the Declaration in this respect from the very first, and the Central Powers soon followed suit. This experience teaches us that it is impossible to have lists fixed in neutral. (17 Amer. Jour. Int. Law [Jan. 1923], p. 7.)

Moore on doctrine of contraband.—Judge Moore in 1923, referring to the practice and arguments made during and subsequent to the World War in regard to absolute and conditional contraband, said:

During the recent war there were exigent belligerent measures which in effect merged the second category in the first. These measures were defended on the ground that the "circumstances" of the war were "so peculiar" that "for all practical purposes the distinction between the two classes of contraband" had "ceased to have value"; that "so large a proportion of the inhabitants of the enemy country" were "taking part in the war, directly or indirectly, that no real distinction" could be drawn "between the armed forces and the civilian population"; that "similarly" the enemy government had "taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for government use"; and that "so long as these exceptional conditions" continued, "belligerent rights in regard to the two kinds of contraband" were the same and the "treatment of them must be identical."

Probably under the influence of these arguments, and without full appreciation of the implication, which they seem to have been anxiously designed to convey, that the measures were to be regarded as highly emergent and altogether exceptional, it has lately been intimated that the distinction, defended and maintained through ages of almost forgotten time, between articles absolutely and articles conditionally contraband, has been shown by the recent war to be unsound and should no longer be preserved. One writer has indeed gone so far as to assert that the distinction "dates from the time when armies were very small, and comprised only a very small fraction of the belligerent countries," a statement that would have astonished Grotius, and that must equally astonish those who are familiar with the history, either legal or military, of the wars growing out of the French Revolution and the Napoleonic Wars. For reasons such as these it has been suggested, but not, I believe, by any government, that the category of "conditional contraband" should now be evacuated and decently interred, and its contents
included in the absolute list. The suggestion is startling, since its acceptance would at once render illicit practically all trade with countries at war, and put in jeopardy much of the trade even between countries not at war.

But we must not permit ourselves to be betrayed by illusions of novelty. We do our ancestors grave injustice if we think they admitted that a belligerent might capture at sea and confiscate all commodities destined to his enemy which perchance might be used for a military purpose, but believed that belligerent governments then could not or did not appropriate within their own jurisdiction whatever they needed for war. Our ancestors were not so hopelessly senseless. They were, on the contrary, consciously engaged in a conflict, which has not ceased, between belligerent claims to stop trade and neutral claims to carry it on. Neutrals denied the right of belligerents to capture and confiscate anything but articles primarily useful for war. So far as concerned foodstuffs, the defenders of neutral rights, while fully aware that armies must and did eat, maintained that the noncombatant mouths always vastly outnumbered the combatant, so that the preponderant consumption of food was ordinarily not hostile. They carried their point, with the single concession, the narrowness of which was mutually and perfectly understood, that foodstuffs should become contraband if, when seized, they were destined for distinctively military use. (Moore, International Law and Some Current Illusions, p. 26.)

Admiral Jellicoe on treatment of seized vessels.—Admiral Jellicoe, writing of the operations of the British fleet, 1914–1916, says:

The fate of the detained ship was decided in London on receipt of the report of examination. As was perhaps natural, the sentence on many ships' cargoes pronounced in London was not accepted without question from the Fleet, and a good deal of correspondence passed with reference to individual ships. We, in the Fleet, were naturally very critical of any suspicion of laxity in passing, into neutral countries bordering on Germany, articles which we suspected might find their way into Germany, and constant criticisms were forwarded by me, first to the Admiralty, and, later, to the Ministry of Blockade, when that Ministry was established. The difficulties with which the Foreign Office was faced in regard to neutral susceptibilities were naturally not so apparent in the Fleet as to the authorities in London, and though many of our criticisms were perhaps somewhat unjustifiable, and some possibly incorrect, it is certain that in the main
they were of use. Indeed, they were welcomed in London as giving the naval point of view. (The Grand Fleet, 1914–1916, p. 76.)

Convoy and certification.—On April 16, 1918, the Dutch Minister of Marine announced to the First Chamber that “the Government would send a convoy of Government passengers and goods to the Netherlands East Indies.” Mr. Balfour in a dispatch to the minister at The Hague said on April 25, 1918, that:

You should let the Netherlands Government know that His Majesty’s Government of course do not recognise the “right of convoy,” and that they will exercise the belligerent rights of visit and search of merchant vessels should the Netherlands Government carry out their proposal. (Parliamentary Papers, Misc. No. 13 [1918], p. 4.)

The Dutch, however, continued their preparations and on April 29, 1918, the Netherlands Legation informed Mr. Balfour that:

In connection with the decision of the Netherlands Government to send a convoy to the Dutch East Indies to relieve military men, and to send out Government officials with their families and some urgently needed military and other Government goods, I have the honour, in accordance with instructions received, to inform your Excellency that the said convoy will be composed of the following:

1. Her Majesty’s Hertog Hendrik, accompanied by a coal boat requisitioned for that purpose, for the purpose of bunkering during the voyage.

2. A Netherlands merchant ship, transformed into a man-of-war according to the rules of the VIIth Convention, 1917, for the transport of military men to the Dutch East Indies, having as cargo military stores.

3. A Netherlands merchant ship requisitioned by the Netherlands Government under convoy of the man-of-war mentioned sub 1 for the transport of Government passengers with their families, and having for cargo exclusively goods of the Netherlands Government destined for the Government of the Dutch East Indies.

The loading of all goods and the embarkation of all passengers will be effected under strict supervision of Netherlands Government officials.

The passengers and their luggage will be submitted to a strict examination.
No private correspondence may be carried. The ships carry neither ordinary nor parcel mail.

Of the Government goods, the usual manifesto will be produced with certificates of origin issued by the Inspector of Import Duties.

I have been directed to add that it is intended to send the above convoy about the middle of the month of June, and that it will sail round the Scottish Isles and the Cape of Good Hope. (Parliamentary Papers, Misc. No. 13 [1918], p. 5.)

Various delays occurred, but on May 31 a communiqué was issued by the Dutch explaining that:

Warships will therefore only carry naval personnel and war supplies, and the merchant ships only Government passengers with their families and Government goods. It is not intended to institute under protection of warships commercial intercourse which, without such protection, would not be permitted by the belligerents according to their views of commercial liberty of neutrals. No mail will be carried. It is obvious that convoy commandant would not tolerate any examination of the convoyed ships. According to usage, he will, on meeting belligerent warships, permit perusal of cargo documents in his custody by commander at latter's request. In fact, those documents will be communicated to Powers concerned before departure from Netherlands. As is customary in these times when despatching warships with view to preventing misunderstanding in event of meeting belligerent warships, notice has been given to Governments of belligerents of the despatch of the convoy. (Ibid. p. 7.)

On June 7, 1918, in a note to the Dutch minister at London Mr. Balfour said:

2. It was therefore with considerable surprise that I received on the 31st ultimo, by telegraph from Sir W. Townley, a translation of an official notice published in the Dutch press that morning by the Ministry of Marine at The Hague, announcing among other things that "the commander of the convoy would not tolerate any examination of the convoyed ships."

3. In the face of this announcement, so made, His Majesty's Government feel compelled to reiterate in the most formal manner that the right of visit and search which Great Britain, whether she was a neutral or a belligerent, has, in conformity with the rules of international law, consistently upheld for centuries, is not one which she can abandon.

4. As the Netherlands Government is well aware, the claim that immunity from search is conferred on neutral merchant ves-
sels by the fact of their sailing under the convoy of a man-of-war flying the national flag has never been conceded by this country. By the course, therefore, which they are now pursuing, they do in fact demand that Great Britain shall abdicate her belligerent right to stop contraband trade by the regulated exercise of naval force, and, in the middle of a great war, abandon the allied blockade. This is a demand to which Great Britain could not possibly accede. (Ibid. p. 8.)

After a lengthy memorandum the British Government, however, waived its "right of visit and search in this particular case, as an act of courtesy" of an exceptional nature, and the following statement of conditions was made:

(a) A detailed list of all passengers sailing in the convoy, to be furnished to His Majesty's Government, none but Dutch Government officials and their families being allowed to proceed.
(b) Full particulars of the cargo on board any merchant vessel sailing in the convoy to be supplied in the same way as is now done by the Netherlands Oversea Trust in respect of ships under their control.
(c) The Netherlands Government to give a formal guarantee that no goods shipped in the convoy are either wholly or in part of enemy origin.
(d) The ships sailing under the Dutch naval flag, including the converted liner, not to carry any civilian passengers, nor any goods or articles other than warlike stores destined for the colonial authorities or forces, of which complete lists should be furnished.
(e) No mails, correspondence, private papers, printed matter, or parcels to be carried by any ship in the convoy (except official despatches of the Dutch Government).
(f) The convoy not to sail until the above stipulated particulars and undertakings have been furnished and have been found satisfactory by the British authorities. (Ibid. p. 9.)

The Dutch Legation at London in a note of June 15, 1918, said:

In reply to the note you were good enough to address to me on the 7th instant, I have the honour to inform you, in accordance with instructions received, that the Netherlands Government are pleased to see that both the British and the Netherlands Governments agree as to the mode of carrying out the plan for the convoy mentioned therein. The conditions stated correspond
almost identically with the intentions communicated in my note of the 29th April, last. A complete list of passengers had also been prepared, to be sent, together with full particulars of the cargoes, to all foreign Legations concerned, as the Netherlands Government wish to avoid even any possible impression that anything is being concealed. They can not agree with the point of view that their readiness to conform to the views of the belligerents of the liberty of neutral commerce is difficult to reconcile with the whole plan of the convoy. The protection of the men-of-war has the advantage of excluding all unnecessary delay. The Netherlands Government are fully aware that the British Government do not recognise the right of convoy upheld by the first-named Government and all other nations, but, in their opinion, this point of international law can be left out of account in the present case of a very special sort of convoy destined to transport between the mother-country and its colonies none but goods for the service of the Government and Government passengers, with their families. (Ibid. p. 10.)

This case involved official Government transport and a form of certification which was resorted to as a matter of convenience such as might often be found advantageous by both parties. Mr. Balfour’s note of June 7 had referred particularly to neutral merchant vessels.

The “Black Lists.”—

Closely connected with the legal conception of trading with the enemy, is the institution of the Statutory or “Black Lists” initiated for the first time in 1915 by Great Britain and France. All commercial intercourse by British and French citizens with the persons or firms included therein was strictly forbidden on account of the enemy nationality or hostile associations of such persons or firms. By section 1, subsection 3 of the Trading with the Enemy (Extension of Powers) Act, 1915, corrections and additions of further persons or firms to the Statutory Lists could be made by Order in Council, and were in fact so made from time to time up to the end of the war.

In the case of Great Britain, the adoption of the “Black Lists” was a distinct departure from the ordinarily and generally accepted criteria governing enemy character. The individuals or corporations comprised in the lists with whom intercourse by British subjects was rendered illegal as involving trading with the enemy, were persons or firms who, in the great majority of cases, were resident or carrying on business in neutral countries. It would thus appear that, in so far at least as the “Black Lists”
were concerned, Great Britain was applying the test of nationality, and not the traditional criterion of domicile. (Colombos, Law of Prize, p. 224.)

Proposal to prohibit export of contraband.—At the meeting of the American Society of International Law in 1915, Professor Butte proposed that in time of war the export of contraband be prohibited by neutrals. He argued that:

Under present conditions, the captor always acts on the presumption that a neutral ship bound for an enemy port or a neutral port near enemy territory is transporting contraband. Except when under convoy, such vessels carrying a mixed cargo are presumed guilty. Their innocence must be established by a visit and search; their manifest and other papers have little or no probative value. Under modern conditions, with large ships and large miscellaneous cargoes, the search of each vessel consumes many hours, and not infrequently can not be carried out on the high seas at all. The neutral ship is often taken into the belligerent's nearest port and detained there for days to be unloaded and reloaded, to the great damage and loss of neutral shippers and shipowners. So long as neutral states allow the export of contraband from their shores, it seems that they have no just grounds of complaint against a thorough search of each vessel intercepted by the belligerent, however long it may reasonably require and whatever the means that may be reasonably necessary. The belligerent must obtain for himself the assurance that neutral states now fail or refuse to give. Surely the belligerent would be glad to be relieved of the burden, the liability, and the endless difficulties and controversies with neutrals connected with the execution of these minute searches, if he had some assurance upon which he could rely that no contraband was put aboard ship in neutral ports.

By the enforcement of such prohibitory statutes, neutral maritime commerce would be safer, because the risk of confiscation of ships or of condemnation to pay expenses and costs because of contraband found on board would be almost entirely eliminated; and delays and losses to a shipper of innocent goods in the same vessel would be avoided. A shipper of innocent goods can not feel safe under the existing rules and the uncertainties as to the doctrine of infection. How is he to know when he sends his goods on board (unless he owns the ship himself) whether contraband will be carried, and if so, what proportion by value, weight, volume and freight of the whole cargo? And who knows
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what proportion in law infects the ship and renders it liable to confiscation? His goods may be thrown out at the first convenient port; and it is incumbent upon him to recover them and to reload and reship them, if he can find the space, at his own expense. He has no recourse against the captor for the interruption of his trade, the damage to himself or his customers, or for other losses by reason of the delay. In many cases, especially if his goods are perishable, he is fortunate if he recovers a fraction of their value.

Further, the prohibition of the export of contraband from neutral states would tend to restrain the belligerent from arbitrarily extending the list of contraband articles. (Amer. Soc. Int. Law, Proceedings, 1915, p. 127.)

_Treaty provisions._—The United States has been a party to many treaties in which certification in varying forms has been recognized as in the treaty with Bolivia, 1858:

**ARTICLE XXII**

To avoid all kinds of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they agree that, in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea-letters or passports, expressing the name, property and bulk of the ships, as also the name and place of habitation of the master and commander of said vessel, in order that it may thereby appear that said ship truly belongs to the citizens of one of the parties; they likewise agree that such ships being laden, besides the said sea-letters or passports, shall also be provided with certificates, containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form; without such requisites said vessels may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall prove to be owing to accident, and supplied by testimony entirely equivalent.

**ARTICLE XXIII**

It is further agreed that the stipulations above expressed, relative to the visiting and examination of vessels, shall apply only to those which sail without convoy; and when said vessels
shall be under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

Other treaties contain identical or similar provisions: Brazil, 1828; Central America, 1825; Chile, 1832; Colombia, 1824 and 1846; Dominican Republic, 1867; Ecuador, 1839; France, 1778 and 1800; Guatemala, 1849; Hayti, 1864; Mexico, 1831; Netherlands, 1782; Peru, 1851, 1870, and 1880; Prussia, 1785 and 1799; Salvador, 1850 and 1870; Spain, 1795; Sweden, 1783; Venezuela, 1836 and 1860.

Certification of cargo.—The treaty provisions just mentioned were aimed to secure regularity of papers and to avoid unnecessary delays. The papers would to some extent facilitate visit and search, but would not necessarily exempt the vessels from seizure. The absence of such papers would make the vessel liable to be declared prize.

Various propositions have been made from time to time in regard to methods of avoiding the inconvenience of visit and search. Many of these plans have involved placing of additional obligations upon the neutral. Some of these contain obligations which if not fulfilled by the neutral state would give rise to new international differences and would place a part of the burden of the war upon the neutral. Even if a neutral should be conscientious in investigating and certifying the cargo and character of a vessel about to leave port, such a vessel might take on cargo after leaving port as has been the practice in the days of smuggling when the rewards are great. It can not always be presumed that the officers investigating and certifying to cargoes would not in some countries yield to inducements to make false returns. Under the proposed systems the right to visit and search was to be reserved, thus placing the neutral under a new obligation merely without necessarily relieving the vessel from any inconvenience.
Professor Hyde in commenting on certain aspects of the matters involved said:

Doubtless latitude should be accorded a belligerent in attempting to check traffic in contraband, and to ascertain its existence on the high seas. The procedure, however, whereby innocent ships are forced to deviate from their courses, put into belligerent ports and there submit to protracted searches as a means of indicating whether they or other vessels are participating in the war, or are about to do so, appears to be at variance with the demands of justice.

The British argument and the facts which supported it indicate why the right of search as exercised in previous wars is inapplicable to modern conditions. There is solid reason for the attempt to place within the reach of a belligerent, by some other process less injurious to innocent shipping, information concerning the nature of neutral cargoes and the voyages of neutral vessels. It is believed that neutral governmental certification of ships' papers would offer as reliable assurance as to facts ascertainable by search as could be furnished by a neutral convoy. Moreover, the burden of making such certification might be fully compensated by benefits derived from the freedom from annoyances under the system now prevailing. General approval of a procedure establishing reasonable neutral guarantees effected through increasing governmental oversight of neutral commerce, may cause the exercise of the belligerent rights of visit and search to sink into a much desired desuetude. (2 Hyde, Int. Law, p. 444.)

Doctor Lawrence had previously, as Professor Hyde indicates, raised this question when after reciting the facts as to the cases arising during the South African war Doctor Lawrence says:

It is clear from the bare recital of these facts that in any future naval struggle carried on by powerful maritime states the position of neutrals possessed of a great mercantile marine will be intolerable. The only way of escape is to modify the right of search to such an extent that belligerents may obtain reasonable assurance of the innocence of harmless cargoes, without inflicting on neutrals the ruinous and humiliating process of deviation to a belligerent port and a complete overhaul therein of all the vessel contains. The continuance of the existing state of things involves grave danger of a great extension of any naval war that may break out in the near future. It is worthy of consideration whether some system of official certificates could not be devised,
LETTERS OF ASSURANCE

whereby neutral vessels could carry, if they chose, satisfactory assurances that their passengers and cargoes consisted only of the persons and goods set forth and described in their papers. A visiting belligerent officer could then decide whether to effect a capture or not, without the need of a preliminary search. (Principles of Int. Law, 4th ed., p. 473.)

Letters of assurance, 1917.—Lord Robert Cecil, Minister of Blockade and Undersecretary of State for Foreign Affairs, said in the House of Commons, March 27, 1917:

There is one other device which I am going to describe to the House and which has really been of great assistance to the blockade. I should like to describe it, because I believe it to be the type of device which ought to be employed in a blockade of this description. About the time I was appointed, the Consul-General of the United States came to see me, and he pointed out to me: "You say in your diplomatic representations to the United States that, after all, British goods suffer just as much as American goods from the blockade, and that we are not really injuring American goods and American traders in any way beyond the injury which the British trader suffers. That is not quite right, because the British trader can go to your War Trade Department before he makes any arrangements with regard to the shipping of the goods and he can obtain a licence. When he has got his licence he knows that it is all right, and he can proceed to secure ship's space and make his financial arrangements. He is able to carry on his trade without fear that it will be stopped at the last minute. That is not the case in the United States. Cannot you do something to supply that want?" We thereupon organised a system of Letters of Assurance as it is called in the States. It is perfectly voluntary. Nobody need take out letters of assurance unless he wishes to do so, but if he likes to go to our authorities there and make inquiries whether a particular ship is likely to meet with difficulty, he can obtain from those authorities in America letters of assurance, and then the goods, generally speaking, unless something exceptional intervenes, go through without any trouble or difficulty. That device has been of enormous importance in smoothing the difficulties which had before then existed with America, and it has been of equal importance in enabling us to know exactly what is going on in reference to exports from the United States to these neutral countries. It has enabled us, without any unfairness or injustice, to regulate the
Supplies to these neutral countries. (Parliamentary Debates, Commons, 92 H. C. Deb. 5 s., p. 254.) * * *

I think the visit of the Consul-General to me took place rather more than a year ago, and I established this system as soon as it could be established. I should think it is about a year ago. It has taken some little time to get it in working order. It is entirely a voluntary system, but now, though I do not say it is universal, it is very largely utilized by traders between the United States and neutral countries. In my judgment, as the result of these measures and other measures, because, of course, they were accompanied by other measures of general tightening-up the various devices which before existed, there has been for some months past a complete cessation of overseas importation into enemy countries. I will give some instances of that in a moment. My hon. Friend the Member for Devizes (Mr. Peto) said that we had really done nothing, at any rate up to the summer or the third quarter of 1916, because we had not succeeded in stopping the trade of what I will call, roughly, the home produce of these neighboring countries. I think he must forget that right through the early stages the question of the home produce of neighboring neutrals was never raised. The whole question which was then discussed was, "Are you really stopping the overseas trade and the imports into Germany?" That was accomplished completely, or substantially completely—nothing is complete in this world—about June or July of last year. * * *

I have had some figures prepared. Three or four of them I do not think will do any injury to the State, at any rate, some of them will not. The form in which these figures have been prepared deals with the whole of the neutral countries—that is to say, the three Scandinavian countries and Holland, all in a lump. After all, that is the real test. If you can show that the imports into the whole of these countries have been reduced to something about either just over or just under the pre-war normal figure, you may fairly conclude that there is no considerable direct import into the enemy country. * * *

I felt when we had succeeded in stopping all imports, apart from questions of smuggling and things of that kind—all overseas imports—we still had not done all that was necessary in order to complete the blockade of Germany. There was the question of the home produce of the border neutrals. That is a much more difficult subject to deal with, as my hon. Friends who have spoken will realise. The foundation of a blockade is the prize; that is the sanction. An ordinary blockade entirely depends upon it. You can only stop ships and goods going to a blockaded port which are and can be condemned in a Prize Court. Where you
have to deal with a direct blockade, the matter is perfectly simple. You merely have to ascertain that the ship is going to a blockaded port and put it into a Prize Court, and, if you can prove that fact, the ship is condemned as a matter of course. The House is aware that that is not the problem with which we have to deal here. We have to deal with an indirect blockade, that is, a blockade through neutral countries. There the position is much more difficult. You can stop and get condemned in a Prize Court any goods which are going into the neutral countries, the ultimate destination of which is the enemy country. That is described in our text books as "continuous voyage," and I believe in the American text books it is described as the "doctrine of ultimate destination." That is the point. We have acted to the full on that doctrine, and have stopped all goods, the ultimate destination of which was Germany or any enemy country. (Ibid. p. 258.)

General.—It is evident that the problem of ratio determining liability of a vessel to condemnation is not confined to a single standard but may be value, weight, volume, or freight charges of cargo. Doubt may easily arise as to any of these. Lists of named specific articles, contraband of war, may not include all articles which from their nature might be classed as contraband. The enumeration of categories such as food, fuel, clothing may be inclusive though less definite. Foods consigned to order may be sent to a prize court. Some other consignments may be suspicious and receive similar treatment. The burden of proof of liability before the World War rested, in general, on the captor. Naturally the relation of ports of neutral states to the means of communication with belligerent states would influence the opinion upon the probable ultimate destination of cargo upon a vessel that had been brought-to for visit and search. A certificate of a neutral official as to the innocent character of the goods might not be regarded as proof of such character, as other goods might have been taken on at sea or elsewhere after sailing. A letter of assurance from one belligerent might be a ground of suspicion to the other that there was some collusion between the shippers and the belligerent.
The responsibility for seizure must rest upon the commander of the visiting vessel of war. While the master of a merchant vessel may consider that his vessel is exempt from seizure, the commander of the visiting vessel of war may have information not possessed by the master of a merchant vessel and suspicion justifies taking the merchant vessel before the prize court.

In the situation as stated there are goods of such character that they may by well-known processes be converted into articles of special use in war and under modern conditions the immediate consignment to a neutral port may have little significance in determining the ultimate destination. Certification of innocent character and similar documents are not recognized as binding in international law. The master has good grounds for maintaining exemption from seizure, but these are not sufficient to preclude seizure.

**SOLUTION**

The contentions of the master are not grounds sufficient to exempt the merchant vessel from liability to seizure.