

International Law Studies—Volume 26

International Law Situations

With Solutions and Notes

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INTERNATIONAL LAW SITUATIONS

WITH SOLUTIONS AND NOTES

SITUATION I

CONTINUOUS VOYAGE

States X and Y are at war. Other States are neutral. The *Alta*, a private merchant vessel lawfully flying the flag of State Z, is bound for a port of State B, a State bordering on State Y. The *Alta* is visited on the high sea by a cruiser of State X. The cruiser finds on board fodder suitable for stock raised in State B. The supply of this fodder would, however, make possible the exportation of additional animal products from State B to State Y. The cruiser captures the *Alta*, alleging continuous voyage through substitution. Should the capture be sustained?

SOLUTION

The capture should not be sustained under the doctrine of continuous voyage.

NOTES

Naval War College discussions.—The doctrine of continuous voyage has received consideration at the Naval War College from time to time, and particularly in 1901 (International Law Situations, pp. 38–85) and 1905 (International Law Topics and Discussions, pp. 77–106). From the discussion of 1905 the conclusion was drawn that—

The actual destination of vessels or goods will determine their treatment on the seas outside of neutral jurisdiction.

*Treaty of 1674.*¹—Early treaties contained provisions in regard to commerce; e. g., one to which there have been many references is the treaty between Great Britain and the United Provinces, December 1–11, 1674, Article II:

Nor shall this freedom of navigation and commerce be violated, or interrupted by the reason of any war; but such freedom shall extend to all commodities which might be carried in time of peace; those only excepted, which are described under the name of contraband-goods, in the following articles:

Eighteenth century comment.—The publications of the Navy Records Society relating to the law and custom of the sea, 1649–1767, edited by Marsden, quote from British documents:

1758. Holderness to Yorke as to the Dutch carrying on the colonial trade of the French.—*S. P. Foreign, Holland 481, 21st July*

* * * I have enlarged the more upon this point, as I could wish that it were better understood upon the changes of Rotterdam and Amsterdam, as I am convinced that they serve more to keep up the clamour against the English than other points of a more difficult nature—I mean the proper bounds that ought and must be set between interrupting the real fair trade of the Dutch, and suffering them to carry on the trade of the enemy in a manner that passes the bounds of the neutrality they profess. And this brings me to the last article I am to treat of upon this subject; I mean the visiting of Dutch ships at sea, and effectually preventing them from supplying the French colonies with necessaries, and carrying on for them a trade which they can not support themselves in time of war, and to which the Dutch are not admitted in time of peace. This is a point of real importance to the King's service, and of so great consequence that I am persuaded his Majesty will never be induced to desist from his just pretension
* * * (Vol. 11, p. 382.)

Later in 1762, Murray, one of the law officers, wrote:

* * * I think the order desired by the Dutch insidious, and the more improper as it proceeds upon a kind of reciprocity with Spain. I am of opinion that it should not be granted. I have thrown upon paper a sketch of the sense of an answer which I

¹ Some of this discussion may be found in 1921 Proceedings Am. Soc. Int. Law, pp. 45–55.

send your Lordship inclosed. If you approve the substance, you will change the form as you think fit. * * *

Dated 1st May, 1762.

(Ibid. p. 397.)

A memorandum given by France for guidance of Dutch merchants and published by authority in the Utrecht Gazette, July 8, 1756, states a principle revived by Great Britain in 1915:

ART. 7. If the Dutch ships carry any goods or merchandise of the growth or manufacture of the enemies of France, they shall be esteemed good prizes; but the ships shall be discharged.

N. B.—The regulation made in the last war permitted the Dutch to trade with the enemy, in conformity to the treaty of commerce made with the States in 1739. But as the King revoked that treaty at the conclusion of the war the goods of the growth or manufacture of England, or belonging to the English, which shall hereafter be found on board a Dutch ship, shall be declared good prize, unless the 14th article of that treaty should hereafter be renewed. (Marriott, Case of the Dutch Ships, p. 74.)

The rule is that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship and is liable to be taken. (Lord Mansfield in *Berens v. Rucker*, 1760, K. B. 1 Wm. Black, 314.)

The problem of continuous voyage, as it was understood in the middle of the eighteenth century, may be inferred from the statement of the case of *Hillbrands contra Harden*, 1761:

By the treaties of alliance betwixt Great Britain and Holland, particularly that of 1674, the liberty of navigation and commerce is secured to the one state even with the enemies of the other; and, excepting contraband goods, that no ship of either nation shall be searched for goods belonging to the enemies of the other, and that they shall be free to carry all goods which they can lawfully carry in time of peace, even supposing the whole cargo should belong to an enemy.

In the present war betwixt Britain and France, the power of the latter at sea has been so reduced as to oblige them for safety to carry on their whole commerce in Dutch bottoms. And if this plan can be carried into execution under color of the above-mentioned treaties, the British merchants lie under a great disadvantage; for their cargoes lie open to capture, while the French cargoes are free from it.

By edicts of the King of France, no goods can be exported from their colonies but in French bottoms. At present these edicts are suspended and the commodities of the French colonies are imported into France in Dutch bottoms. At least Dutch ships are employed within the narrow seas where there is the greatest risk of capture * * *. In short, French goods in a Dutch ship ought to be secure, where the Dutch ship is preferred as the better sailor, or as being hired at a cheaper rate. But where none of these circumstances occur, and that the Dutch ship is preferred for no other reason than to protect from capture, it ought not to have the benefit of the treaties. (Kames, Select Decisions, 242.)

Early nineteenth century.—Vessels of one state were sometimes allowed to carry on trade between their own ports and the colonial ports of another state. This trade was at times permitted to continue without molestation in the time of war, even though one belligerent had cut off the colonies of the other belligerent. Sometimes neutrals might be permitted to enter into previously closed colonial trade. These neutrals might also be engaged in trade with the belligerent country. Some merchants accordingly conceived the idea of bringing goods from the colony to a neutral state, and after discharging and passing the goods through customs there, they then reloaded and carried the goods to the mother country. For example, during the war between Great Britain and Spain in early nineteenth century transportation by the way of the United States from Spanish colonies to Spain under the United States flag was common. Goods were sometimes carried from the colonial Spanish port of La Guayra to Marblehead in the United States, were there entered under bond during slight repairs to the vessel, and then reshipped for Bilboa. On this last stage of the journey an American vessel was captured and taken to a British prize court, as engaged in trade between Spain and her colonies. Of this the court said:

The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of im-

portation into the place where it is done. * * * The truth may not always be discernible, but when it is discovered it is according to the truth and not according to fiction that we are to give the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. (*The William*, 1802, 5 Rob. p. 387.)

This principle is related to the so-called rule of 1756 and sets forth the idea of continuous voyage as understood at the beginning of the nineteenth century.

Lord Stowell's opinions.—Sir William Scott, Lord Stowell, in the case of the *Immanuel* (1799), said:

But without reference to the accidents of the one kind or the other, the general rule is that the neutral has the right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking. (2 Rob. 197.)

Christopher Robinson in 1804, in reporting Sir William Scott's decisions, and discussing condemnations based on the so-called rule of 1756, said:

At that period there were no instructions, in which the principle was laid down; yet then the court did not hesitate to come to a conclusion on the illegality of such a trade. (Appendix A, 4 Rob. p. 8.)

Closed trade regulations were common during the nineteenth century. Even the coastwise trade of the United States was reserved to American vessels and later the same principle was extended to Porto Rico and the Philippines after they were acquired in 1898.

In 1810 Lord Stowell said in the case of the *Luna*—

I can not admit that, because the port of St. Sebastian's borders on ports which are blockaded, that therefore it is less accessible than any other port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent. (Edwards 190.)

Robinson's comment.—In commenting on continuous voyage in the early nineteenth century, Christopher Robinson, editor of British Admiralty Reports, said:

There is one other remark, which the editor takes the opportunity of introducing here, as connected with that branch of the colonial principle which relates to *continuous* voyage. It is merely to point out to those, who may have occasion to observe upon the manner in which that extension has grown out of the original principle, a circumstance which appears to have hitherto escaped notice, viz, that it was in the first instance adopted as a rule of equitable construction in favour of neutral trade, in protection of that part of a cargo, which had gone from *Hamburgh* to *Bordeaux*, and was afterwards captured on the ulterior part of the voyage to *St. Domingo*. Those goods were contended to be liable to condemnation, under the instructions. They were excepted, however, by the interpretation which the court adopted, that the touching at *Bordeaux*, accompanied with *an entry*, and the *forms of exportation*, did not create such an incorporation into the commerce of *France*, as could render the destination of the *continuous* voyage liable to be considered, *as between French ports only*. (6 C. Rob. Note II.)

Kent's opinion.—Chancellor Kent, in 1826, said:

It is very possible that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate and which shall prove sufficient to render it expedient for her maritime enemy (if such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the argument of the foreign jurists in favor of the policy and equity of the rule. (Commentaries (a), p. 229.)

American Civil War.—It was held in many cases before the American Civil War that the destination of the cargo followed the destination of the vessel. During the Civil War the destination of the cargo and of the vessel was separated. The early ideas had in view the transport from a closed colonial port; the later extension was applied to transport between neutral ports, if an ultimate enemy destination could be proven. As was said by the United States Supreme Court in the case of the *Circassian* in 1864:

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, though she intends to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination. (2 Wall. 135.)

As the doctrine of separation of liability of cargo and vessel had developed, this was applied in the case of the *Bermuda* in 1865, in which Chief Justice Chase said:

If by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it. * * *

It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene * * * even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at an intermediate port. (3 Wall. 514.)

This distinguishes the cargo and vessel and considers intention in relation to the ultimate destination of the cargo.

In the case of *The Peterhoff*, in 1866, the Supreme Court of the United States said as to blockade :

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and can not be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence. (5 Wall. 28.)

In the same case reference was made to the contraband on board.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

The Springbok.—Much difference of opinion was called forth by the decision of the Supreme Court of the United States in 1866 by which the cargo of the *Springbok*, a vessel which had sailed from London to Nassau, was condemned, though the vessel was seized when sailing between two neutral ports. The vessel itself was released. In this case the court said :

Upon the whole case we can not doubt that the cargo was originally shipped with the intent to violate the blockade; that

the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching a blockaded port than the *Springbok*; that the voyage from London to the blockaded port was, as to the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing. (5 Wall. 1.)

Writing after but speaking of the period just before the American Civil War, Sir Travers Twiss, agreeing with the law officers of the Crown, as to the case of the *Springbok*, said:

Great Britain and the United States of America had until then been content to enforce against neutral merchants the confiscation of their property upon proof of some *constructive attempt* on their part to violate a blockade; it has remained for the younger sister, under her extraordinary difficulties, to initiate the doctrine of a *prospective intention*, on the part of a neutral merchant, to violate a blockade, and to subject him to the confiscation of his property not upon the *evidence* of any present voyage of the ship and cargo, in which the ship and cargo have been intercepted, but upon the *presumption* of a future voyage of the cargo alone to a blockaded port, after it had been landed from the ship at a neutral port. (Continuous Voyage, 3 Law Mag. and Rev. 4th series, p. 1.)

Many British authorities, as well as many continental writers, regarded the decision in the case of the *Springbok* as unsound.

A formal statement in 1882, with the names of such distinguished members of the Institute of International Law as Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rollin, Travers Twiss, declared the *Springbok* decision—

subversive of an established rule of maritime warfare. * * * that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interests of neutrals, should take an early opportunity of declaring in such form as it may see fit, that it does not intend to incorporate the above propounded theory into its system of maritime prize law and that the condemnation of

the cargo of the *Springbok* shall not be adopted as a precedent by its prize courts.

Such a declaration was never made by the United States.

The Institute of International Law.—The Institute of International Law in 1882 included in the Regulations Concerning Prizes, article 44, a provision that: “In no case can the doctrine of continuous voyage justify condemnation for violation of blockade.”

In 1896, however, the Institute said of contraband:

Destination for the enemy is presumed when the shipment goes to one of the enemy’s ports, or even to a neutral port which, from clear evidence or undeniable fact, is only a temporary stopping place in a commercial transaction having an enemy end. (Annuaire 1896, p. 231.)

Hall’s opinion.—Hall, the English authority, writing of the American extension of the doctrine of continuous voyage, said in 1884 in a note to the second edition of his *International Law*:

During the American Civil War the courts of the United States gave a violent extension to the notion of contraband destination, borrowing for the purpose the name of a doctrine of the English courts, of wholly different nature from that by which they were themselves guided. As has already been stated (§ 234) it was formerly held that neutrals in a sense aided in the hostilities of a belligerent by taking advantage of permission given by him to carry on a trade which was forbidden to them in time of peace. Property engaged to such trade was therefore deemed to be confiscable. During the Anglo-French wars of the revolution traders foreign to France or Spain were permitted to trade between French and Spanish ports and French and Spanish colonies, commerce with the colonies in question having before the war been restricted to trade with foreign ports and the colony. To evade the liability to condemnation in the English courts which entering into the new trade involved, neutral merchants endeavoured to give an air of innocence to their ventures by making a colourable importation into some port from which trade with the colony or the home country was permissible. Thus in the case of the *William*, (5 Rob. 385), a cargo taken on board at La Guayra was brought to Marblehead in Massachusetts, it was landed, reembarked in the same vessel with the addition of some sugar from

the *Havannah*, and within a week of its arrival was despatched to Bilboa. In this and in like cases the English courts condemned the property; but they were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colourable importation to the enemy country. The doctrine upon which the English courts acted was called by Lord Stowell the doctrine of continuous voyage.

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

The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country. On the confession indeed of one of the judges then sitting in the Supreme Court, they seem to have been due partly to passion and partly to ignorance. "The truth is," says Mr. Justice Nelson, "that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exceptions to that feeling. Besides, the court was not then familiar with the law of blockade" (p. 624, n. 1).

The editor of the eighth edition of Hall, 1924, says of Hall's early position:

This statement is not supported by the current American writers on international law.

South African War.—The doctrine of continuous voyage was put to the test through the shipment of goods on a German vessel, the *Bundesrath*, to a Portuguese port near the South African Republic, during the South African War in 1900. A British cruiser captured the *Bundesrath*. The German ambassador protested, saying in a note of January 4, 1900:

With reference to the seizure of the German steamer *Bundesrath* by an English ship of war, I have the honour to inform your excellency, in accordance with instructions received, that the

Imperial Government, after carefully examining the matter and considering the judicial aspects of the case, are of opinion that proceedings before a prize court are not justified.

This view is grounded on the consideration that proceedings before a prize court are only justified in cases where the presence of contraband of war is proved, and that, whatever may have been on board the *Bundesrath*, there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports.

This is the view taken by the British Government in 1863 in the case of the seizure of the *Springbok* as against the judgment of the American prize court, and this view is also taken by the British Admiralty in their Manual of Naval Prize Law of 1866.

The Imperial Government are of opinion that, in view of the passages in that manual: "A vessel's destination should be considered neutral if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral," and "the destination of the vessel is conclusive as to the destination of the goods on board," they are fully justified in claiming the release of the *Bundesrath* without investigation by a prize court, and that all the more because, since the ship is a mail steamer with a fixed itinerary, she could not discharge her cargo at any other port than the neutral port of destination. (Parliamentary Papers, Africa No. 1, 1900, Cd. 33, p. 6.)

On the same date Lord Salisbury informed the British ambassador at Berlin that he was—

entirely unable to accede to his (the German ambassador's) contention that a neutral vessel was entitled to convey without hindrance contraband of war to the enemy, so long as the port at which he intended to land it was a neutral port. (Ibid. p. 7, No. 18.)

On January 10, 1900, Lord Salisbury wrote:

It is not the case that the British Government in 1863 raised any claim or contention against the judgment of the United States prize court in the case of the *Springbok*. On the first seizure of that vessel, and on an *ex parte* and imperfect statement of the facts by the owners, Earl Russel, then Secretary of State for Foreign Affairs, informed Her Majesty's minister at Washington that there did not appear to be any justification for the seizure of the vessel and her cargo, that the supposed reason, namely, that there were articles in the manifest not accounted for by the captain, certainly did not warrant the seizure, more especially as

the destination of the vessel appeared to have been *bona fide* neutral, but that, inasmuch as it was probable that the vessel had by that time been carried before a prize court of the United States for adjudication, and that the adjudication might shortly follow, if it had not already taken place, the only instruction that he could at present give to Lord Lyons was to watch the proceedings and the judgment of the court, and eventually transmit full information as to the course of the trial and its results.

The prize court of the United States, in a long and considered judgment, decreed confiscation both of the vessel and the cargo. The owners applied for the intervention of Her Majesty's Government, and forwarded in support of their application an opinion by two English counsel of considerable eminence.

The real contention advanced in this opinion was that the goods were, in fact, *bona fide* consigned to a neutral at Nassau. It can not, therefore, be adduced in support of the doctrine now advanced by the German Government. But Her Majesty's Government, after consulting the law officers of the Crown, distinctly refused to make any diplomatic protest or enter any objection against the decision of the United States prize court, nor did they ever express any dissent from that decision on the grounds on which it was based.

The volume which is described in Count Hatzfeldt's note as "The Manual of Naval Prize Law of the British Admiralty," and from which Count Hatzfeldt quotes certain phrases as expressing the view of the lords commissioners on this subject, is, in fact, a book originally compiled by Mr. (now Sir Godfrey) Lushington, which was published under the authority of the lords commissioners as stating in a convenient form the general principles by which Her Majesty's officers are guided in the exercise of their duties; but it has never been asserted and can not be admitted to be an exhaustive or authoritative statement of the views of the lords commissioners. The preface to the book states that it does not treat of questions which will ultimately have to be disposed of by the prize court, but which do not concern the officer's duty of the place and hour. The directions in this manual, which for practical purposes were sufficient in the case of wars such as have been waged by Great Britain in the past, are quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port. In a portion of the introduction the author discusses the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favourable to the contention advanced in Count Hatzfeldt's note. Moreover, Professor Holland, who edited a revised edition of this

manual in 1888, in a recent letter published in the Times, has expressed an opinion altogether inconsistent with the view which the German Government endeavour to found upon the words of the manual.

In the opinion of Her Majesty's Government, the passage cited from the Manual, "that the destination of the vessel is conclusive as to the destination of the goods on board," has no application to such circumstances as have now arisen.

It can not apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country. (Ibid. p. 18.)

The British Admiralty Manual of Naval Prize Law, 1888, stated:

71. The ostensible destination of the vessel is sometimes a neutral port, while she is in reality intended, after touching and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be "continuous" and the destination is held to be hostile throughout.

Paragraph 73 of this manual provided as to the cargo that if the destination of the vessel on board of which the cargo was should be neutral, then the "destination of the goods should be considered neutral," even if the goods have apparently an ulterior hostile destination.

Report in 1905.—In the Report of the British Royal Commission on Supply of Food and Raw Material in the Time of War, 1905, the doctrine of continuous voyage is stated as follows:

Goods, moreover, whatever may be their intrinsic character, are not contraband unless they have a belligerent destination, but there has been during the last half century much discussion as to the evidence necessary to establish the fact that goods are intended for the enemy's use. If the destination of the ship carrying the goods is an enemy's port, this is held to be conclusive evidence as against absolutely contraband goods, but to exonerate the goods it is not sufficient to show that the ostensible destination of the ship is a neutral port. If after touching and even landing and colorably delivering her cargo at such a port, she is in reality intended to proceed with the same cargo to an enemy's port, the voyage is held to be "continuous" and the destination to be

hostile throughout. Moreover, even when the destination of the ship is *bona fide*, a neutral port, it does not follow that she is not engaged in the carriage of contraband, should it appear that the goods in question have an ulterior destination, to be attained by transshipment, over land conveyance or otherwise, for the use of the enemy. In case of goods *incipitis usus* the requirements as to destination are stricter, and to render such articles confiscable by a belligerent, it is necessary to show that they are intended to reach a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, for the enemy's fleet at sea, or for the relief of a port besieged by such belligerent." (Vol. 1, p. 23, sec. 97.)

International Naval Conference, 1908-1909.—In the invitation to the international naval conference which drew up the Declaration of London in 1908-9, Sir Edward Grey suggested as one of the questions for the conference "The doctrine of continuous voyage in respect both of contraband and of blockade."

In the letter of Sir Edward Grey, December 1, 1908, naming the delegates to the International naval conference, he said of continuous voyage:

25. The principle underlying the doctrine of continuous voyage is not of recent origin, and may be regarded as a recognized part of the law of nations. Its application to vessels carrying contraband has already been incidentally explained in paragraph 15 of the present instructions, as justifying the seizure of any neutral ship carrying a contraband cargo which is in fact destined for enemy territory, whether the cargo was to be carried to such territory by the ship herself, or after transshipment, by another vessel, or by overland transport from a neutral port.

26. For the purposes of blockade, on the other hand, the destination justifying capture is that of the ship, and not of the cargo; and a vessel whose final destination is a neutral port can not, unless she endeavours, before reaching that destination, to enter a blockaded port, be condemned for breach of blockade, although her cargo may be ear-marked to proceed in some other way to the blockaded coast. His Majesty's Government believe that all the powers will probably be in agreement on this point, unless the United States were to maintain that the condemnation pronounced by their Supreme Court in the well-known case of the *Springbok* extended the application of the doctrine of continuous voyage to breaches of blockade, and rendered the vessel carrying a cargo destined for a blockaded port liable to seizure, even

though she herself was not proceeding to such port. It is, however, exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly, if such was the intention, the decision would *pro tanto* be in conflict with the practice of the British courts. His Majesty's Government see no reason for departing from that practice, and you should endeavour to obtain general recognition of its correctness. (Parliamentary Papers, Misc. No. 4, 1909, p. 27.)

The question of regulation of continuous voyage gave rise to divergent views, as is evident in the report of the British Delegation to Sir Edward Grey on March 1, 1909, in which the delegation says of continuous voyage:

As the powers by whose prize court the doctrine has always been upheld and applied were naturally reluctant to renounce a right which they claimed to be founded in logic and justice and as, on the other hand, its abandonment was made a vital issue by those who refused to acknowledge it, there seemed at one time to be a danger of the complete breakdown of the conference at this point. (International Naval Conference, Misc. No. 4, 1909, p. 96.)

Agreement among the 10 leading maritime powers that signed the Declaration of London was embodied in article 30, as follows:

Absolute contraband is liable to capture if it is shown to be destined to the territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.

Of this article the general report of the naval conference says:

The articles included in the list in article 22 are absolute contraband when they are destined for a territory of the enemy or for a territory occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a similar final destination can be shown by the captor. It is not, therefore, the destination of the vessel which is decisive, it is the destination of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that the goods are to be forwarded from there by land or sea to an enemy country, that

is sufficient to justify the capture and subsequent condemnation of the cargo. It is the very principle of continuous voyage, which as regards absolute contraband is thus established by article 30. (1909 Naval War College, International Law Topics, p. 75.)

Continuous voyage as related to conditional contraband was provided for in article 35:

Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port.

The ship's papers are conclusive proof of the voyage of the vessel as also of the port of discharge of the goods, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation. (Ibid. p. 85.)

On this the general report says:

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband. This then is liable to capture only if it is to be discharged in an enemy port. As soon as the goods are documented to be discharged in a neutral port they can not be contraband, and there is no examination as to whether they are to be forwarded to the enemy by sea or land from that neutral port. This is the essential difference from absolute contraband. (Ibid. p. 85.)

Parliamentary discussion.—Even though the Declaration of London was not ratified by Parliament, the doctrine of continuous voyage did receive some considerations, as is seen in the remarks of Mr. McKinnon Wood on June 28, 1911:

I come now to the doctrine of continuous voyage upon which we have been attacked. * * * The result of the agreement is very satisfactory. The doctrine is established where it is important and given up where it is of no practical value. It is agreed in the case of absolute contraband that it is very important to us. * * * It is said that we give an advantage to foreign nations who can bring things in by land. Never was there a more ridiculous argument. It is an advantage you can not deprive them of. (Hansard, Commons, v. 27, p. 454.)

Regulations in 1914.—While the Declaration of London had not been ratified in 1914, the rules of this Declaration

had prior to 1914 been embodied in the regulations of many States. Articles 30 and 35, relating to absolute and conditional contraband, often appeared without change.

Article 32 of the French instructions of 1912 was issued in conformity with article 30 of the Declaration of London.

“Les articles énumérés ci-dessus sont de contrebande, s’il vous apparait qu’ils sont destinés au territoire de l’ennemi ou à un territoire occupé par lui ou à ses forces armées. Peu importe que le navire transporteur soit lui-même à destination d’un port neutre.” (1925 Naval War College, International Law Documents, p. 149.)

Article 35 of the German ordinance of September 20, 1909, followed the same principle.

Articles of conditional contraband are subject to seizure only on board a ship which is on the way to the enemy country or a place held by the enemy or to the enemy forces, and when these articles are not to be discharged in an intermediate neutral port, i. e., a port at which the ship must call before reaching any final destination. (Ibid. p. 157.)

No Japanese rules had embodied much of the Declaration of London.

After the outbreak of war an effort was for a time made to conform to the articles of the Declaration of London, but soon changes were introduced in general, restricting neutral freedom of commerce.

Declaration of London and World War.—On August 6, 1914, Mr. Bryan, Secretary of State of the United States, sent communications, similar to the following, to the embassies at St. Petersburg, Paris, Berlin, and Vienna, and to the legation at Brussels:

DEPARTMENT OF STATE,

Washington, August 6, 1914—1 p. m.

Mr. Bryan instructs Mr. Page to inquire whether the British Government is willing to agree that the laws of naval warfare as laid down by the Declaration of London of 1909 shall be applicable to naval warfare during the present conflict in Europe provided that the governments with whom Great Britain is or may be at war also agree to such application. Mr. Bryan further in-

structs Mr. Page to state that the Government of the United States believes that an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents. Mr. Bryan adds that it is earnestly hoped that this inquiry may receive favorable consideration. (Special Supplement, vol. 9, Amer. Jour. Int. Law, p. 1.)

Austria on August 13 and Germany on August 20 replied indicating that their Governments were prepared to apply the Declaration of London "provided its provisions are not disregarded by other belligerents."

Russia, August 20, answered that its actions would be similar to the British.

On August 22 the British Foreign Office informed the American ambassador that the Government—

have pleasure in stating that they have decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations. A detailed explanation of these additions and modifications is contained in the inclosed memorandum.

The necessary steps to carry the above decision into effect have now been taken by the issue of an order in council, of which I have the honor to inclose copies herein for your excellency's information and for transmission to your Government.

I may add that His Majesty's Government, in deciding to adhere to the rules of the Declaration of London, subject only to the aforesaid modifications and additions, have not waited to learn the intentions of the enemy governments, but have been actuated by a desire to terminate at the earliest moment the condition of uncertainty which has been prejudicing the interests of neutral trade. (Ibid. p. 3.)

This order in council was as follows:

Whereas during the present hostilities the naval forces of His Majesty will cooperate with the French and Russian naval forces; and

Whereas, it is desirable that the naval operations of the allied forces so far as they affect neutral ships and commerce should be conducted on similar principles; and

Whereas the Governments of France and Russia have informed His Majesty's Government that during the present hostilities it

is their intention to act in accordance with the provisions of the convention known as the Declaration of London, signed on the 26th day of February, 1909, so far as may be practicable :

Now, therefore, His Majesty, by and with the advice of his privy council, is pleased to order, and it is hereby ordered, that during the present hostilities the convention known as the Declaration of London shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty.

The additions and modifications are as follows :

(1) The lists of absolute and conditional contraband contained in the proclamation dated August 4, 1914, shall be substituted for the lists contained in articles 22 and 24 of the said declaration.

(2) A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband if she is encountered before she has completed her return voyage.

(3) The destination referred to in article 33 may be inferred from any sufficient evidence, and (in addition to the presumption laid down in article 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy state or to or for a merchant or other person under the control of the authorities of the enemy state.

(4) The existence of a blockade shall be presumed to be known—

(a) To all ships which sailed from or touched at an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade ;

(b) To all ships which sailed from or touched at a British or allied port after the publication of the blockade.

(5) Notwithstanding the provisions of article 35 of the said declaration, conditional contraband, if shown to have the destination referred to in article 32, is liable to capture, to whatever port the vessel is bound and at whatever port the cargo is to be discharged.

(6) The general report of the drafting committee on the said declaration presented to the naval conference and adopted by the conference at the eleventh plenary meeting on February 25, 1909, shall be considered by all prize courts as an authoritative statement of the meaning and intention of the said declaration, and such courts shall construe and interpret the provisions of the said declaration by the light of the commentary given therein.

And the lords commissioners of His Majesty's Treasury, the lords commissioners of the Admiralty, and each of His Majesty's principal secretaries of state, the president of the probate, divorce, and admiralty division of the high court of justice, all other judges of His Majesty's prize courts, and all governors, officers, and authorities whom it may concern are to give the necessary directions herein as to them may respectively appertain.

ALMERIC FITZROY.

(Ibid. p. 4.)

The United States replied :

DEPARTMENT OF STATE,

Washington, October 22, 1914—4 p. m.

Your No. 864, October 19, Declaration of London.

Inasmuch as the British Government consider that the conditions of the present European conflict made it impossible for them to accept without modification the Declaration of London, you are requested to inform His Majesty's Government that in the circumstances the Government of the United States feels obliged to withdraw its suggestion that the Declaration of London be adopted as a temporary code of naval warfare to be observed by belligerents and neutrals during the present war; that therefore this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States, irrespective of the provisions of the Declaration of London; and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government.

LANSING.

(Ibid. p. 7.)

This reply was in accord with article 65 of the Declaration of London, which stated—

The provisions of the present declaration form an indivisible whole.

The general report says :

This article is of great importance, and is in conformity with that which was adopted in the Declaration of Paris.

The rules contained in the present declaration related to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the delegations; some concessions have been made on one point in con-

sideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory. A legitimate expectation would be defeated if one power might make reservations on a rule to which another power attached particular importance. (1909 Naval War College, International Law Topics, p. 155.)

Restraints on commerce.—A British order in council of October 29, 1914, introduced still further modifications in the provisions of the Declaration of London and other modifications followed.

These and other acts led the Secretary of State of the United States in a note of December 26, 1914, to say:

DEPARTMENT OF STATE,
Washington, December 26, 1914.

To Ambassador W. H. PAGE:

* * * * *

The Government of the United States has viewed with growing concern the large number of vessels laden with American goods destined to neutral ports in Europe, which have been seized on the high seas, taken into British ports and detained sometimes for weeks by the British authorities. During the early days of the war this Government assumed that the policy adopted by the British Government was due to the unexpected outbreak of hostilities and the necessity of immediate action to prevent contraband from reaching the enemy. For this reason it was not disposed to judge this policy harshly or protest it vigorously, although it was manifestly very injurious to American trade with the neutral countries of Europe. This Government, relying confidently upon the high regard which Great Britain has so often exhibited in the past for the rights of other nations, confidently awaited amendment of a course of action which denied to neutral commerce the freedom to which it was entitled by the law of nations. * * *

Articles listed as absolute contraband, shipped from the United States and consigned to neutral countries, have been seized and detained on the ground that the countries to which they were destined have not prohibited the exportation of such articles. * * *

In the case of conditional contraband the policy of Great Britain appears to this Government to be equally unjustified by the established rules of international conduct. As evidence of this, attention is directed to the fact that a number of the American cargoes which have been seized consist of foodstuffs and other articles of common use in all countries, which are admittedly

relative contraband. In spite of the presumption of innocent use because destined to neutral territory, the British authorities made these seizures and detentions without, so far as we are informed, being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination, as that term is used in international law. Mere suspicion is not evidence and doubts should be resolved in favor of neutral commerce, not against it. The effect upon trade in these articles between neutral nations resulting from interrupted voyages and detained cargoes is not entirely cured by reimbursement of the owners for the damages which they have suffered, after investigation has failed to establish an enemy destination. The injury is to American commerce with neutral countries as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets.

It also appears that cargoes of this character have been seized by the British authorities because of a belief that, though not originally so intended by the shippers, they will ultimately reach the territory of the enemies of Great Britain. Yet this belief is frequently reduced to a mere fear in view of the embargoes which have been decreed by the neutral countries, to which they are destined, on the articles composing the cargoes.

That a consignment "to order" of articles listed as conditional contraband and shipped to a neutral port raises a legal presumption of enemy destination appears to be directly contrary to the doctrines previously held by Great Britain and thus stated by Lord Salisbury during the South African War:

"Foodstuffs, though having a hostile destination, can be considered as contraband of war only if they are for the enemy's forces; it is not sufficient that they are capable of being so used, it must be shown that this was in fact their destination at the time of their seizure."

With this statement as to conditional contraband the views of this Government are in entire accord, and upon this historic doctrine, consistently maintained by Great Britain when a belligerent as well as a neutral, American shippers were entitled to rely. * * *

(Special Supplement, vol. 9, Amer. Jour. Int. Law, pp. 55-8.)

A preliminary reply to this note was made by the British Foreign Office, January 7, 1915. Only brief extracts will be made from these notes, in their relation to continuous voyage. In its reply the Foreign Office said:

We are confronted with the growing danger that neutral countries contiguous to the enemy will become on a scale hitherto un-

precedented a base of supplies for the armed forces of our enemies and for materials for manufacturing armament. The trade figures of imports show how strong this tendency is, but we have no complaint to make of the attitude of the governments of those countries, which so far as we are aware have not departed from proper rules of neutrality. We endeavor in the interest of our own national safety to prevent this danger by intercepting goods really destined for the enemy without interfering with those which are "bona fide" neutral. (Ibid. p. 64.)

The British note of February 10, 1915, was a fuller attempt to meet the American objections to British practices. In this note it was said, among other things:

No country has maintained more stoutly than Great Britain in modern times the principle that a belligerent should abstain from interference with the foodstuffs intended for the civil population. The circumstances of the present struggle are causing His Majesty's Government some anxiety as to whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible the supplies which were intended for the civil population, are effective for the purpose, or suitable to the conditions present. (Ibid. p. 79.)

Official consignees.—On February 20, 1915, the United States proposed as a modus vivendi to the belligerent governments that the United States should designate agencies which would be consignees of foodstuffs in Germany and that these agencies should distribute to noncombatants only and that under these conditions Great Britain would not place foodstuffs on the absolute contraband list. Germany indicated its readiness to accede to this proposition on March 1, 1915, saying, "Such regulation would, of course, be confined to importations by sea, but that would, on the other hand, include indirect importations by way of neutral ports." Great Britain maintained that it could not accept these propositions, March 15, 1915.

Retaliatory measures.—Retaliatory measures began to be aimed not merely at belligerents but at neutrals in order to weaken belligerents, and neutral rights, for which there had been many years of struggle, were, from the American viewpoint, disregarded.

In the note of March 30, 1915, the American Secretary of State said:

It is confidently assumed that His Majesty's Government will not deny that it is a rule sanctioned by general practice that, even though a blockade should exist and the doctrine of contraband as to unblockaded territory be rigidly enforced, innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or breach of blockade, much less to detention, requisition, or confiscation." * * *

The note of His Majesty's principal Secretary of State for Foreign Affairs, which accompanies the order in council and which bears the same date, notifies the Government of the United States of the establishment of a blockade which is, if defined by the terms of the order in council, to include all the coasts and ports of Germany and every port of possible access to enemy territory. But the novel and quite unprecedented feature of that blockade, if we are to assume it to be properly so defined, is that it embraces many neutral ports and coasts, bars access to them, and subjects all neutral ships seeking to approach them to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties. (Ibid. p. 117.)

British blockade in World War.—The report of the British war cabinet for the year 1917 speaking of interference with neutral trade by what was called blockade said:

Turning to blockade, by the end of 1916 the system of the blockade had reached a high point of elaboration. It was based upon—

(a) Vigilant scrutiny of the transactions of all suspect neutral traders and the listing of all who habitually assisted enemy trade.

(b) Rationing schedules showing the normal requirements of all the European neutrals in respect of all the more important commodities which they obtain from overseas.

(c) Agreements with neutral shipowners, traders and associations of traders under which the contracting neutrals gave certain undertakings in consideration for special facilities for their shipments. Many of these agreements contain rationing clauses which make it possible for His Majesty's Governments to detain automatically any excessive shipments of the articles in question.

Broadly speaking, it may be said that by December, 1916, all, or almost all, the oversea trade of Germany had been stopped.

There was still a little leakage in respect of the trade from the Dutch colonies, which, when we were not in so strong a belligerent position, we had to deal with specially, but it only affected a few articles like tobacco, cinchona, and, even so, the amounts were relatively small. We could, in fact, claim that the German attempt to interpose the border countries for the purpose of pursuing the great overseas trade which they had previously carried on from German ports was definitely defeated.

Beyond this the main preoccupation of the Ministry of Blockade has been directed to diminishing the trade between the border neutrals and Germany. It was impossible to get at this trade directly, for obvious reasons, nor had we any belligerent right which we could enforce in the prize court to stop the import into a neutral country of goods which might be used to produce other goods which were to be sent into Germany. All we could do was, firstly, to use such means of economic pressure as we had to induce the neutrals to forego their German trade, and, secondly, to buy, as far as we could, surplus products which otherwise would have gone to Germany. (The War Cabinet, Report for the Year 1917, p. 22.)

Discussion in British House of Commons.—In the British House of Commons in January, 1916, the matter of further interference with commerce was discussed. On January 26, 1916, the following were among the statements made:

Mr. SHIRLEY BENN. I beg to move—

“That this House, having noted the volume of the imports into neutral countries bordering on enemy territory of goods essential to the enemy for the prosecution of the war, urges the Government to enforce as effective a blockade as possible, without interfering with the normal requirements of those neutral countries for internal consumption.” (Parliamentary Debates, Commons, 1916, 5th series, LXXVIII, 1279.)

In proposing this motion Mr. Benn stated he did not wish to embarrass the Government, but called attention to the increase of imports to neutral countries near Germany with the implication that an “emphatic enforcement of the law of continuous voyage and the doctrine of ultimate destination” would have cut off many of these imports. He suggested a blockade from the Norwegian shore across the Straits of Gibraltar and that

everything going into or coming out of Germany be declared contraband. He admits that neutral countries "would very probably object," but maintains that America in the Civil War and in the Spanish-American War had made extreme claims.

Mr. Leslie Scott, continuing the debate, said :

We have heard a good deal of talk, conveyed to us from the press in other countries, of the rights of neutrals. I think the rights of belligerents are a little lost sight of by neutrals. The business of His Majesty's Government is to consider rather the rights of belligerents than the rights of neutrals. We have to take risks, but in measuring the risks it is worth while remembering what the true character of the risks are that we are running in relation to neutrals. I am satisfied that the Government are satisfied that there is no risk of any one of those neutral powers which are concerned going to war with us. Upon that basis, which I assume, and I believe everyone in this House believes to be the right basis—upon that footing the only risks we run in regard to neutrals are the risks of causing pecuniary damage to their commercial interests. I never knew a commercial grievance which was not adequately compensated by a money payment. (*Ibid.* p. 1286.)

After further discussion he says :

Fourthly, and this is the crux of the situation, goods in excess of neutral requirements should be presumed to be intended for the enemy. (*Ibid.* p. 1293.)

Mr. Scott advocated a comprehensive blockade.

Our command of the sea is absolute. It is in the power of the Allies to stop every ship carrying goods, directly or indirectly, coming from or destined to an enemy country. We can stop them in the Atlantic, we can stop them in the North Sea, we can stop them in the Mediterranean, and we can stop them in the Indian Ocean, the Black Sea, and the Persian Gulf. We can stop them all round the enemy powers, and we ought to do it. Under existing conditions no neutral can dispute our ability in fact to prevent the ingress and egress of German trade. That cardinal necessity of the validity of blockade can not be disputed. We are in a position to do it. The effective force is there. We can apply it this minute without fear of effective resistance and with a certainty of danger attaching to every ship that tries to break our blockade. Under these circumstances the major premise is estab-

lished for the suggestions that I make. I conceive that the object of this motion is that this House should tell the Government and the world in no uncertain terms that we mean the command of the sea to be utilised to the full; that no more exceptions shall be made in individual cases; and that the blockade shall be applied rigorously to-day and in future, continuously and without intermission, until Germany admits defeat. (Ibid. p. 1294.)

Other members took views at variance with these expressed, but there was general agreement that some of the orders in council aimed to check trade with the Central Powers had failed.

Mr. Leverton Harris, who had been associated with the enforcement of so-called blockade, speaking of exports from neutrals to belligerents in the early days of the World War, said:

Those neutrals, having got rid of their own commodities, at once find a difficulty in providing for their own population, and consequently you find a very large increase of the imports into those neutral countries, which increase appears in the figures. That is one of the most difficult questions with which the Government have to deal. Here is a perfectly legitimate trade. Nobody can say to a neutral country, "You are not to sell your butter to Germany." We can not say to Denmark, "You are not to sell your butter to Germany." We buy butter ourselves very largely from Denmark, and Denmark is perfectly entitled to sell her butter. I do not know upon what principle of international law you can say to Denmark that she is not to buy nuts or other articles from foreign countries to produce margarine unless it was for consumption by her own people. That is the greatest difficulty which I think the problem presents at the present moment. (Ibid. p. 1305.)

Speaking in reply to various questions, the British Undersecretary of State for Foreign Affairs, Lord Robert Cecil, on March 9, 1916, 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. LXXX, 1815.)

The rationing system.—Mr. J. A. Salter, who had been closely related to the administration of the British and allied measures to control movements of vessels and goods toward the Central Powers in the World War, writing in 1920 said:

Germany's declaration, however, that after February, 1915, she would instruct her submarines to attack all merchant vessels in British waters, created an outburst of indignation in neutral countries, which Great Britain at once used to make the blockade comprehensive. In the reprisals order of March 11, 1915, she announced her intention to stop all goods of enemy origin or destination, and proceeded henceforth to stop supplies intended for Germany, without regard to the distinction of the earlier contraband rules or to the fact that the supplies might be consigned through a neutral port. Even this, however, was not enough. It was useless to prohibit every cargo of food destined for Germany, whether sent through contiguous neutral countries or not, if these neutral countries could themselves import freely for their own uses, and with the sufficiency so obtained, export their own produce to Germany by routes which the Allies could not control. This was the reason for the "rationing" policy, which was begun in 1915, and subsequently became the central feature in the whole blockade system. Detailed statistics were compiled as to the pre-war imports and consumption of all the neutral countries which had uncontrolled access to Germany; and only enough war imports were allowed to give a bare sufficiency for internal consumption. The neutral countries were therefore compelled to adopt internal rationing measures, so that the system of official control extended over almost the whole world—neutral and belligerent alike. The actual privations of some of the neutrals were indeed much more serious than those in allied countries, no doubt partly because their export prohibitions were not sufficient to prevent supplies slipping across the border under the attraction of very high profits. (Allied Shipping Control, J. H. Salter, p. 100.)

Extension of doctrine, 1914-1918.—In the case of the *Kim*, the British prize court in 1915, relying upon early

cases, referred to the case of the *Bermuda* in which Chief Justice Chase said:

Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. (3 Wall. [1865], 514.)

In the decision in the case of the *Kim*, Sir Samuel Evans said:

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 Kim* L. R. [1915], p. 215.)

He also said:

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. * * *

And with the facilities of transportation by sea and by land which now exist, the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port, at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached. (Ibid.)

In this case the decision was upon the goods themselves, and states:

For the many reasons which I have given in the course of this judgment and which do not require recapitulation or even summary, I have come to the clear conclusion from the facts proved and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption or bona fide sale or otherwise; but, on the contrary, that they were on their way not only to German territory but also to

the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities and to be blinded to the realities of the case. (Ibid.)

The *Balto* had in its cargo when on a voyage from American to Swedish ports in 1915 leather. The ship was "diverted to Kirkwall for examination." The British Government contended—

that leather on its way to a neutral country, there to be made into boots and then to be taken to an enemy country, is liable to condemnation as contraband;

while for the owners it was maintained that—

The doctrine of continuous voyage applies only to goods which in their actual state at the time of capture are on the way to the enemy. Where the destination is a neutral port, the subsequent transportation after manufacture is permitted. There must be a preconceived plan or scheme to send the goods to a hostile destination, and that plan must be in operation when the goods are seized. There is absolutely no proof of any such intention in this case. Even if there was such an intention, the right of the belligerent is not to seize the leather on its way to the factory, but to stop the boots on the way from Sweden to Germany. (L. R. [1917], p. 79.)

The president of the prize court said:

One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view the notion that leather, imported into a neutral country for the express purpose of being at once turned into boots for the enemy forces, becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage.

It may be well to give a few instances, by way of illustration, relating both to conditional and absolute contraband.

Suppose coffee beans and cocoa beans were imported into a neutral country with the object of their being converted into

coffee or cocoa to be sent on to the enemy, would the fact that the coffee beans were ground into coffee, or the cocoa beans were ground and mixed with sugar to make cocoa in the neutral country, be enough to render those goods immune from capture if they would be capturable as coffee or cocoa foodstuffs when afloat? Again, assume that cloth of an inappropriate hue, but intended for the enemy forces, was imported into a neutral country, and there dyed into the desired colour for the enemy forces; or that steel helmets were so imported, and there painted with the Germany colour, or fitted with the regulation German army or regimental marks, would a belligerent lose the right to seize them at sea when and because they were not so dyed, painted, or fitted? To take a couple more instances. It is quite possible that the metal parts of rifles for the enemy army might be imported into a Scandinavian country in a complete state; and that the butt ends or timber parts were intended to be affixed in such country because timber was plentiful there, or for some other reason good or ostensible. Would the metal rifles be free from capture by a belligerent because they were to be so completed in the neutral country before being sent on to the enemy? If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?

The court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense. (Ibid.)

The decision in the case of the *Bonna* in 1918 governed a number of other cases. The *Bonna*, a neutral vessel, was seized on its way from the Dutch East Indies to Scandinavian ports and had on board coconut oil which was used in Sweden in the manufacture of margarine. The case was presented as follows:

Mr. Leslie Scott, K. C., M. P., for the claimants: Apart from the contention based on the export of butter, there is no case to answer. There is no authority that supports this contention. The case nearest in point is the *Balto*, in which it was held that leather destined to be made into boots for the German Army could be stopped on its way to a Swedish boot factory. That is a very different case. There is no support in international law for the proposition that materials used in manufacture are confiscable when the products of the manufacture are to be consumed in the country into which they are imported, because their consumption will enable other people to export a totally different

product to the enemy country. The proposition is a totally unjustifiable extension of the doctrine of continuous voyage.

Mr. J. G. Pease, replying for the Crown: The butter is released when the materials for making margarine are brought into Sweden and the margarine is manufactured. That is enough to make the goods conditional contraband. The principle established by the cases is that if goods of the same kind are going to the enemy country it is not necessary to identify the particular goods. If the goods are of the same species and can be used for the same purpose, the doctrine of continuous voyage should apply. The articles are practically the same. Instead of being classified as "margarine" and "butter" they can all be classed as goods of the same kind, viz, "edible fats." This may be carrying the principle of conditional contraband further than hitherto, but in view of the ramifications of modern commerce it is not going too far. (7 Lloyds Prize Cases, 367; L. R. [1918], p. 123.)

In the judgment on this case the president of the prize court, Sir Samuel Evans, said:

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country, to be converted into a manufactured article for consumption in that country, were subject to condemnation on the ground that the consequence might, or even would necessarily, be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy. (Ibid.)

In the case of the *Bonna* the doctrine of continuous voyage by substitution was not supported. No authorities sustain such a position. The debates in the House of Commons, even when the strain of war was extreme, show little approval of such a doctrine. The practical application of such a policy would put an end to ordinary neutral trade and would tend to make war general.

Liability on account of substitution.—There were many propositions for restricting the exports from neutral to belligerent States during the World War. The theory of restricting or prohibiting trade with neutrals in articles which themselves might not go to a belligerent but which might release others which might go to a belligerent was advanced and received some approval. That a belliger-

ent might decline to export certain goods to a neutral unless the neutral agreed not to export certain goods to the other belligerent was regarded as a lawful restraint. The Minister of Blockade said on March 27, 1917, of the British relations to Norway :

The position is this. Norway wants a great deal of copper of a particular refined kind for her electric works which she is establishing in all parts of the country. She has got copper in her own country, but it is in the form of pyrites, and contains a small quantity of copper in a large amount of sulphur ore. We have made an arrangement by which, in return for our providing electrolytic copper—refined copper—Norway will restrict her trade to Germany, and indeed to us, within certain limits. That is the nature of the bargain we made. It has been of great use to us, and I believe it has been of great use to Norway. That is the kind of negotiation which, as it seems to me, is the only way in which you can deal with the situation. (Parliamentary Debates, Commons, 92 H. C. Deb. 5 s. 260.)

Such a negotiation as mentioned above was unlike in principle to the theory of substitution though discussed in the same speech, where it was said :

I come to agricultural produce. Simple agricultural produce is different. My honorable friend (Mr. Peto) stated that in a very plausible way. He said, after all, you let maize come in. It goes to feed the pig, and the pig goes on to Germany. I have heard people put it in a popular way that the pig is merely maize on four legs. After all, when you arrest a cargo of maize you have to show to your prize court that it has an ultimate destination—Germany. What you can show is that it is going to feed pigs, part of which will be eaten in Holland or wherever it may be, part of which will be reexported to this country, and part of which will go, it may be, to Germany. It is very difficult indeed to say that any particular part of that cargo of maize has the ultimate destination of Germany, even if you disregard the fact that it is intermediately being changed into pig. I can only go on what I am advised I can do. That is one difficulty. * * *

The question is whether we are entitled and how far we are able to stop maize or oil cake which is coming from a neutral country—the United States—and going to a neutral country and passing through our patrols upon the doctrine which I have tried to describe to the House. In the present condition of affairs I do not want to prejudge anything, but I rather doubt whether

we could succeed in a prize court if we put forward such a doctrine as that. My honorable and gallant friend (Commander Bellairs) recognises the difficulty we are in, but says the time has come to put aside the prize court altogether. We are to proceed upon what he regards as a new European law. He told us in his notice that we are not to allow any supplies to neutral European countries unless there is an entire cessation of their trade with Germany. That would mean, I suppose, that we are to arrest all the cargoes of feeding stuffs, and fertilisers unless neutral countries will undertake that they will not export any agricultural produce to Germany at all—of course, from a neutral country. I have some doubt whether that could be easily defended. I should have some little hesitation in repeating the perorations in which we have indulged about the defence of the rights of small countries. * * *

We have to consider—and I speak in very general terms here—the geographical and military position in these countries. Any honorable member can, if he chooses, by consulting an ordinary textbook, see what was the military power of Denmark, both on sea and land, before the war. I do not know what she may have done to improve that position since then. If he will try to consider what his position would be as a Danish statesman, faced with a demand of the British Government that Denmark should wholly cut off trade with Germany, I think he would begin to count up rather anxiously the number of soldiers and ships at his command. He would have to consider also the relation between Denmark and the other Scandinavian countries. He would have to consider the general effect of any action against her on other neutral nations. He would have to consider the effect of any such policy as that which my honorable and gallant friend recommends on the general war aims with which this country entered the war. We have above all to remember this, that we can not lay down this principle—and to do my honorable and gallant friend justice he does not lay it down—as applied to Denmark only. You have to consider what would be the effect of attempting to apply such a rule as that to all neutrals alike. (Ibid. 260–263.)

Later in the same debate, Sir Edward Carson, first lord of the Admiralty, said:

The policy of the country, whatever it may be, must be the policy not merely of the Foreign Office or of the Navy, but it must be the policy of the cabinet, and the cabinet having laid down the policy, the Foreign Office by negotiation, and the Navy by action, have tried to see that policy carried out. Somebody comes

and says, "Leave it to the Navy. The blockade will be all right, and nothing will go into Germany." Those who think that do not really see what that means. What they really mean by that is that the Navy will go just as they please, seize every ship of every neutral, bring it into port, and take the goods out of it that were intended for neutral countries, and all will be well. That is really what they imagine. They never imagine for a moment that we are dealing not with one neutral, but with two neutrals—the neutral who is exporting and the neutral who is importing. I would like to know where we would be if this kind of duty had been put upon the Admiralty, that we were simply to get an instruction that nothing was to go to Germany through a neutral country that was imported from another neutral country. The truth of the matter is that those who put forth that absurd doctrine mean that we should go to war with everybody. That is what it really comes to. * * *

Will any honorable member get up here, for instance, to say in this House "You ought to prevent anything going to Norway which, by any possibility, can go to Germany under any circumstances"? Will anybody get up and say that? What would be the result? Norway would say, "Very well, you shall no longer get from us what is essential for your munitions and other matters of this kind." Will anybody say that this is a course we ought to pursue? No; what the system of blockade that is carried out by my right honorable friend means is this—and we profess nothing more—not that we are able to prevent food and imports entirely from getting into Germany through neutral countries, but that this is the best system for minimizing imports from getting into Germany. My honorable friend who spoke last about the food cry took as an illustration feeding stuffs that go to the fattening of cattle in neutral countries, and suggested that we ought to do something to prevent the produce of those feeding stuffs from ever going into Germany. I do not know where our rights come in to do that. Will he tell me that we have a right to say to America that she is to have no trade with neutral countries? Does he say that? Of course he can not. The only way, leaving international law and international rights out of account, of doing this is by saying that what is really going into Denmark, or Holland, or wherever it may be, is really intended to go into Germany. That is what is called the doctrine of continuous voyage. Was there ever a more absurd theory put forward than that the doctrine of continuous voyage was to be treated in this way? You sent foodstuff into Denmark or Holland; it does not go into Germany, but is used to feed pigs, and eventually the pigs when fattened may go into Germany, or may be eaten in

Denmark or Holland, and you are to go into court and say that by the doctrine of continuous voyage that food ought not to be allowed to go into the neutral countries, because it is food which is used to feed the pigs which may or may not go to Germany. On the face of that you might starve the Danes, or the Dutch, or other neutrals. How do you know when bread goes into Norway that the Norwegian who feeds upon it may not join the German Army? There is continuous voyage for you! (Ibid. 271-274.)

CONCLUSION

While the early decisions upon continuous voyage related to vessels engaging in time of war in trade which was not open to them in time of peace, later decisions greatly extended this doctrine. The destination of vessel or the destination of the cargo might make it liable to condemnation. The cargo might go forward by another vessel or by overland transport. In case of the cargo it was maintained that it made no difference as to how many intermediate means of transport or national boundaries might interpose, it was the ultimate destination that determined liability, and the doctrine of ultimate destination came to be accepted. The ultimate destination was viewed as an objective fact, regardless of the intent of the parties concerned. In the case of the *Kim* in 1915 Sir Samuel Evans, president of the British prize court, 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 overland, 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. This test was applied over a century ago by Sir William Grant in the Court of Appeals in prize cases in the case of the *William*. It was adopted by the United States Supreme Court in their unanimous judgment in the *Bermuda*, where Chase, C. J., in delivering the judgment, said: "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port." (L. R. [1915], p. 215.)

The cargo on board a vessel at the time of seizure was the proper subject for the proceedings of the prize court, but not the goods for which this cargo might be substituted in the neutral country to which the cargo itself was really destined.

SOLUTION

The capture should not be sustained under the doctrine of continuous voyage.