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International Law Situations with Solutions and Notes
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SITUATION V.

War exists between the United States and State X. Neutral merchant vessels bound for a fortified port of State X and loaded for the most part with contraband are overtaken on the high seas by vessels of the United States Navy.

Some of these neutral merchant vessels are unseaworthy, some are overtaken at points too far from a prize court to make it advantageous to send the vessels in, others can not be cared for without impeding the action of the United States naval forces, which are in danger of immediate attack, and in other cases prize crews can not be spared to take the captured neutral merchantman to a prize court.

What action may be taken by commanders of vessels of the United States Navy in such cases?

SOLUTION.

(a) If the contraband cargo and the seized neutral vessel have different owners, the contraband cargo, after proper survey, appraisal, and inventory, and with consent of the master, if in accordance with treaty provisions, may be taken, and the vessel, if guilty only of the carriage of contraband, should be dismissed and the papers relating to the whole transaction should be forwarded to the prize court.

(b) If the master does not consent the vessel and cargo are liable to the usual penalties for contraband trade.

(c) If the neutral vessel and contraband cargo belong to the same owner the contraband cargo may be treated as in (a). The vessel, however, should, if possible, be sent to a prize court for adjudication, otherwise the vessel should be dismissed.

(d) Destruction, on account of military necessity, of a neutral vessel guilty only of the carriage of contraband entitles the owner to fullest compensation. Before destruction all persons and papers should be placed in safety.

NOTES ON SITUATION V.

Discussion in 1905.—Topic IV, considered by the Naval War College in 1905, was as follows:

Should the destruction of captured vessels be allowed before adjudication by a prize court? If so, under what condition?

The conclusion of the Conference was as follows:

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

Neutral vessels.—If a seized neutral vessel can not for any reason be brought into port for adjudication, it should be dismissed. (Naval War College, International Law Topics and Discussions, 1905, pp. 62-76.)

The discussion in 1905 was more particularly concerned with the conditions under which enemy vessels might be destroyed.

In 1905 it was said:

The destruction of a neutral ship must be clearly distinguished from the destruction of a belligerent ship even under the principles at present generally accepted. If the belligerent's vessel is good prize it may be lost to that belligerent from the time when his opponent captures it. This is not always necessarily the case, because it may be recaptured or a court for some reason may not condemn the vessel. "Quarter-deck courts" should be avoided, except in extreme instances, even in deciding on the destruction of enemy vessels. Such vessels may have neutral cargo, which may be in no way involved in the hostilities. The principle of the Declaration of Paris that "neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag" may be involved in such a manner as to make great caution necessary in destroying vessels of the enemy before adjudication.

Much greater care should be taken before destroying a neutral vessel itself. (Ibid, p. 72.)

In Topic IV, 1905, attention was particularly directed to the conditions under which enemy vessels might be

destroyed. In Situation V of 1907 it is the purpose to give somewhat more consideration to the treatment of cargoes on neutral vessels and to the treatment of neutral vessels themselves.

Many grounds have been put forward as sufficient for the destruction of private vessels that have been seized in time of war. From the phraseology of the rules that have been drawn up from time to time it would seem that it had not entered the minds of some writers that a neutral vessel could under any circumstances be destroyed before condemnation by a prize court.

Restriction on movements of vessels with prize.—When prizes could be brought into neutral ports the question of destruction was not particularly pressing, as sale in a neutral port was a possibility, or in case of unseaworthiness refitting could be undertaken there.

Most neutral states at the present time forbid the entrance to their ports of war vessels of the belligerents with prize. The following are examples of the prohibitions:

An Italian royal decree of June 16, 1895, says:

ART. 12. Foreign ships of war and merchantmen armed for cruising are forbidden to bring prizes into, or to arrest and search vessels in, the territorial sea or in the sea adjacent to the Italian islands, as well as to commit other acts which constitute an offense to the rights of state sovereignty.

Great Britain in 1898 and in 1904 prohibited the entrance of prize.

Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of Her Majesty's colonies or possessions abroad.

France allowed the entrance of war vessels with prize in 1898 and in 1904.

The Government decides in addition that no ship of war of either belligerent will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, its colonies

and protectorates, for more than twenty-four hours, except in the case of forced delay or justifiable necessity.

No sale of objects gained from prizes shall take place in the said harbors and anchorages.

Regulations as to destruction of seized vessels.—The regulations of different states in regard to the destruction of seized vessels vary. The British regulations are rather more definite than those of most other states.

In regard to destruction of captured vessels the British Admiralty Manual of Prize Law of 1888 makes clear distinction between the treatment of neutral and of enemy vessels.

303. In either of the following cases :

(1) If the Surveying Officers report the Vessel not to be in a condition to be sent into any port for Adjudication ; or

(2) If the Commander is unable to spare a Prize Crew to navigate the Vessel to Port of Adjudication, the Commander should release the Vessel and Cargo without ransom, unless there is clear proof that she belongs to the Enemy.

304. But if in either of these cases there be clear proof that the Vessel belongs to the Enemy, the Commander should remove her Crew and Papers, and, if possible, her Cargo, and then destroy the Vessel. The Crew and the Cargo (if saved) should then be forwarded to a proper Port of Adjudication in charge of a Prize Officer, together with the Vessel's Papers and the necessary Affidavits. Amongst the Affidavits should be one, to be made by the Prize Officer, exhibiting the evidence that the Vessel belonged to the Enemy, and the facts which rendered it impracticable to send her in for Adjudication. (Page 86.)

The French *Instructions Complémentaires* of 1870 grant great freedom in the treatment of neutral property.

ART. 20. Si une circonstance majeure forçait un croiseur à détruire une prise, parce que sa conservation compromettrait sa sécurité ou le succès de ses opérations, il devrait avoir soin de conserver tous les papiers du bord et autres éléments nécessaires pour permettre le jugement de la prise et l'établissement des indemnités à attribuer aux neutres dont la propriété non confiscable aurait été détruite. On ne doit user de ce droit de destruction qu'avec la plus grande réserve.

The instructions issued by the United States in 1898 (General Order, No. 492) make no distinction between neutral and enemy vessels seized as prize.

28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

The Russian Prize Regulations of March 25, 1895, make no distinction in the treatment of detained vessels, whether enemy or neutral vessels.

21. In extraordinary cases, when the preservation of a detained vessel proves impossible in consequence of its bad condition or extremely small value (sic), the danger of its recapture by the enemy, or the considerable distance or blockade of the ports, as well as of danger threatening the detaining vessel or the success of its operations, the naval commander is permitted, on his personal responsibility, to burn or sink the detained vessel after having first taken all the people off it, and as far as possible the cargo on board, and also after having taken measures for preserving the documents and other objects on board, and which might prove essential in elucidating matters when the case is examined according to the method prescribed for prize cases. (U. S. Foreign Relations, 1904, p. 738.)

The Japanese regulations issued during the Chino-Japanese war of 1894 provide:

ARTICLE 18. After detention, the commander should as soon as possible himself bring the vessel to the port where the prize court is, or the port nearest the prize court.

If the state of things renders it necessary, he may order the officer who secured the vessel (art. 14) or another officer to embark on board and bring the vessel to the above-named port.

ARTICLE 19. If the quantity of provisions, the state of the weather, or other circumstances render it necessary, the commander may call at the nearest port. When the circumstances admit, he should as soon as possible go to the port stated in article 18.

ARTICLE 20. When the commander finds that the detained vessel is unfit to be sent to the port stated in article 18, or when the commander is not able to send a crew to the vessel for the purpose of bringing her to the above-named port, or when he finds the cargo is unfit to be sent to that port, the commander may bring the vessel to the nearest port to where he is, and may act as the state of things permits him.

In this case the commander should cause a survey thereof to be made by the officers of his ship the best qualified for the duty, and the surveying officers should report in writing the details of the matter to the commander, and the commander should forward the report to the prize court.

When the commander causes the cargo to be sold, the affidavit may be in Form No. 4. In other cases, in which the detained vessel is brought to the nearest port, the affidavit may be in Form No. 5.

In the above-mentioned case, if the vessel is not an enemy's vessel, the commander should release the vessel after confiscation of the contraband goods.

ARTICLE 21. The sale may be made in any neutral port where the local authorities may be willing to allow the sale to take place.

ARTICLE 22. If the enemy's vessels are unfit to be sent to a port, as stated in article 18, the commander should break up the vessels, after taking the crew, the ship's papers, and the cargo, if possible, into his ship. The crew, the ship's papers, and the cargo should be sent to a port, as stated in article 18. (Takahashi, *International Law During the Chino-Japanese War*, p. 183.)

The Japanese regulations of March 7, 1904, are much more general in character.

ARTICLE XCI. In the following cases, and when it is unavoidable, the captain of the man-of-war may destroy a captured vessel, or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her he shall transship all persons on board and, as far as possible, the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination:

1. When the captured vessel is in very bad condition and can not be navigated on account of the heavy sea.
2. When there is apprehension that the vessel may be recaptured by the enemy.
3. When the man-of-war can not man the prize without so reducing her own complement as to endanger her safety.

ARTICLE XCII. In the cases of the above article the captain of the man-of-war shall direct the prize officer to prepare a certificate stating the circumstances of inability to send in the prize and the details of her disposal, and to send it to the nearest prize court, together with persons and cargo removed from the vessel, the ship's papers, and all other documents required for judicial examination.

These regulations have not received the same interpretation in all cases.

Oppenheim says:

Japan, which according to article 20 of her prize law of 1894 ordered her captors to release neutral prizes after confiscation of their contraband goods, in case the vessels can not be brought into a port, altered her attitude in 1904, and allowed in certain cases the destruction of neutral prizes. (2 International Law, p. 471, sec. 431.)

Of the above statement J. B. Moore says:

A close scrutiny of article 20 of the Japanese prize law of 1894 seems scarcely to bear out this statement. The article does not in terms embrace vessels not brought in, but refers to cases in which the prize was, in conformity with article 18, brought in, if not to the port where the prize court sits, then, in conformity with article 19, to the port nearest the place of capture; and in this relation it provides: "In the above-mentioned cases, if the vessel is not an enemy's vessel, the commander should release the vessel after confiscation of the contraband goods."

A stronger implication, to the effect stated by Oppenheim, might have been drawn from article 22 of the prize law of 1894, which reads: "If the enemy's vessels are unfit to be sent to a port as stated in article 18, the commander should break up the vessels, after taking the crew, the ship's papers, and the cargo, if possible into his ship. The crew, the ship's papers, and the cargo should be sent to a port as stated in article 18." (7 Moore, International Law Digest, p. 524.)

The Instructions to Blockading Vessels and Cruisers issued by the United States June 20, 1898 (General Order No. 492), states:

24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

British cases and opinions.—Professor Holland, in a letter to the *Times*, London, referring to the Russian rules, also refers to several cases.

The *Actaeon*, an American ship, in 1814, under British license, was destroyed by the British war ship *La Hogue*. The captain of *La Hogue* could not spare a prize crew to send the *Actaeon* to port and did not deem it wise to allow the *Actaeon* to proceed, as she might disclose the position and strength of his force. He therefore destroyed the

Actaeon with her cargo. The court decided that while the action of the British captain might be meritorious as toward his own Government, it might not properly entail loss upon the innocent owner.

Lastly, it has been said that Captain Capel could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston, because she would have furnished important information to the Americans. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain Capel as far as his own Government is concerned, but they furnish no reason why the American owner should be a sufferer. I do not see that there is anything that can be fairly imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, that he is entitled to receive the fullest compensation from the captor. (2 Dodson's Admiralty Report, p. 48. The *Felicity*, Ibid., p. 381, stated in International Law Topics and Discussion, Naval War College, 1905, p. 63.)

In 1855 Doctor Lushington gave his opinion in the case of the *Leucade*.

The destruction of a vessel under hostile colors is a matter of duty; the court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the enemy proprietor where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colors is detained, she has the right to be brought to adjudication according to the regular course of proceeding in the prize court; and it is the very first duty of the captor to bring it in, if it be practicable.

From the performance of this duty the captor can be exonerated only by showing that he was a *bona fide* possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as for the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colors is not brought to a competent court for adjudication, the claimants are, as against the captor, entitled

to costs and damages. Indeed, if a captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her. (Spink's Admiralty Reports, 217.)

These British cases seem to some to admit the right of destruction of neutral vessels under circumstances of grave necessity under penalty not merely of restitution of value but of costs and damages.

In his letter to the London *Times* dated August 1, Professor Holland thus comments upon the practice:

There is no doubt that by the Russian regulations of 1895, article 21, and instructions of 1901, article 40, officers are empowered to destroy their prizes at sea, no distinction being drawn between neutral and enemy property, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from a Russian port, danger to the imperial cruiser or to the success of her operations. The instructions of 1901, it may be added, explain that an officer "incurs no responsibility whatever" for so acting if the captured vessel is really liable to confiscation and the special circumstances imperatively demand her destruction. It is fair to say that not dissimilar, though less stringent, instructions were issued by France in 1870 and by the United States in 1898; also that, although the French instructions expressly contemplate "l'établissement des indemnités à attribuer aux neutres," a French prize court in 1870 refused compensation to neutral owners for the loss of their property on board of enemy ships burnt at sea.

The question, however, remains whether such regulations are in accordance with the rules of international law. The statement of these rules by Lord Stowell, who speaks of them as "clear in principle and established in practice," may, I think, be summarized as follows: An enemy's ship, after her crew has been placed in safety, may be destroyed. Where there is any ground for believing that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of "the gravest importance to the captor's own state," after securing the ship's papers and subject to the right of neutral owners to receive full compensation. (*Actæon*, 2 Dods., 48; *Felicity*, *Ib.*, 381; substantially followed by Dr. Lushington in *Leucade*, Spinks, 221.) It is not the case, as is alleged by the *Novoe Vremya*, that any British regulations "contain the same provisions as the Russian" on this subject. On the contrary, the Admiralty Manual of 1888 allows destruction of enemy vessels only, and goes so far in the direction of liberality as to order the release, without ransom, of a neutral prize which, either from its condition or from lack of a prize crew, can not be sent in for adjudication. The Japanese in-

structions of 1894 permit the destruction of only enemy vessels; and article 50 of the carefully debated "Code des prises" of the Institut de Droit International is to the same effect. It may be worth while to add that the eminent Russian jurist, M. de Martens, in his book on international law, published some 20 years ago, in mentioning that the distance of her ports from the scenes of naval operations often obliges Russia to sink her prizes, so that "ce que les lois maritimes de tous les états considèrent comme un moyen auquel il n'y a lieu de recourir qu'à la dernière extrémité, se transformera nécessairement pour nous en règle normale," foresaw that "cette mesure d'un caractère général soulèvera indubitablement contre notre pays un mécontentement universel." (*The Times*, August 6, 1904.)

Lord Landsdowne, in a communication sent to the British ambassador at St. Petersburg, August 10, 1904, protests against the destruction of neutral ships (cited in Topic IV, 1905):

The position, already sufficiently threatening, is aggravated by the assertion on behalf of the Russian Government that the captor of a neutral ship is within his rights if he sinks it, merely for the reason that it is difficult, or impossible, for him to convey it to a national port for adjudication by a prize court. We understand that this right of destroying a prize is claimed in a number of cases; among others, when the conveyance of the prize to a prize court is inconvenient because of the distance of the port to which the vessel should be brought, or when her conveyance to such a port would take too much time or entail too great a consumption of coal. It is, we understand, even asserted that such destruction is justifiable when the captor has not at his disposal a sufficient number of men from whom to provide a crew for the captured vessel. It is unnecessary to point out to your excellency the effects of a consistent application of these principles. They would justify the wholesale destruction of neutral ships taken by a vessel of war at a distance from her own base upon the ground that such prizes had not on board a sufficient amount of coal to carry them to a remote foreign port—an amount of coal with which such ships would probably in no circumstances have been supplied. They would similarly justify the destruction of every neutral ship taken by a belligerent vessel which started on her voyage with a crew sufficient for her own requirements only, and therefore unable to furnish prize crews for her captures. The adoption of such measures by the Russian Government could not fail to occasion a complete paralysis of all neutral commerce.

It appears to His Majesty's Government that no pains should be spared by the Russian Government in order to put an end without delay to a condition of things so detrimental to the com-

merce of this country, so contrary to acknowledged principles of international law and so intolerable to all neutrals. You should explain to the Russian Government that His Majesty's Government does not dispute the right of a belligerent to take adequate precautions for the purpose of preventing contraband of war, in the hitherto accepted sense of the words, from reaching the enemy; but they object to, and can not acquiesce in, the introduction of a new doctrine under which the well-understood distinction between conditional and unconditional contraband is altogether ignored, and under which, moreover on the discovery of articles alleged to be contraband, the ship carrying them is, without trial and in spite of her neutrality, subjected to penalties which are reluctantly enforced even against an enemy's ship (Parliamentary Papers, Russia, No. 1 (1905), p. 12.)

The Knight Commander case.—The sinking of the *Knight Commander* in 1904 during the Russo-Japanese war has attracted general attention and caused much discussion. The *Knight Commander* was a British steamer and was captured by a Russian cruiser and sunk before adjudication by a prize court.

Attitude of the United States.—In regard to the rumored sinking of the *Knight Commander* during the Russo-Japanese war in 1904, the United States cabled its representatives in Russia:

DEPARTMENT OF STATE,

Washington, July 30, 1904.

(Mr. Loomis instructs Mr. Eddy to call the attention of the minister of foreign affairs to the treaty of 1854, and that, as legitimate commerce is carried on by American ships with Japanese ports and the Far East, the United States Government, considering the above treaty and section 1, article 5, of the Russian proclamation of rules of conduct in the war between Russia and Japan, expects, and should the contingency arise, shall claim rights under that treaty or international law.

As it is represented that the *Knight Commander* was under American charter and was carrying American property, instructs him to inquire whether that vessel was sunk by the commander who made the seizure, and to inform the Russian Government that if such is the case the Government of the United States would view with the gravest concern the application of similar treatment to American vessels and cargoes, and that this Government reserves all rights of security, regular treatment, and reparation for American cargo on board the *Knight Commander* and in any seizure of American vessels.) (U. S. Foreign Relations, 1904, p. 734.)

Decision of Vladivostok prize court.—The sinking of the *Knight Commander* during the Russo-Japanese war in 1904 was considered by the Russian prize court at Vladivostok, which rendered its decision on August 3-16, 1904. The decision gives the following statements:

The facts of the case are as follows: On July 11/24, about 6 a. m., a separate detachment of cruisers of the Pacific Ocean squadron under command of Rear-Admiral Jessen, consisting of cruisers *Rossia* (flagship), *Gromoboi* and *Rurik*, while in latitude 34° 21' N., longitude 138° 53'.5 E., to southwest of entrance to Gulf of Tokio, perceived a merchant steamer. *Rossia* gave chase, and when within 15 or 20 cables hoisted signal "stop," and then sent, one after another, two blank shots, then two projectiles under her bow as steamer continued on her course at full speed for entrance of Tokio Gulf. The steamer then stopped and hoisted British commercial flag. By order of commander of detachment, *Rossia* hoisted signal "Master come on board with papers," but as this order was not obeyed, a party headed by Lieutenant Favrishenko and Sub-Lieutenant Aminoff was sent aboard to examine steamer's papers and cargo. Examination proved that J. R. Durant was master, that she was on voyage to Japan with cargo consisting of railway material, bridge material, machinery, and various articles. The master of the steamer was not able to present any documents of his cargo, but examination of the holds showed that they were filled with contraband exclusively, the other articles constituting an unimportant portion. After examination the officers returned to the cruiser, bringing the master and papers along. Having inquired of the master why there were no bills of lading amongst the papers, and learning there was coal for four days only, Rear-Admiral Jessen informed the master that the steamer was subject to confiscation, and as she had not sufficient coal to take her into a Russian port, she would be destroyed. Half an hour was given for removal of the crew. After removal of crew she was sunk by explosion of cartridges at 9.15 a. m. On return of cruiser division to Vladivostok, the matter of sinking of steamer was submitted to the prize court. Examination of master's papers showed that steamer was British register, built in Yarrow in 1890, of 9,620 displacement, 4,305 and 2,716 registered tonnage and speed of 11 knots. Her registry was from Liverpool, No. 97801, and steamer belonged to Robert Low Greenshields, of Liverpool. From entries in log and testimony of master it was learned that until December, 1903, the vessel made voyages between Calcutta and other East Indian ports. In December she was chartered by the Austrian Lloyd for a trip to Trieste and Venice. From Venice steamer chartered by an Austrian firm in Trieste to carry coal for machinery and private cargo to Mes-

sina, then from Palermo to load 25,000 cases of lemons and general cargo for New York, where the charter lapsed. In New York the steamer was not chartered by anyone, but gradually received various cargo, and was sent by orders of the agents of the ship's owner to Singapore, Manila, Shanghai, Yokohama, and Kobe, where this voyage was to end. In regard to the cargo for which the master, Durant, presented no bills of lading or even manifest, the court could only form a notion of that portion addressed to Japanese ports of Yokohama and Kobe, which was in the steamer at time of capture. Ship's papers being missing, the court took the evidence of the two boarding officers, Lieutenant Favrishenko and Baron Aminoff, in two private memorandum books, presented by the latter. From the data, when carefully confronted one side with the other, we may conclude that the cargo at moment of seizure of ship consisted of the following articles: Rails, bridge materials, various railway material, steel, steel sheets, nails, wire, pipes, wheels, tar, acids, shovels, and a small quantity of assorted cargo consisting of paint, clothing, leather, sailcloth, tin, hardware, wood, and small articles, as ink, perfumery, soap. Thus it may be considered as fully proven that the *Knight Commander* was arrested by the Russian cruisers while carrying contraband of war into the enemy's ports.

After examination of the evidence the court reached the following conclusion:

Therefore the court feels convinced that the following is indubitably proven.

(1) The fact that the owner of the steamer *Knight Commander* having performed illegal acts, directed to make more effective the efforts of our antagonist by carrying to him at Chemulpo, the theater of war directly, articles of military contraband.

(2) The suppression by the master of said steamer of an entire file of important documents relating to his vessel and to her cargo as well as his undoubted knowledge that he was conveying articles of military contraband to the enemy; and

(3) The presence on said steamship at the moment of being seized of military contraband in quantity indubitably exceeding one-half of her entire cargo.

On these grounds, and taking into consideration the actual facts of the present case as provided for by articles 5, 8, 13, of the statutes of naval prizes, the prize court finds:

(1) That the *Knight Commander* was arrested in a legal manner in compliance with the rules enacted in articles 2, 3, 15-17 of the statutes; and

(2) That the said steamer having been caught conveying military contraband to the enemy in quantity exceeding one-half of the cargo, as well as the mentioned contraband, appear to be legal

prizes, and decrees to adjudge the steamer *Knight Commander* and the contraband cargo that was in her at the time of her seizure as subject to confiscation as legal prizes.

Appeal from the Vladivostok decision.—In the appeal from the decision of the Vladivostok court to the higher prize court, the attorney for the owners of the steamer and for the owners of the sunken cargo concludes, on review of the evidence, that—

Therefore the only action that should have been taken in this case was to arrest the ship and bring her into the nearest Russian port to land the contraband, but in no case to sink the steamer. Under the circumstances when the steamer was arrested, taking her into a Russian port presented scarcely any difficulty whatever; for (1) because there was on the steamer, as seen from the record, about 120 tons of coal, which, allowing for a ten-knot speed, would have been sufficient for four days, distance of nearly 1,000 miles. Whereas the distance to the nearest Russian port, Kersakovsk or Saghalin, from Yokohama is considered 750 miles, and (2) though the vessel was stopped 15 miles off the entrance of the Gulf of Tokio, no enemy was seen nor was there any evidence of his proximity, whereas these circumstances exactly were deemed extraordinary and the steamer was sunk. The prize court in its decision with reference to the quantity of the cargo was guided by the same data as the naval authority, whereas had they acted in conformity with article 71, statutes on prizes, by virtue of which in similar cases the shipper must be summoned by publication, in such case most probably there would have been at the disposal of the court a sufficient number of proofs of the faulty character of the decision regarding the quantity of cargo adjudged military contraband.

Relying upon all the above statements, I have the honor to ask the highest prize court to revoke the decision of the Vladivostok prize court as incorrect, and to decree that the sinking of the *Knight Commander* was unjustifiable, and that the owners both of the steamer and cargo are entitled to receive remuneration for the sinking of the one and the other.

Decision on the appeal.—The following telegram explains the action upon the appeal in the case of the *Knight Commander*:

AMERICAN EMBASSY,
St. Petersburg, December 5, 1905.

(Mr. Eddy reports that the decision in the case of the *Knight Commander*, rendered on Saturday, maintains the finding of the Vladivostok prize court in regard to condemnation of the vessel and cargo, that the protest of Mr. Berline concerning neutral

goods was allowed, and that that matter was referred to the Libau prize court for revision under article 88, naval prize regulations.) (U. S. Foreign Relations, 1905, p. 754.)

The article 88 above referred to is:

88. Matters concerning indemnification for losses arising as a result of the detention, destruction, perishing, or injury of merchant vessels and cargoes are transacted in port prize courts, and are begun only at the instance of parties who have sustained losses or their agents. The rights of parties in the matters mentioned are enjoyed by the persons who have suffered loss, or their agents, and by the judge-advocate as representative of the interests of the Government. (U. S. Foreign Relations, 1904, p. 746.)

Review of the case.—There is no contention that the condition of the *Knight Commander* was bad, that its value was extremely small, that there was danger of recapture, or that the distance from a port was great, though it was maintained that there was coal enough only for four days, and on this ground the vessel was destroyed. As the court decision says:

Having inquired of the master why there were no bills of lading among the papers, and learning there was aboard coal for four days only, Rear-Admiral Jessen informed the master that the steamer was subject to confiscation, and as she had not sufficient coal to take her into a Russian port, she would be destroyed. Half an hour was given for removal of the crew. After removal of the crew she was sunk by explosion of cartridges at 9.15 a. m.

The naval officer thus constituted a "quarter-deck prize court" decided the neutral vessels liable to confiscation and destroyed vessel and cargo.

In the case of the *Knight Commander* the prize court at Vladivostok was largely military in character, made up as follows: "Major-General Knipper, chairman; Captain (second rank) Simonoff, Lieutenant-Colonel Egerman, Public Councillor Stein, Collegiate Secretary Cheborenko, Procurator Titular Councillor Lazarevsky, Collegiate Secretary Engelhardt, secretary."

Reciting certain facts in regard to cargo and voyage, this court says, "Thus it may be considered as fully proven that the *Knight Commander* was arrested by the Russian cruisers while carrying contraband of war into the enemy's ports."

It may be noted that the articles mentioned, such as rails, railway material, wire, acids, wheels, clothing, hardware, perfumery, soap, etc., are generally regarded as contraband only when destined for the enemy's military or naval use. The simple destination of such articles of conditional contraband nature to the ports of an enemy does not necessarily make them liable to capture.

The absence, loss, or destruction of certain of the proper ship's papers which was set forth before the court is not a ground for destruction, but may be ground for seizure of a vessel.

The destination was not proven beyond a doubt, though supposed for a part of the cargo to be Chemulpo, which, though in Korea, the Russian report names as "the theater of war."

That the owner of the vessel was involved in the transaction other than as a carrier is not affirmed.

The amount of goods of various classes is admittedly in doubt. The nature of the cargo was bulky and of such character as to make it impossible for the visiting party of two or three to make sure it was conditional contraband.

In Attorney Bagenoff's appeal from the decision of the Vladivostok court it is claimed that the trial was illegal because—

1. The procedure was irregular and the evidence insufficient and *ex parte*.

2. The absence of certain of the ship's papers would, according to Russian instructions 18 and 20, permit only search and detention of the vessel.

3. The examination of the cargo was superficial and indefinite by looking through the hatchways into the holds, and the testimony of the examining officers was not in agreement.

Professor Woolsey's opinion.—In the discussion of the case of the *Knight Commander*, Professor Woolsey, in an article appearing since this Situation was prepared, says:

These are the considerations involved:

- (1) The injustice of penalizing a ship not shown to be guilty.

(2) The insufficiency of an *ex parte* examination of cargo at sea.

(3) Validity of excuses for destruction.

(4) The doctrine of conditional contraband; its application to this cargo.

(5) Is destruction ever permissible?

(6) Is destruction lawful subject to compensation?

* * * * *

So far as I am aware the injustice of destruction attaching as a penalty to the neutral ship, even granting that it is carrying contraband, has not been sufficiently emphasized in the *Knight Commander* case.

The argument is this: To condemn a ship carrying contraband it must be shown that it belonged to the owner of the contraband or that the contraband formed so large a part of the cargo as to prove complicity. This is an intricate business of a highly judicial nature, demanding the production of papers and examination of witnesses. It will be later shown what grave doubt existed as to the really contraband character of the cargo in question. But, laying this aside, the case in point shows us a penalty, namely, the loss of the ship, which according to the accepted rules governing contraband would not have been inflicted by any well-regulated prize court, unless the owner of the ship was shown to be the owner of the cargo as well, as to which there is no proof that the searching officer made inquiry. Thus we find the case to involve an enlargement of the accepted penalties for carrying contraband.

2. The vast difference between the cursory *ex parte* judgment upon all the facts in a ship's case and the judicial examination of the same is also to be noted as a sound reason against the practice we are considering. In port the cargo can be landed, its character ascertained, its destination learned, and witnesses summoned in proof of all, beside that evidence which the ship's papers give. This trial, before a court trained to judge the credibility of evidence, if properly conducted, creates so strong a presumption of guilt or innocence that few governments will venture to challenge the verdict. It must be admitted that the prize court of first instance sitting at Vladivostok seems to have been scarcely a judicial body it seems to have existed for condemnation only.

After discussing other questions raised by the destruction of the *Knight Commander*, Professor Woolsey refers to the distinction between "compensation paid for a destroyed neutral ship as implying a penalty for an unlawful act and compensation interpreted as the price to

be paid by the belligerent for destruction as a military necessity acting within its rights." He says:

With this distinction clearly in mind and the *jus angariae* to justify destruction on account of the military necessity alluded to by Professor Holland, it is contended that the only reason for exceptions to the rule disappears, and that we are justified in laying down as probably the usage of to-day—with the sole exception of Russia—that neutral ships which can not be taken before a court for trial must be released. If military necessity demands, they may be appropriated or destroyed subject to full payment.

In defense of this rule are the following considerations: This is substantially the usage of to-day except in Russia. This is the opinion almost unanimous of British and American writers. Continental publicists, while not unanimous, are fairly favorable to this rule. Neutral states demand it as a reasonable measure, in their interest. It is a logical rule, because otherwise you are enlarging the penalty of carrying contraband, making ship liable with goods, and conferring improper judicial authority upon a naval officer not trained for it. If this is not the rule, yet it is a reasonable rule, and as it is the fashion now-a-days to say, the next Hague Conference should make it a rule. (16 Yale Law Journal, p. 567 ff.)

Later Russian regulations.—The protests in regard to the sinking of the *Knight Commander* led to the issue of new orders.

The Russian instructions of August 5, 1905, leave some doubt by making a distinction between "direct necessity" and "emergency."

Russian vessels were not to sink neutral merchantmen with contraband on board in the future, except in case of direct necessity, but in case of emergency to send prizes into neutral ports.

Case of the Kow-Shing.—On July 25, 1894, the *Kow-Shing*, a British vessel, engaged in Chinese transport service in the Chino-Japanese war, and having on board about 1,100 troops, was stopped and ordered to follow a Japanese war ship to port. The Chinese on board the transport refused to allow this. The Japanese war ship sunk the *Kow-Shing*. The action of the Japanese war ship has been generally supported as an act of war, the transport being engaged in the military service

of the enemy. (Takahashi, *International Law during the Chino-Japanese War*, p. 24.)

Professor Holland's opinion.—Professor Holland, in a letter to the *London Times*, says of the sinking of the *Kow-Shing*:

The *Kow-Shing*, therefore, before the first torpedo was fired, was, and knew that she was, a neutral ship engaged in the transport service of a belligerent. (Her flying the British flag, whether as a *ruse de guerre* or otherwise, is wholly immaterial.) Her liabilities as such a ship were twofold:

1. Regarded as an isolated vessel, she was liable to be stopped, visited, and taken in for adjudication by a Japanese prize court. If, as was the fact, it was practically impossible for a Japanese prize crew to be placed on board of her, the Japanese commander was within his right in using any amount of force necessary to compel her to obey his orders.

2. As one of a fleet of transports and men-of-war engaged in carrying reinforcements to the Chinese troops on the mainland, the *Kow-Shing* was clearly part of a hostile expedition, or one which might be treated as hostile, which the Japanese were entitled, by the use of all needful force, to prevent from reaching its destination. The force employed seems not to have been in excess of what might lawfully be used, either for arrest of an enemy's neutral transport or for barring the progress of a hostile expedition. The rescued officers also having been set at liberty in due course, I am unable to see that any violation of the rights of neutrals has occurred. No apology is due to our Government, nor have the owners of the *Kow-Shing* or the relatives of her European officers who may have been lost any claim for compensation. I have said nothing about the violation by the Japanese of the usages of civilized warfare (not of the Geneva Convention, which has no bearing upon the question) which would be involved by their having fired upon the Chinese troops in the water; not only because the evidence upon this point is as yet insufficient, but also because the grievance, if established, would affect only the rights of the belligerents *inter se*; not the rights of neutrals, with which alone this letter is concerned. I have also confined my observations to the legal aspects of the question, leaving to others to test the conduct of the Japanese commander by the rules of chivalrous dealing or of humanity.

Your obedient servant,

T. E. HOLLAND.

ATHENÆUM CLUB, August 6.

(Reprinted in Takahashi, *International Law during the Chino-Japanese War*, p. 41.)

United States opinion as to court and prize.—In 1851 the case of *Jecker v. Montgomery* in the Supreme Court of the United States gave rise to several questions.

This case arises upon the capture of the ship *Admittance* during the late war with Mexico by the United States sloop of war *Portsmouth*, commanded by Captain Montgomery.

The *Admittance* was an American vessel, and after war was declared sailed from New Orleans, with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands, and was found by the *Portsmouth* at Saint Jose, on the coast of California, trading, as it was alleged, with the enemy.

Before this capture was made, a prize court had been established at Monterey, in California, by the military officer exercising the functions of governor of that province, which had been taken possession of by the American forces. A chaplain belonging to one of the ships of war on that station was appointed alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States, and the officers of the squadron were ordered to carry their prizes to Monterey and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the *Admittance* was carried to Monterey and condemned by the court as lawful prize, and the vessel and cargo sold under this sentence. The seizure at Saint Jose was made on the 7th of April, 1847, and the ship and cargo condemned on the 1st of June, in the same year.

* * * * *

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made, and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question, and under the Constitution of the United States the judicial power of the General Government is vested in one Supreme Court and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States, and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the laws of nations.

The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more

than the agents of the military power, to assist it in preserving order in the conquered territory and to protect the inhabitants in their property and persons while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize, and the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

* * * * *

As a general rule it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture of ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from this duty, and may sell or otherwise dispose of the property before condemnation; and where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States.

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture and award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause. (13 Howard, U. S. Supreme Court Reports, 498.)

Opinions of writers on destruction of prize.—The opinions of writers upon international law show considerable diversity in statement.

Kent says:

Sometimes circumstances will not permit property captured at sea to be sent into port; and the captor, in such cases, may either destroy it or permit the original owner to ransom it. (Abdy's Kent, International Law, p. 276.)

Kleen enumerates the generally claimed grounds of destruction of seized vessels and comments thereon :

1°. Que le navire soit si délabré, ou marche si mal par suite du mauvais temps, qu'il ne puisse être tenu à flot ou remorqué; 2°. Que, devant l'approche d'un vaisseau de guerre ennemi, le navire puisse être pris par celui-ci, ou empêché de l'éviter ou de lui cacher les opérations; 3°. Que le capteur manque de l'équipage nécessaire pour amariner le navire; 4°. Que le port soit bloqué ou trop éloigné, ou que le navire ait trop peu de valeur pour y être mené; 5°. Que le capteur, étant pressé, n'ait pas de loisir de s'occuper du navire.

Aucun de ces prétextes ne soutient un examen sérieux. Le fait qu'un capteur voit dans les événements naturels, dans des risques pour lui-même, dans le manque d'équipage ou dans d'autres inconvénients pratiques, un obstacle à opérer telle saisie, peut bien constituer pour lui—ainsi qu'il a été généralement remarqué surtout en ce qui concerne des prises *neutres*—un motif de l'*omettre*, mais non pas un motif de commettre une violation du droit d'un neutre ou un acte de piraterie. La destruction d'une propriété neutre n'est jamais une "nécessité de la guerre," car le belligérant ne se défend pas par cela contre son ennemi. D'ailleurs le droit de la guerre repose tout entier sur la force comme seul titre juridique, condition *sine quâ non*. Le croiseur qui ne dispose pas de la force requise—soit en armement, en équipage, etc.—pour pouvoir remplir toutes les conditions d'une saisie légale (protection contre l'ennemi, amarinage, conduite au port, direction, etc.), n'est plus un capteur compétent. Comment un acte *remplaçant* la saisie pourrait-il être un titre d'appropriation, alors que la saisie elle-même ne l'est pas? Le croiseur qui, en pleine mer, détruit de la propriété privée non encore jugée et dont partant aucune preuve formelle n'a encore rendu manifeste le caractère ennemi ou coupable, s'arroe les attributions d'un juge, qualité qui ne lui revient pas.

Sur ces fondements et d'autres semblables, la défense absolue de détruire sur mer des prises neutres est à peu unanime: une telle destruction est partout qualifiée de criminelle. L'interdiction se reconte déjà pendant les guerres maritimes de la Revolution française—alors que tant d'autres violations des droits des neutres furent pourtant tolérées—par la règle qu'une destruction pareille ne peut jamais être légitimée, tout au plus peut-elle être excusée en cas de force majeure, et encore dans ce cas, l'État du capteur doit réparation pleine et entière aux lésés. Depuis lors, la défense contre ces sortes de destructions est devenue sévère. (2 La Neutralité, p. 531.)

Lawrence makes a clear distinction between the destruction of neutral and the destruction of belligerent property.

Meanwhile it is necessary to point out that a broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed owners directly the capture is effected, and it matters little to the enemy subject who has lost it whether it goes to the bottom of the sea or is divided by public authority among those who have deprived him of it. But the latter does not belong to the captors till a properly constituted court has decided that their seizure of it was good in international law, and its owners have a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded, a claim for satisfaction and indemnity may be put in by their government. It is far better for a naval officer to release a ship or goods as to which he is doubtful than to risk personal punishment and international complications by destroying innocent neutral property. Even where what is believed to be enemy property is concerned, and destruction or release become the only possible alternatives, it would perhaps be wise to adopt the latter unless the hostile nationality of the vessel and ownership of the cargo are too clearly established to admit of mistake. But the necessity of rapid movement in modern naval warfare, combined with the fact that neutral ports will in most cases be closed to prizes, is almost certain to result in an increase of the practice of destruction, unless the nations will consent to take a further step forward and prohibit the capture of private property unless it be contraband of war. (Principles of International Law, p. 406, § 215.)

Pradier-Fodéré says, after considering the generally enumerated grounds for the destruction of enemy private vessels—

En résumé la pratique internationale autorise, à titre exceptionnel, les capteurs à détruire les navires ennemi qu'ils ont capturés, et la doctrine admet cette destruction dans les cas de nécessité absolue, dans les circonstances de force majeure, tout en reconnaissant, avec raison, que l'annéantissement d'un navire de commerce désarmé et conséquemment n'opposant aucune résistance, est un acte qui excite l'horreur. On considère qu'une pareille pratique est une aggravation des désastres inséparables des hostilités dirigées contre la propriété privée, mais on la tolère comme une nécessité fatale qui peut s'imposer parfois, et dont il faut se garder de faire abus. car indépendamment de l'atrocité morale d'un semblable holocauste offert à l'intérêt des

armes, l'anéantissement de vaisseaux et de cargaisons sur une vaste échelle serait, au point de vue économique, suivant l'observation très juste de de Boeck, un fait déplorable, dont le monde civilisé subirait le contre-coup, et qui fait reculer l'humanité aux plus mauvais jours de son histoire, avec la circonstance aggravante que les ruines accumulées par ce système de destruction dépasseraient aujourd'hui tout ce que les temps anciens peuvent offrir, étant donné le développement du commerce international et la puissance et la rapidité dont sont désormais doués les vaisseaux de guerre. (S Droit International Public, p. 659, §3185.)

Risley states his opinion as follows:

Where both ship and cargo have a hostile character her destruction is not a harsh measure, for the captor only destroys what would otherwise become his own property. In two wars destruction has been adopted as a deliberate policy—by the United States against Great Britain in 1812–1814, and by the Confederate States in the American civil war. In the latter case all the Confederate ports were blockaded, and they could not have sent in prizes if they had wanted to.

But where the cargo, or a portion of it, is neutral property, destruction can only be justified in exceptional cases, on the ground of military necessity, if the Declaration of Paris has any binding value. It is impossible to reconcile a policy of systematic destruction applied to neutral cargoes with the provision of the Declaration of Paris protecting neutral goods in enemy ships, except contraband. (The Law of War, p. 149.)

Sir Robert Phillimore says:

If a neutral ship be destroyed by a captor, either wantonly or under alleged necessity, in which she herself was not directly involved, the captor, or his Government, is responsible for the spoliation. The gravest importance of such an act to the public service of the captor's own State will not justify its commission. The neutral is entitled to full restitution in value. (International Law, III, CCXXXIII.)

Oppenheim, in his recent work, says of the destruction of neutral prizes:

That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed is as universally recognized as that captured enemy merchantmen may not as a rule be destroyed. But whereas, as shown above in §194, the destruction of captured enemy merchantmen before a verdict is obtained against them is, in exceptional cases, lawful, it is a moot question whether the destruction of captured neutral vessels is likewise exceptionally allowed instead of bringing them before a prize court.

British practice does not, as regards the neutral owner of the vessel, hold the captor justified in destroying the vessel, however exceptional the case may be, and however meritorious the destruction of the vessel may be from the point of view of the government of the captor. For this reason, should a captor, for any reason whatever, have destroyed a neutral prize, full indemnities are to be paid to the owner, although, if brought into a port of a prize court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule is, that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought into a port of a prize court. (2 International Law, 469, sec. 431.)

In Atlay's edition of Wheaton's International Law is the following opinion:

If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. Neutral cargoes are not always equally privileged. In 1870, the *Desaix*, a French cruiser, captured two German vessels, the *Ludwig* and the *Vorwaerts*, and burnt them on the day of capture. Part of the cargo of these vessels belonged to neutral owners (British subjects), and was therefore under the express protection of the third article of the Declaration of Paris. The owners claimed compensation for the destruction of their goods, but the *Conseil d'État*, in a judgment delivered by the President, of the French Republic, held that though the Declaration of Paris exempts the goods of a neutral on board an enemy's ship from confiscation, and entitles the owner to their proceeds in case of a sale, yet it gives him no claim for damage resulting from the lawful capture of the ship or from any subsequent and justifiable proceedings of the captors. As the destruction of the two vessels was held to have been necessary under the circumstances, no compensation was awarded to the owners of the neutral cargo. (P. 507, sec. 359e.)

The destruction of an enemy merchant vessel seized at sea is doubtless the easiest disposition of such a vessel. It has been argued that when such a vessel would surely be condemned by a prize court, it would be lost to the enemy owner in any case, and its destruction at sea would be no greater loss to the enemy owner, while the enemy destroying the vessel would not profit by the action as when the vessel is taken into port and regularly condemned and forfeited. It is thus argued that relatively it would be an advantage to the enemy owner's state that the vessel

certain to be condemned should be destroyed rather than be forfeited to the capturing state.

In Atlay's edition of Wheaton's International Law it is stated that—

If the vessel belong to the enemy, and the captor has no means of retaining possession of her or of bringing her into port, he is then justified in destroying her, but it is his duty to preserve her papers and as much of the cargo as he can secure. The Confederate cruisers burnt many of their prizes at sea during the civil war, as their own ports were all blockaded by the Federal fleets; and though this was not a proceeding to be approved of, it was not a violation of international law. (P. 506, sec. 359d.)

In regard to the unqualified and universal obligation to release a neutral vessel, Professor Moore raises a question. He says:

Let us take, for example, the case of a neutral vessel laden with arms and munitions of war, which is captured by a cruiser of one belligerent while approaching a port of the other. Soon afterwards a superior force of the latter belligerent appears, so that the only way to prevent the arms and munitions of war from being conducted to their hostile destination is to burn or sink the vessel in which they are borne. Is the captor bound under such circumstances practically to hand over the vessel and cargo to his enemy? (7 Moore's International Law Digest, p. 523.)

Professor Moore concludes as follows:

The discussion between Great Britain and Russia during the Russo-Japanese war serves to emphasize the potentially important relation of the question of contraband to the question of destruction. When publicists have spoken of the presence of "contraband" as justifying or excusing the destruction of a neutral ship that could not be brought in, they have no doubt had in mind cargoes composed of things specially adapted to use in war and confessedly contraband, such as arms and ammunition, and cannot be assumed to have contemplated the subjection of neutral commerce to general depredation under an extension of the categories of contraband. (Ibid., p. 527.)

Rules of the Institute of International Law.—After much discussion in earlier sessions in regard to limiting destruction to vessels of the enemy, the following regulations were adopted at the Heidelberg meeting of the Institute of International Law in 1887:

SEC. 50. Il sera permis au capteur de brûler ou de couler bas le navire ennemi saisi, après avoir fait passer sur le navire de

guerre les personnes qui se trouvaient à bord et déchargé autant que possible la cargaison, et après que le commandant du navire capteur aura pris à sa charge les papiers de bord et les objets importants pour l'enquête judiciaire et pour les réclamations des propriétaires de la cargaison en dommages et intérêts dans les cas suivants.

(1) Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;

(2) Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;

(3) Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;

(4) Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;

(5) Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.

SEC. 51. Il sera dressé procès-verbal de la destruction du navire saisi et des motifs qui l'ont amenée; se procès-verbal sera transmis à l'autorité supérieure militaire et au tribunal d'instruction le plus proche, lequel examinera et, au besoin, complétera les actes y relatifs et les transmettra au tribunal des prises. (9 Annuaire de l'Institut de Droit International, 228.)

Usual procedure.—It is not easy to determine from a superficial examination such as is usually made by a visiting war vessel that destruction of an enemy merchant vessel would not involve serious complications in consequence of the presence of neutral goods on board which are regarded as exempt from capture even under an enemy flag.

The general principle followed by states is to regard the status of a seized vessel as in abeyance till determined by the court.

The right of search is preliminary to the right of seizure, and the right of seizure depends upon the result of the exercise of the right of search. * * * Even though there may be a legal seizure, it is the duty of the seizing vessel to follow such seizure by affording to the captured party all facilities of defense to which he may be entitled. (*The Nancy*, 37 U. S. Court of Claims, 401.)

In general any action toward a captured vessel in the way of appropriation or destruction of cargo must await condemnation by the court.

Destruction deprives the neutral of much evidence which he might otherwise show in support of the innocence of the destroyed property.

Practical objections to destruction.—There are certain practical considerations which at the present time make the destruction of enemy prize a serious question. Some of the considerations were mentioned in the Naval War College Discussions in 1905. Such possibilities as the following were mentioned as making destruction a doubtful proceeding: The possibility of error in the decision of a “quarter-deck court,” the liabilities under the provision of the Declaration of Paris exempting neutral goods except contraband from capture, and the fact that unwarranted destruction of any neutral property entails not merely restitution of value but also damages. Certain practical difficulties also arise, as was said in 1905:

The generally enunciated rule in regard to destruction of an enemy’s vessel is, “an enemy’s ship can be destroyed only after her crew has been placed in safety.” If this is to be strictly interpreted, there would be considerable doubt as to whether the deck of a war vessel, whose commander fears that his prize is in imminent danger of recapture because of the approach of his enemy, would be a “place of safety.” It is held that the property and persons of belligerents are subject to the hazard of war when coming within the field of operations. It would scarcely follow that such persons should be forced to assume such hazards, particularly when it is a matter of doubt before adjudication by the court whether the vessel is a proper subject for seizure. What is true of the belligerent vessel is even more emphatically true of a neutral vessel.

* * * * * * *

Many arguments may be urged against the destruction of neutral vessels. Before destruction in any case, the crew, passengers, and papers must be taken from the neutral vessel on board the belligerent ship. These are then immediately subjected to all the dangers of war to which a war vessel of a belligerent is subjected. Such a position may be an undue hardship for those who have not been engaged in the war and one to which they should not be exposed.

A belligerent vessel, with crew, passengers, and papers of the destroyed neutral vessel, may enter a neutral port to which entrance with the vessel itself would be forbidden. This is in effect almost an evasion of the general prohibition in regard to the entrance of prize, because on board the belligerent vessel is

the evidence upon which the decision of the prize court of the belligerent will be rendered. It is certain that a neutral state would be very reluctant to admit within its territory a belligerent vessel having on board the crew and papers of one of its own private vessels which the belligerent had destroyed. The belligerent vessel might thus obtain the supplies from the neutral which would enable it to carry to its prize court the evidence in regard to capture.

It does not seem possible in view of precedent and practice to deny the right of a belligerent to destroy his enemy's vessel in case of necessity. Of course if the doctrine of exemption of private property at sea is generally adopted this right can no longer be sustained. The destruction of neutral vessels not involved in the service of the belligerent is sanctioned neither by precedent nor practice. (International Law Topics, Naval War College, 1905, pp. 73-75.)

Opinion of the British Commission.—The questions of capture, sending in, and destruction of private vessels was quite fully considered in the Report of the British Royal Commission on the Supply of Food and Raw Material in Time of War:

106. The only point in this connection which seems to demand special examination is whether the practice ordinarily followed, and generally prescribed, of "sending in" a prize with a view to inquiry into her character and that of her cargo by a prize court is, in every case, internationally obligatory. If so, the rule must obviously limit the number of prizes which any one cruiser can capture, to any purpose. The smaller the cruiser the less will she be able to provide the prize crews necessary for "taking in" any large number of prizes. For this and other reasons it has not unfrequently happened that captors have sunk or burned their prizes after a necessarily perfunctory inquiry into their nationality and trade.

107. With reference to ships and cargoes unquestionably belonging to the country of the captor or of the enemy, no question of international duty can arise, and a belligerent is entitled to give its cruisers such instructions as regards the disposal of such ships and cargoes as it may think fit. It is for the protection of "innocent" neutral property that international law insists upon opportunity being given for judicial examination into the facts of any capture in which such property may be involved. "Sending in" is, in such a case, internationally obligatory, when it is reasonably possible; and should the retention of the prize by the captor imperil his own safety, or be incompatible with the operations in which he is engaged, his proper course would seem to be to release her (although some national instructions may be quoted

to the contrary), taking from her a ransom bond, if he is allowed to do so by the regulations of his own Government.

108. The organization of modern war ships would appear to place new difficulties in the way of either "sending in" or destroying prizes on a large scale. Such ships, it is said, could spare but few of their men, trained, as they are, for highly specialized departments of labor, to act as prize crews; nor could they find room on board for the crews which it would be necessary to remove from prizes before proceeding to sink them.

146. Again, engines and machinery have reduced the space available for the *personnel* of warships as compared with that available in the days of sailing ships. A modern warship could only to a very limited extent furnish prize crews, and she would impair her fighting and steaming capacity by so doing. To some extent she could also accommodate crews of captured merchantmen or could carry a limited number of supernumeraries (if such surplus *personnel* of trained officers and men should be available) for the purpose of providing prize crews. It follows, therefore, that after a very few captures a warship will be face to face with the dilemma that she must either sink a fresh prize or must take it into port; and if the former alternative is adopted, she must take the crew on board and, owing to the inconvenience which their presence would cause, land them at the earliest opportunity. In either case the warship ceases to be a free operator against commerce. Hence modern conditions tend to limit the capturing power of regular war cruisers. These observations do not, however, apply to ocean trading steamers converted and armed for the purpose of attacking commerce.

It should be added that torpedo-craft (*i. e.*, destroyers and torpedo boats) can neither spare prize crews nor accommodate anyone above their complement numbers. If, therefore, they are employed against commerce, for which they were never intended, such craft could only compel merchant ships to follow them into port under threat of being torpedoed. Moreover, these craft can only operate within a comparatively short distance of their shore basis. (Vol. I, pp. 25 and 34, §§ 106-108, 146.)

The following questions by Sir John Colomb and replies by Professor Holland also appear in the minutes of the British Royal Commission on the Supply of Food and Raw Material in Time of War, 1905:

6833. In your paper you refer to the limitation put by international law upon the number of prizes taken, by the necessity of furnishing prize crews, and of taking prizes into port?—In the memorandum I discuss the question whether there is a limitation and how far it applies.

6834. Generally there is a limitation?—There is for the protection of neutral property, but for no other purpose. There is the chance that neutral property is involved; if it were not for that, it would not be necessary at all.

6835. Then, as regards the destruction of prizes, what about the crews on board those ships?—They must take out the crews, and they may take out the cargoes if they have time to do so.

6836. It is against international law, then, to sink them without taking out the crews?—Yes.

6837. Therefore, that is another limitation to the power of a man-of-war making seizures and destroying vessels, because it crowds the ship?—Yes, and it takes time to transfer, too.

6838. Therefore, there are two limitations put by international law: One is the necessity of furnishing a prize crew to bring the prize into court, and the other is that if they resolve to destroy her they must crowd their ship with her crew?—Yes. There is no necessity where she is clearly enemy property to spare her; that is only the case where neutral property is involved.

6839. But there is an equal obligation to save the crew, is there not?—Certainly, always.

6840. Therefore, in either case that particular limitation applies?—Always. I may say that the criticism of the Admiralty on the navy maneuvers in 1888, which I think I mentioned just now, was, that when they pretended to take so many prizes in such a short time, they did not allow themselves time in which to transfer the crews and, therefore, must be taken to have sunk them.

Treaty provisions in regard to contraband cargo.—In an early treaty of the United States with Sweden and Norway, 1783, it is provided in regard to the seizure of neutral vessels with contraband—

And in case the contraband merchandize be only a part of the cargo and the master of the vessel agrees, consents & offers to deliver them to the vessel that has discovered them, in that case the latter, after receiving the merchandizes which are good prize, shall immediately let the vessel go & shall not by any means hinder her from pursuing her voyage to the place of her destination. (Art. 13.)

Article XIII of the treaty with Prussia in 1799, which is still in effect, gives very liberal treatment.

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 mer-

chandise 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, shall be deemed contraband so as to induce confiscation or condemnation and loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles and detain them for such length of time as the captors 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 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.

In the treaty between the United States and Bolivia, 1858, is the following:

ARTICLE 19. The articles of contraband before enumerated and classified, which may be found in a vessel bound to an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners of them may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or super-cargo of said vessel will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great, or of so large a bulk, that they cannot be received on board the capturing ship without great inconvenience; but in this, as well as in other cases of just detention, the vessel detained shall be sent to the nearest convenient port for trial and judgment according to law.

Article 18 of the Brazilian treaty of 1828 is practically the same, as is article 19 of the Colombian (New Grenada) treaty of 1846.

In article 23 of the treaty with Haiti of 1864 it is provided that—

If it shall appear from the certificates that there are contraband goods on board any such vessel, and the commander of the same shall offer to deliver them up, that offer shall be accepted, and a receipt for the same shall be given, and the vessel shall be

at liberty to pursue her voyage unless the quantity of contraband goods be greater than can be conveniently received on board the ship of war or privateer, in which case, as in other cases of just detention, the vessel shall be carried to the nearest safe and convenient port for the delivery of the same.

Article XX of the treaty between the United States and Italy, February 26, 1871, states that—

In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to, or committing any outrage against, citizens or subjects of the other, or against their vessels or property; and if said commanders shall act contrary to this stipulation, they shall be severely punished, and made answerable in their persons and estates for the satisfaction and reparation of said damages, of whatever nature they may be.

Résumé.—From the opinions, precedents, rules, treaties, etc., thus far stated it is evident that the treatment of neutral vessels in the time of war is not yet a fully settled question.

Situation V relates to one aspect of this question.

Situation V relates to the treatment of neutral vessels loaded for the most part with contraband overtaken by war vessels of the United States on the high seas when bound for a fortified port of State X when there is war between the United States and State X.

The vessels are in each case carrying contraband to the enemy of the United States, and in each the cargo is for the most part contraband.

These facts, however, do not change the status of the vessel unless the cargo and vessel belong to the same owner, in which case both vessel and cargo might be subject to like penalty; otherwise, unless the vessel were guilty of some other offense, the cargo only would be liable to penalty and the owner of the vessel would suffer sufficiently in the loss of freight and the delay caused by the capture and prize proceedings.

Considering these questions first upon the basis that the ship and cargo belong to different owners and that it is a simple act of commerce, it may be said that in each case

the penalty in general would be the loss of cargo for the owner of the contraband and the loss of freight for the owner of the vessel.

How would the fact that the commanding officer of the force overtaking the vessel bound with contraband for a fortified port of the enemy found the vessel carrying the contraband unseaworthy and not able to stand a voyage to a port where a prize court of the United States could sit affect the case?

If it were an enemy vessel he might as a military necessity sink the vessel and cargo after removing papers and crew and making proper survey, but no such penalty is prescribed for carriage of contraband by a neutral vessel. The commander under some treaties would be justified in removing the contraband from the vessel. This, in view of the circumstances, would be the best course if his ship could accommodate such a burden. He would also as a military necessity be justified in destroying the contraband if it was not possible to take it on board. In all cases he should bring in the papers relating to the cargo and observe the other naval regulations relating to such seizure. The vessel should be dismissed. Its penalty will be loss of freight.

If contraband cargo and vessel belong to the same owner both are liable to condemnation if sent to a prize court. It would, however, be exceedingly dangerous to allow officers occupied with the duties of war to pass judgment upon the relative cost of sending vessels to prize court as compared with the probable value of vessel and cargo, little of which could be examined in most cases. It would also impose a very serious burden upon the naval officer which he probably would not care to assume, particularly if the field of operations was remote from a prize court. The only safe course is to take on board or, in case of necessity, to destroy the contraband, retaining all necessary papers.

If, as he overtakes the neutral merchantman, the commanding officer discovers that he is in danger of immediate attack by the enemy, he should dismiss the mer-

chantman unless he can spare a prize crew to send her in. He would under no circumstances be justified in compelling a neutral, engaged in commerce for which there is a fixed penalty, to run additional risks of war by accompanying his fleet. Nor would he be justified in taking upon his own vessel, about to be attacked, the crew and perhaps the passengers of the neutral vessel in order that he might sink the vessel. The conditions are such that he is not in a position to inflict the legitimate penalty on the vessel because of his own danger. He would not on this account be warranted in inflicting a greater penalty and in subjecting neutral persons to the hazards of war.

When the personnel of his fleet is so reduced that he cannot spare a crew to take the vessel in, he should dismiss the vessel, though he, in accordance with the treaties with certain states, may take or destroy the cargo, retaining the proper papers.

Conclusion.—(a) If the contraband cargo and the seized neutral vessel have different owners, the contraband cargo, after proper survey, appraisal, and inventory, and with consent of the master, if in accordance with treaty provisions, may be taken, and the vessel, if guilty only of the carriage of contraband, should be dismissed, and the papers relating to the whole transaction should be forwarded to the prize court.

(b) If the master does not consent, the vessel and cargo are liable to the usual penalties for contraband trade.

(c) If the neutral vessel and contraband cargo belong to the same owner, the contraband cargo may be treated as in (a). The vessel, however, should if possible be sent to a prize court for adjudication, otherwise the vessel should be dismissed.

(d) Destruction, on account of military necessity, of a neutral vessel guilty only of the carriage of contraband entitles the owner to fullest compensation. Before destruction all persons and papers should be placed in safety.