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International Law Situations with Solutions and Notes

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Situation V.

Influence of destination on contraband character.

(In this Situation it is granted that the Declaration of London is binding.)

There is war between Great Britain and European State X. Hostile operations are confined to the European Continent. State X has no ports in the Pacific Ocean, but one of her cruisers chances to be in the Pacific Ocean and overtakes an American merchant vessel loaded with coal consigned to, and of a kind commonly used by, the civil Government of New Zealand. The merchant vessel's papers are regular and she is on the proper course. The merchant vessel contends that she is exempt from capture. The commander of the cruiser maintains that the coal is conditional contraband.

Which is correct? What should be done?

SOLUTION.

The contention of the master is correct. The commander of the cruiser should allow the vessel to proceed.

NOTES.

Coal in time of war.—In the long period during which a list of contraband has been evolved the treatment of coal has varied. The decisions of courts and the opinions of text writers have likewise varied. Some writers have maintained that the treatment of coal in time of war should be determined by conventional agreement. (Galani, De Doveri, 1, cap. IX, secs. 3–7.) Others with the desire to leave neutrals free in time of war have demanded that only articles of the nature of absolute contraband be liable to seizure.

The treaties of earlier days show how coal and other articles were regarded in conventional agreements. The Treaty of Utrecht, 1713, Article 20, shows the tendency to exempt many articles from the list of contraband. Coals are definitely exempted.
TREATY PROVISIONS AS TO COAL.

These merchandises which follow shall not be reckoned among prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of cloths and wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, lead, copper, brass, coals; as also wheat and barley, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salt, and, in general, all provisions which serve for the nourishment of mankind and the sustenance of life. Furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloths, anchors, and any parts of anchors; also ship masts, planks, boards, and beams, of what trees soever; and all other things proper either for building or repairing ships; and all other goods whatever, which have not been worked into the form of any instrument or thing prepared for war, by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall wholly be reckoned among free goods, as likewise all other merchandises and things which are not comprehended and particularly mentioned in the preceding article, so that they may be transported and carried, in the freest manner, by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up round about, or invested. (1 Chalmers, Treaties, p. 403.)

This treaty was frequently reaffirmed during the eighteenth century, and this clause occurs in other important treaties during the eighteenth century as in the treaties between the United States and France in 1778 (Art. 24), the United States and Sweden, 1783 (Art. 10), and Great Britain and France in 1786 (Art. 23).

Treaties of the earlier part of the nineteenth century in general made no mention of coal. Treaty provisions specifically excluding from capture articles not of the nature of absolute contraband are common during the first half of the nineteenth century. Some treaties forbid capture of goods not enumerated though actually bound to a seat of operations. The treaty of 1828 between the United States and Brazil (still in force) is an example of this practice:

Art. 17. All other merchandise and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an
enemy, excepting only those places which are at that time besieged or blockaded; and, to avoid all doubt in this particular, it is declared that those places are only besieged or blockaded which are actually attacked by a force capable of preventing the entry of the neutral.

This clause was repeated in the treaty between the United States and Colombia in 1846 (Art. 18), and in the treaty with Bolivia in 1858 (Art. 17).

The article relating to this subject was somewhat modified in the treaty with Haiti in 1864, by omitting the last clause.

Art. 21. All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above shall be held and considered as free, and subjects of free and lawful commerce, so that they be carried and transported in the freest manner by the citizens of both the contracting parties, even to places belonging to an enemy, excepting only those places which are at the time besieged or blockaded.

Coal as contraband.—In the days of sailing vessels, when the wind was the sole means of propelling ships at sea, articles of fuel were not thought of as potential contraband of war. Soon after the middle of the nineteenth century the treatment of fuel in time of war became a matter of growing importance.

Secretary Cass, writing to the United States Minister to France in 1859, said:

The discussion which at this time is going on respecting the military character of coal, and whether it is now excluded from general commerce as contraband of war is a striking illustration of the tendency to enlarge this power of prohibition and seizure and of the necessity of watching its exercise with unabated vigilance. Here is an article not exclusively nor even principally used in war, but which enters into general consumption in the arts of peace to which, indeed, it is now vitally necessary. It has become also important in commercial navigation. It is a product of nature with which some regions are bountifully supplied, while others are destitute of it, and its transportation, instead of meeting with impediments, should be aided and encouraged. The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it as far as their vessels are concerned. (Quoted in 7 Moore, International Law Digest, sec. 1252, p. 673.)

The attitude of the United States changed with the change of conditions. A considerable correspondence
was carried on between Secretary Seward and the British chargé d'affaires in 1862, which gives evidence of the drift of opinion. Mr. Seward says in part in a long letter of October 3, 1862:

On the 14th of April, 1862, before the act of Congress was passed, it had been reported to the President that anthracite coal was being shipped from some of the ports of the United States to southern ports within and to other southern ports without the United States for the purpose of supplying fuel to piratical vessels which were engaged in depredating on the national commerce on the high seas. The Secretary of the Treasury, therefore, by authority of the President, who is charged with the supreme duty of maintaining and executing the laws, issued to the collectors of the customs at New York and other ports the following instruction:

"Clear no vessel with anthracite coal for foreign ports nor for home ports south of Delaware Bay till otherwise instructed."

It was thereupon represented to the President that this order was unnecessarily stringent and severe upon general commerce, because it prohibited the exportation of coal to ports situated so far from the haunts and harbors of the pirates that the article would not bear the expense of transportation to such haunts and harbors, and thereupon the Secretary of the Treasury, by the President's authority, on the 18th of May issued a new instruction on the subject to the collectors of the customs, which was of the effect following:

"The instructions of the 14th ultimo, concerning the prohibition of the exportation of coals, are so far modified as to apply only to ports north of Cape St. Roque, on the eastern coast of South America, and west of the fifteenth degree of longitude east. Coal may be cleared to other foreign ports, as before, until further directed."

The subject of supplies of coal and other merchandise having, in the meantime, engaged the attention of Congress, with the result of the passage of the law before mentioned, the Secretary of the Treasury, on the 23d of May last, and as speedily as possible after the approval of the law, issued the following instruction to the collectors of the customs of the United States:

Until further instructed you will regard as contraband of war the following articles, viz: Cannon, mortars, firearms, pistols, bombs, grenades, firelocks, flints, matches, powder, saltpeter, balls, bullets, pikes, swords, sulphur, helmets or boarding caps, sword belts, saddles and bridles, always excepting the quantity of the said articles which may be necessary for the defense of the ship and of those who compose the crew, cartridge-bag material, percussion and other caps, clothing adapted for uniforms, rosin, sailcloth of all kinds, hemp and cordage material, ship lumber, tar and pitch, ardent spirits, military persons in the service of the enemy, dispatches of the enemy, and articles of like character with those specially enumerated.
You will also refuse clearances to all vessels which, whatever the ostensible destination, are believed by you, on satisfactory grounds, to be intended for ports or places in possession or under the control of insurgents against the United States, or that there is imminent danger that the goods, wares, or merchandise, of whatsoever description, will fall into the possession or under the control of such insurgents. And in all cases where, in your judgment, there is ground for apprehension that any goods, wares, or merchandise shipped at your port will be used in any way for the aid of the insurgents or the insurrection, you will require substantial security to be given that such goods, wares, or merchandise shall not in any way be used to give aid or comfort to such insurgents. You will be especially careful upon applications for clearances to require bonds with sufficient sureties for fulfilling faithfully all the conditions imposed by law or departmental regulations from shippers of the following articles to the ports opened, or to any other ports from which they may easily be and are probably intended to be reshipped in aid of the existing insurrection, namely, liquors of all kinds, coals, iron, lead, copper, tin, brass, telegraph instruments, wire, porous cups, platinum, sulphuric acid, zinc, and all other telegraph materials, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, fire bars, and every article whatever which is, can, or may become applicable for the manufacture of marine machinery or for the armor of vessels. (Message and Diplomatic Correspondence, U. S., 1862, p. 302.)

In 1864 Mr. Dayton, the American representative at Paris, reported to Secretary Seward as follows:

[Mr. Dayton to Mr. Seward.]

PARIS, May 16, 1864.

No. 465.]

Sir: In a recent conference with M. Drouyn de l’Huys he complained seriously of your late action in refusing to the French navy a supply of coal bought by it in New York. He says France never has declared and never will declare coal contraband of war; that if the United States should do so, it would be a retrograde move, inasmuch as its traditional policy had always been in favor of neutrals and in limitation rather than in extension of the list of contraband. He hopes that we will not retrace our steps, but in this matter adhere to our past policy; that France has always gone with us, or we with her, on these questions of maritime law, and he does not think it for the interest of either country to part company; at least that was the inference from his language.

He informed me, further, that your opinion was understood to be favorable to letting the coal go to the French vessels, but difficulty was made by the Secretary of the Treasury. I told him, if this were so there might be some question connected with the revenue which had
interfered, but he thought otherwise, and said that it was made to rest purely upon the question, Is coal contraband of war? This is a question of deep interest to the French Government—deeper, perhaps, than to us, she having a large navy and little coal, while Great Britain and the United States have an abundance of the latter article.

He said, further, that if the United States should declare coal contraband of war, it would place France in a false position in reference to our country. That she, France, holding coal not to be contraband, would be compelled to supply it to our enemies in time of war, and to the Confederates, while denying it to us, because we denied it to them. That they would dislike much to be placed in a position indicating such apparent want of neutrality, yet that it would be inevitable if coal was declared by us contraband of war.

There is a good deal of sensitiveness manifested here on this point. M. Rouher, minister of state, referred to it, I observe, in his late speech in the Chamber of Deputies.

I am, sir, your obedient servant,

WM. L. DAYTON.

(Diplomatic Correspondence, U. S., 1864, Part 3, p. 84.)

Attitude of Peru in 1866.—In the war with Spain in 1866, Peru issued the following decree:

LIMA, February 9, 1866.

Mariano Ygnacio Prado, Provisional Supreme Chief of the Republic, considering:

That in the actual state of war in which the Republic finds itself with the Government of Spain, it is necessary to determine the conditions of certain articles which being of lawful commerce may be considered according to circumstances as contraband of war;

I decree:

Sole article. Coal and provisions will be considered contraband of war when one or other are destined for the use of Spanish ships of war.

The Secretary of State in the Foreign Office is ordered to fulfill this decree. (56 British Foreign and State Papers, p. 917.)

The Peruvian Instructions for the Guidance of the Commanders of Vessels of War, issued on February 10, 1866, after enumerating the articles of contraband generally mentioned, said, “Equally so are coals destined for the vessels of war of the enemy or his privateers, etc.” (56 ibid., p. 914.)

Coal in the war between Spain and Chile, 1866.—During the war between Spain and Chile in 1866 there was a declaration by the Spanish admiral in regard to Chilean
coal. The following note was addressed by him to the dean of the consular corps at Valparaiso:

HEADQUARTERS OF THE SQUADRON OF HER CATHOLIC MAJESTY IN THE PACIFIC, FRIGATE NUMANCIA,

Valparaiso, January 29, 1866.

My Dear Sir: Inclosed is the declaration which, in reference to Chilean mineral coal and in the exercise of my rights as a belligerent, I have issued this day.

I beg your excellency, as the worthy dean of the consular corps resident in Valparaiso, to inform it thereof.

I avail myself of this occasion to offer to your excellency the assurances of my respect and to repeat that I am your most obedient servant.

CASTO MENDEZ NUNEZ,
The Consul General of Her Faithful Majesty in Valparaiso.

The commander-in-chief of the Spanish squadron in the Pacific—

Considering, That the vessels of war, both Peruvian and Chilean, provide themselves with coal from the mines of Chile for their hostile operations on this coast;

Considering, That the laws of war permit belligerents to take possession of everything employed by the enemy in hostile operations against them, in which category the said combustible is included, being, moreover, a product of the soil of that enemy;

Considering, That the belligerent is authorized to declare new articles contraband of war whenever by the circumstances of said war, they become, in the hands of the enemy, elements for the undertaking and carrying on of hostilities:

Considering, finally, That the Government of Chile has declared coal destined for Spanish vessels of war or privateers to be contraband;

I have resolved—

1. Mineral coal of the different mines of Chile is hereby declared contraband of war.

2. Neutral vessels, on board of which those of this squadron may find Chilean mineral coal, whatever be the port for which they are bound, shall remain subject to the provisions of the fourth article of the instructions of blockade, circulated in establishing that of the ports of this Republic.

3. The object of this declaration, circumscribed as it is to a special instance of the present war, is not to lay down any precedent whatever respecting the general principle that stone coal ought not to be considered as contraband of war.

4. This declaration, made by the commander-in-chief of the naval forces of Her Catholic Majesty in the Pacific, shall bear a temporary character until his Government shall decide as it may deem proper in regard thereto.
On board the frigate Numancia, in the Bay of Valparaiso, January 29, 1866.

CASTO MENDEZ NUNEZ.

(Diplomatic Correspondence, 1866, Pt. 2, p. 371).

To this note the consular representatives of twenty-one States sent the following joint reply:

The undersigned members of the consular corps, assembled at the consular general of His Faithful Majesty the King of Portugal, have made themselves aware of the contents of the note which his excellency, the commander-in-chief of the squadron of Her Catholic Majesty in the Pacific, was pleased to address to the dean of the consular corps of this city on the 29th of January last. In that note and the accompanying resolution, the commander-in-chief is pleased to set forth that he has declared the coal of the different mines of Chile to be contraband of war, and that consequently neutral vessels on board of which those of the squadron of Her Catholic Majesty may find this combustible, whatever be its port of destination, will be subject to the provisions of the fourth article of the blockade instructions.

It is not the intention of the undersigned to enter into a discussion either upon the greater or less right possessed by the commander-in-chief to make the said declaration, nor upon the considerations upon which it is founded, nor upon the consequences to be deduced therefrom and they leave to their respective Governments the reservation to discuss with that of his excellency the questions involved in the measure adopted.

The undersigned, in conformity with the principles contained in the protest which they presented to the predecessor of his excellency, under date of the 5th of October last, deeming it their unavoidable duty to assist and protect the commerce of their peoples and the free navigation of the vessels bearing the flag of their respective nations, whenever they are employed in lawful traffic, can not do otherwise than protest in the most formal manner, and make the Government of the commander-in-chief responsible for all damages that may be caused to their people in consequence of the said resolution relative to coal from the different mines of the Republic of Chile.

For this purpose the undersigned have likewise agreed that the present be drawn up in duplicate, one being addressed to the commander-in-chief of the squadron of Her Catholic Majesty in the Pacific, through Mr. George Lyon, consul general of His Faithful Majesty and dean of this consular corps, and the other of the same tenor filed in the consulate general of His Faithful Majesty the King of Portugal.

The undersigned, begging the commander-in-chief to be pleased to acknowledge the receipt of the present communication, have the honor to offer to his excellency the assurances of their high consideration and respect. (Ibid, p. 374.)
Destination as an element in contraband.—In determination as to the nature of contraband, questions in regard to the character, ownership, and destination of the goods and the nationality of the vessel arise. The simple carriage of goods of the nature of contraband is not in itself an offense making goods or vessel liable to penalty, "it is the hostile destination of the goods that renders them liable to penalty and the vessel liable to delay or other consequences according to circumstances." (Wilson and Tucker, International Law, 5th ed. p. 319.) "Hostile destination" is an essential element in determining the treatment of goods in time of war. Goods of the nature of absolute contraband in neutral vessels and bound in good faith for a neutral destination are exempt.

Views of States in 1908.—The memoranda submitted by the ten States represented at the International Naval Conference at London in 1908-9 afforded the common ground that "La destination de la marchandise décide de son caractère de contrebande." (Proceedings, International Naval Conference, British Parliamentary Papers, Miscellaneous No. 5 (1909) p. 70.)

In the memoranda submitted by Germany, United States, Spain, France, Great Britain, Italy, Japan, Netherlands, and Russia, a wide range of opinion in regard to destination is found.

The German memorandum proposed to put burdens upon the neutral by forbidding carriage of contraband under certain circumstances. The statement of the proposed regulations was as follows:

Il est interdit aux navires neutres faisant route vers le territoire d’un belligérant ou vers un territoire occupé par lui ou vers sa force armée de transporter des articles de contrebande de guerre qui ne soient pas destinés à être débarqués dans un port intermédiaire neutre.

Les papiers du bord font preuve complète de la route du navire ainsi que du lieu de déchargement de la cargaison, à moins que le navire ne soit rencontré ayant manifestement dévié de l’itinéraire indiqué par les papiers du bord et sans pouvoir justifier d’une cause suffisante de cette déviation.

Sont considérés comme contrebande de guerre d’autres objets et matériaux pouvant servir à la guerre lorsqu’ils sont destinés aux forces
armées ou aux services de l'État d'un belligérant et qu'ils ont été par une déclaration notifiée expressément qualifiés de contrebande de guerre. Ils sont compris sous le nom de contrebande relative.

Il y a présomption péremptoire de la destination visée à l'alinéa précédent, si l'envoi en question est adressé aux autorités d'un belligérant.

Cette destination est présumée, si l'envoi est adressé à un commerçant dont il est notoire qu'il fournit à un belligérant des objets et matériaux de cette nature. La même présomption s'applique dans le cas où l'envoi est à destination d'une place fortifiée d'un belligérant ou d'une autre place servant de base d'opérations ou de ravitaillement à ses forces armées, à moins qu'il ne s'agisse d'établir le caractère de contrebande des navires mêmes qui font route vers une de ces places. Les présomptions prévues au présent alinéa peuvent être détruites par la preuvecontraire. (Ibid., p. 66.)

The United States suggested that articles of the nature of absolute contraband "destined for ports of the enemy or places occupied by his forces, are always contraband of war," while articles of the nature of conditional contraband would be contraband only "when actually and especially destined for the military or naval forces of the enemy."

Austria-Hungary, in the discussion of the notion of contraband, said:

D'après la doctrine généralement adoptée, la contrebande est caractérisée par le fait que le neutre, en transportant des objets propres à être employés dans la guerre, procure au destinataire un avantage sur son ennemi. À cet effet, les objets doivent tomber réellement entre ses mains. Le fait seul qu'ils sont dirigés vers l'adversaire ne suffit point pour leur imprimer le caractère hostile. Si la guerre n'a lieu que sur terre, le belligérant ne devrait donc pas confisquer de blindages ou de machines de marine; et si les objets transportés sont destinés à traverser seulement le territoire ennemi, l'entrave mise au transport ne serait guère justifiable. Peut-être dira-t-on que l'adversaire aurait à craindre, en ce cas, que l'ennemi ne s'en emparât pendant leur transit. Or, un sauf-conduit, délivré par les autorités du pays ennemi et produit par le neutre arrêté, écarterait cette crainte.

Il s'ensuit que, en vérité, il n'existe qu'une contrebande présumable (et non pas absolue), le transport de matériel de guerre créant uniquement la présomption que les articles en route vers l'ennemi seraient employés dans la guerre. On ne saurait donc refuser aux neutres la preuve du contraire. (Ibid., p. 17.)
Spain, following the inclination to limit contraband to the single category of what is known as absolute contraband, proposed:

La contrebande étant réduite aux articles qui n'ont d'utilité que pour la guerre, le fait de leur envoi à une flotte ennemie ou à des points du territoire ennemi ou occupés par l'ennemi, constitue, par lui-même, une preuve de la condition illicite des marchandises. Si celles-ci, destinées immédiatement à un point ennemi, n'y vont qu'en transit et possèdent réellement une destination finale neutre, c'est le destinataire qui aura à le démontrer, moyennant avis préalable à l'autre belligérant et production d'un sauf-conduit délivré par l'ennemi dont le territoire doit être traversé par les marchandises.

Nonobstant le paragraphe précédant, pour que le droit du belligérant à réprimer la contrebande puisse commencer à s'exercer, il est nécessaire que le navire au bord duquel vont les marchandises se trouve en voyage direct vers la flotte ou le point ennemi. (Ibid., p. 67.)

France proposed to forbid carriage of contraband:

Le transport par les neutres de la contrebande de guerre à destination de l'ennemi est interdit.

Things of the nature of 'absolute contraband' were regarded as contraband "lorsqu'ils sont destinés à l'ennemi." (Ibid., p. 29.)

Great Britain gave a somewhat full statement of the British position:

**Presumption as to Conditional Contraband.**

There is a presumption that conditional contraband is on its way to assist in the operations of the enemy only if there is proof that its destination is for the naval or military forces of the enemy, or for some place of naval or military equipment in the occupation of the enemy, or if there has been fraudulent concealment or spoliation of papers.

**Destination.**

The destination of the cargo is generally presumed to be that of the ship. Where the ship is to call at more than one port the presence on board of goods which are *bona fide* documented for discharge at a neutral port before the ship reaches an enemy port can not be made a ground for detention; but if there is no such documentary evidence that port which is least favorable to the neutral will be presumed to be the destination of such cargo as would be contraband if carried to that port. If it is proved that the contraband cargo has an ulterior hostile destination, different from that of the ship, to which such cargo is to be forwarded as part of a single mercantile transaction, the destination of the ship will not protect the cargo.
BRITISH POSITION IN 1908.

LIABILITY TO SEIZURE.

A ship carrying contraband as defined in section 1 may be seized at any moment throughout the whole course of her voyage so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral port of call before reaching the hostile destination.

When the contraband goods have been discharged the liability to seizure is at an end. In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage. (Correspondence and Documents International Naval Conference, British Parliamentary Papers, Miscellaneous, Nov. 4 (1909), p. 4.)

Italy quoted from her domestic law and court decisions:

(a) II. 1. "Les navires neutres dirigés vers un pays ennemi dont la cargaison est formée, en totalité ou en partie, par des objets de contrebande de guerre, seront capturés et conduits dans un des ports de l'État, où le navire et les marchandises de contrebande seront confisqués, et les autres marchandises seront laissées à la disposition des propriétaires."

La disposition susdite a été interprétée et appliquée dans ce sens, que le caractère de contrebande de guerre dépend de la destination finale et intentionnelle de la cargaison, et non pas de la destination immédiate et matérielle du navire. Dans un cas particulier il a été jugé que la contrebande existe lorsque le navire est dirigé vers un port neutre afin d'y décharger les marchandises destinées à rejoindre par voie de terre le pays ennemi, particulièrement si le pays en question n'a aucun débouché sur la mer.—(Comm. prises, 8 décembre 1896, capture du "Doelwijk.") (British Parliamentary Papers, Miscellaneous, No. 5 (1909), p. 67.)

Japan made a full statement as to the nature of hostile destination:

I. La contrebande de guerre est classée en deux catégories générales:
(a) Contrebande absolue.—Les armes, les munitions et les autres articles et matériaux employés immédiatement et ordinairement dans un but militaire, lorsqu'ils sont destinés au territoire de l'ennemi ou à un lieu occupé par lui ou à ses forces militaires ou navales.
(b) Contrebande conditionnelle.—Les articles et matériaux autres que ceux ci-dessus décrits, et qui peuvent être employés dans un but militaire, lorsqu'ils sont destinés aux forces militaires ou navales de l'ennemi.

Les articles et matériaux ci-dessus mentionnés sont considérés comme destinés aux forces militaires or navales de l'ennemi, lorsqu'ils sont destinés au territoire de l'ennemi et que, d'après les circonstances se
IXFLUENCE OF DESTINATION.

rattachant au lieu de destination, on peut les considérer comme devant servir à l'usage militaire de l'ennemi.

II. Lorsque le port de destination ou d'escale d'un navire est sur le territoire de l'ennemi ou est un lieu occupé par l'ennemi, ou lorsqu'il y a des raisons de croire que le navire va à la rencontre des forces militaires ou navales de l'ennemi, la destination du navire est réputée être hostile.

III. La destination du chargement est ordinairement déterminée par la destination du navire.

Les marchandises se trouvant à bord d'un navire sont présumées avoir une destination hostile, si la destination du navire est un lieu qui, géographiquement, ou d'après d'autres considérations, peut être regardé comme constituant la dernière étape dans le transport des marchandises, soit par transbordement, soit par transport terrestre, à une destination hostile. (Ibid., p. 68.)

The Netherlands statement was brief:

La notion de contrebande s'applique au transport en mer libre ou dans les eaux situées sous la juridiction des belligérants vers le territoire ennemi, des marchandises comprises dans la liste de contrebande absolue insérée dans le rapport de la 4e Commission de la Deuxième Conférence de la Paix. (Ibid., p. 68.)

The Russian propositions show that the discussions consequent upon the events of the Russo-Japanese war had emphasized the possibilities of complications if explicit rules should not be made:

I. 1. * * * Les objets de contrebande absolue sont sujets à confiscation, lorsqu'ils sont transportés à destination d'un pays ennemi, d'un territoire occupé par l'ennemi ou de forces armées de l'ennemi.

Art. 2. Le belligérant a, en outre, le droit, après notification préalable, d'interdire le transport d'autres objets susceptibles d'être utilisés pour la guerre par une armée ou une flotte, lorsque ces objets sont transportés à destination de forces armées de l'ennemi (contrebande de guerre relative). Ils sont sujets à confiscation, si les intéressés ne prouvent pas que les objets transportés ne sont pas destinés à être utilisés pour la guerre.

Art. 3. Sous le nom de transport destiné aux forces armées de l'ennemi est compris le transport de la contrebande de guerre à destination:

(a) De l'armée ou de la flotte de l'ennemi;
(b) D'un port militaire ou d'une place fortifiée de l'ennemi;
(c) D'un port occupé par l'ennemi;
(d) De tout autre port de l'ennemi, si les objets de contrebande sont transportés pour le Gouvernement ennemi ou pour ses fournisseurs.

Art. 4. La destination illicite dans le sens des articles 1, 2 et 3 est considérée comme établie, lorsque les objets de contrebande se trouvent à bord d'un navire:
(a) Qui se dirige directement vers un pays ennemi, un territoire occupé par l’ennemi ou vers les forces armées de l’ennemi;

(b) Qui, tout en déclarant faussement une destination neutre, se dirige en réalité vers un pays ennemi, un territoire occupé par l’ennemi ou vers les forces armées de l’ennemi;

(c) Dont la destination est en fait un port neutre, si les objets de contrebande qui se trouvent à bord sont destinées à être expédiés ultérieurement par mer dans un pays ennemi, un territoire occupé par l’ennemi ou à ses forces armées. (Ibid., p. 68.)

**Bases of discussion at the International Naval Conference.**—The above propositions were considered, and an attempt was made to deduce the elements upon which there was accord and to formulate bases which, as points of departure for discussion, would facilitate the work of the delegates.

All memoranda were in agreement upon certain principles, while the interpretation of other principles varied.

Comme le montre tous les Mémorandums, la simple destination hostile suffit pour la contrebande absolue, et en ce qui concerne la contrebande conditionnelle une destination spéciale militaire est nécessaire.

**BASE DE DISCUSSION.**

4. La simple destination au pays ennemi, comme la destination aux forces armées de l’ennemi ou à un territoire occupé par l’ennemi, est suffisante pour rendre saisissables les articles de contrebande absolue.

5. Une destination spéciale aux forces armées de l’ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle.

**OBSERVATIONS.**

En présence du développement des moyens de communication et des multiples ramifications du trafic maritime et terrestre l’expérience des dernières guerres maritimes a conduit à appliquer certaines présomptions de la destination spéciale militaire; mais il n’apparaît pas qu’aucune de ces présomptions ait eu un caractère absolu écartant toute preuve contraire comme on a pu proposer d’en convenir dorénavant pour certains cas.

**BASE DE DISCUSSION.**

6. Il y a présomption de la destination aux forces armées si l’envoi est adressé aux autorités ennemies ou à un commerçant dont il est notoire qu’il fournit à l’ennemi des objets et matériaux pour la guerre, ou s’il est à destination d’une place fortifiée ennemie ou d’une autre place servant de base d’opérations aux forces armées ennemies, à moins qu’il ne s’agisse d’établir le caractère du navire même qui fait route vers une de ces places. Dans les autres cas la destination est présumée innocente. Les présomptions ci-dessus admettent la preuve contraire.
Sans discuter ici si des principes nouveaux devraient être introduits, on peut constater que les Mémorandums déclarant représenter les règles existantes sont unanimes à considérer que la destination de la marchandise prouve son caractère de contrebande.

**BASE DE DISCUSSION.**

7. *La destination de la marchandise décide de son caractère de contrebande.*

(Ibid., p. 69.)

*Discussion of Bases.*—Basis of discussion No. 5 was "Une destination spéciale aux forces armées de l'ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle." When this came before the Conference the German delegation proposed to substitute for the words "de l'ennemi" the words "ou aux administrations de l'Etat ennemi." In sustaining this change the German plenipotentiary said:

Selon notre avis, à la destination aux forces armées de l'ennemi de- vrait être assimilée la destination à ses administrations. La même idée a déjà été exprimée dans les propositions françaises relatives à la contrebande, soumises à la Deuxième Conférence de la Paix, dont l'article 4 était ainsi conçu:

"S'il est établi qu'un article spécialement déclaré contrebande de guerre a, au moment de la saisie, non seulement une destination ennemie, mais une destination réelle aux forces militaires ou navales ou aux services de l'Etat ennemi, cet article est sujet à confiscation." (Ibid., p. 138.)

Later the British delegation, in offering a *projet* upon contraband of war, stated this rule as follows:

Une destination spéciale aux forces armées de l'ennemi ou à l'adminis- tration de l'Etat ennemi est nécessaire pour rendre saisissables les articles de contrebande conditionnelle. (Ibid., Art. 11, p. 251.)

The German delegation said that this form was in accord with their views:

Elle vise en effet le cas d'articles destinés aux forces armées et aux administrations de l'Etat ennemi, et la manière de voir exprimée à ce sujet paraissait d'autant plus nécessaire à adopter que le projet britannique ne tient pas compte des propositions tendant à ajouter à la liste des objets de contrebande absolue certains articles, tels que l'or, l'argent, les rails de chemins de fer, qui, tout en étant susceptibles d'usages pacifiques, peuvent servir à augmenter la force militaire d'un belligérant. Il enregistre donc avec satisfaction le fait que l'article 11 permet
la saisie de ces articles quand ils sont destinés à être employés dans l’intérêt de la Puissance ennemie. (Ibid., p. 200.)

Basis No. 6, which was sometimes coupled with the discussion of Basis No. 5, was as follows:

6. Il y a présomption de la destination aux forces armées si l'envoi est adressé aux autorités ennemies ou à un commerçant dont il est notoire qu'il fournit à l'ennemi des objets et matériaux pour la guerre, ou s'il est à destination d'une place fortifiée ennemie ou d'une autre place servant de base d'opérations aux forces armées ennemies, à moins qu'il ne s'agisse d'établir le caractère du navire même qui fait route vers une de ces places. Dans les autres cas la destination est présumée inoffensive. Les présomptions ci-dessus admettent la preuve contraire. (Ibid., p. 120.)

In the discussion of this basis various opinions were brought forward. Among these were:

M. le Vice-Amiral Roell: Dans le No. 6 des bases de discussion, il est stipulé qu'il y a présomption de la destination aux forces armées si l'envoi est adressé à un commerçant dont il est notoire, etc.

Or, je ne trouve pas cette définition très claire; il se peut, selon la rédaction de l'article, qu'on envisage un commerçant neutre ou seulement un commerçant ennemi. Quant à moi, je crois que l'intention vise seulement les commerçants ennemis, et c'est pour cela que je propose de faire suivre le mot "commerçant" des mots "résidant dans le pays ennemi."

M. Croué fait remarquer que la nature du commerce du destinataire peut modifier la présomption de contrebande. C'est ainsi que des commerçants appelés "agents commissionnaires," tout en ayant un contrat avec leur Gouvernement pour la livraison de certains articles, reçoivent des objets de nature tout à fait variée, et que la marchandise prohibée qui leur serait adressée, peut très bien être tout à fait en dehors de la catégorie d'articles qui tombent sous l'application de leur contrat avec le Gouvernement, de sorte que l'envoi ne présente pas, dans ce cas, le même caractère de violation des droits de la neutralité. C'est pour cette raison qu'il y aurait lieu d'ajouter au texte de la base dont il s'agit les mots "de cette nature." (Ibid., p. 138.)

The German delegation proposed to insert after the words "base d'opérations" the words "ou de ravitaillement." (Ibid., p. 138.)

The Dutch delegation would add the words "résidant en pays ennemi" after "commerçant." (Ibid., p. 235.)

The Italian delegation proposed to substitute the following rule:

La destination spéciale aux usages de la guerre sera établie par des circonstances se rattachant soit à la destination territoriale ou à la per-
sonne du destinataire, soit aux modalités du chargement. La preuve contraire est admise. (Ibid., p. 239.)

The British suggested the addition of the words "de cette nature" after "objets et matériaux." (Ibid., p. 239.)

The United States delegation suggested the suppression of the words "d'opérations" after "base." (Ibid., p. 242.)

Adaptation to modern conditions.—The extension of the area of jurisdiction of many States so that the area of hostile operations may be so remote that an act in one part of the dominions of a State may have no relation to military operations in another part of the dominions is a modern phenomenon. European wars may now have little effect upon a remote dependency. In order that the rights of neutrals may not be unduly disturbed without corresponding advantage to the belligerents it was deemed best at the International Naval Conference to recognize that the area of operations should be somewhat limited. This is provided for in Article 33 of the Declaration of London.

Art. 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4). (International Law Topics, Naval War College, 1909, p. 79.)

Of this Article the general report gives a somewhat full explanation.

The rules which relate to conditional contraband differ from those which have been laid down for absolute contraband in two respects: (1) There is no question of destination for the enemy in general, but of destination for the use of his armed forces or government authorities; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first and Article 35 to the second principle.

The articles included in the list of conditional contraband may serve for peaceful uses as well as for hostile purposes. If, from the circumstances, the peaceful purpose is certain, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, which happens,
for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no doubt. But what is the decision when the articles are destined for the civil authorities of the enemy State? It may be the money sent to a civil authority which is to be used in the payment of salaries of its officials, or rails sent to a department of public works. In these cases there is enemy destination rendering the goods liable in the first place to capture, and subsequently liable to condemnation. This is explained by reasons at once juridical and practical. The State is a unit, although the functions necessary for its action are intrusted to different authorities. If a civil department may freely receive food or money, it is not advantageous to that department alone, but to the entire State, including its military administration, since the general resources of the State are thereby increased. Further, what a civil department receives may be considered of greater use to the military administration and may be directly assigned to the latter. Money or food really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the authorities of the enemy State is assimilated to the destination for its armed forces.

It is the authorities of the State which are dependent on the central power that are in question, and not all the authorities which may exist in the enemy State. Local and municipal authorities, for instance, are not included, and what is destined for their use would not be regarded as contraband.

War may be waged in circumstances such that the destination for the use of a civil authority can not be questioned, and consequently can not give to the goods the character of contraband. For instance, a war exists in Europe, and the colonies of the belligerent countries are not, in fact, affected by the war. Food or other articles in the list of conditional contraband destined for the use of a civil authority of a colony would not be regarded as contraband of war, because the considerations adduced above do not apply in this case. It would not be possible to draw for the needs of the war on the resources of such civil government. Exception is made in case of gold, silver, or paper money, because a sum of money can easily be sent from one end of the world to the other. (Ibid., p. 79; Correspondence and Documents, International Naval Conference, British Parliamentary Papers, Misc. No. 4 (1909), p. 48.)

SOLUTION.

The contention of the master is correct. The commander of the cruiser should allow the vessel to proceed.