Situation V.

Proportion of contraband.

(It is granted in this situation that the Declaration of London is binding.)

X and Y are at war and a neutral vessel bound to an unblockaded port of Y is stopped on the high seas by a cruiser of State X.

The cargo consists of hay, canned meats, and flour, respectively, one-eighth, two-eighths, and five-eighths of the cargo in value, and the cargo is consigned to a well-known commission merchant in the port of destination, which is not a fortified place, a military or a naval base, although there are several such bases at a distance of from 200 to 500 miles, all connected by rail.

Considering the provisions of the Declaration of London and the explanations thereof given in the General Report to the Conference, what action should the cruiser of X State take? Would a prize court probably condemn any or all of the cargo?

Would the vessel herself probably be a good prize?

Solution.

If there were no treaty provisions to the contrary or regulations in contravention, and unless he is reasonably convinced of the enemy destination of the cargo, the captain of the cruiser of State X should allow the neutral vessel to proceed.

The prize court would probably not condemn the cargo.

The neutral vessel would probably not be good prize.

Notes.

Review of attitude up to 1908.—It is evident from treaties, conventions, regulations, and opinions that there has been great diversity in the attitude toward penalizing a vessel for the carriage of contraband. The early practice has been gradually modified till the vessel if not involved beyond the simple act of carriage has generally been subject only to the loss and delay consequent upon the adjudication of the prize. Of course, false papers,
resistance to visit and search, participation of the owner or captain in the venture otherwise than as carriers, involves penalties for the vessel. There could not be said to be any absolutely uniform rule in international law upon the subject of penalty for the carriage of contraband. As Prof. Oppenheim said in 1906:

For beyond the rule that absolute contraband can be confiscated there is no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America confiscate the vessel when the owner of the contraband is also the owner of the vessel; they also confiscate such part of the innocent cargo as belongs to the owner of the contraband goods; they, lastly, confiscate the vessel, although her owner is not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband. Some States allow such vessel carrying contraband as is not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser, but Great Britain and other States insist upon the vessel being brought before a prize court in every case. (2 Oppenheim, International Law, p. 443.)

The further divergence in practice and opinion is shown in the attitude of the powers which took part in the International Naval Conference of 1908-9 at London.

Early practice and opinion as to nature of penalty.— In early times it was the practice to confiscate the ship carrying contraband. The theory was that the goods became of service to the enemy only by the transportation to the enemy. It was held that the vessel transporting contraband should therefore be as justly liable to confiscation as the contraband itself. Bynkershoek maintained that penalty for carriage of contraband should attach to the vessel as well as to the goods. (Quaestiones Juris Publici, Lib. I, cap. 2.) Heineceius also maintains that vessel and contraband fall under the same law. Earlier writers who mention the subject at all in general are of the same opinion. Grotius does not make any special mention of the penalty to which the vessel would be liable because she had carried contraband. There seem to have been variations in practice in the late middle ages, but there was no recognition of neutral rights as such.
A British proclamation of 1625, aimed against the King of Spain, after enumerating articles considered contraband, says:

And therefore if any person whatsoever, after three months from the publication of these presents, shall, by any of his Majesties own ships, or the ships of any of his subjects authorized to that effect, be taken sailing towards the places aforesaid, having on board any of the things aforesaid, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods soe taken for lawful prize, and cause them to be ordered as duly forfeited, whereby as his Majestie doth putt in practice noe innovation, since the same course hath been held, and the same penalties have been heretofore inflicted by other States and Princes, upon the like occasions, and avowed and maintayned by publique wrytings and apologies, so nowe his Majestie is in a manner inforced thereof unto, by proclamations set forth by the King of Spaine and the Archduchesse, in which the same and greater severity is professed against those that shall carry or have carried without limitation the like commodities into their Majesties dominions. (Robinson, Collectanea Maritima, p. 66.)

The French ordinance of 1584 embodied the principles of ordinances as early as the year 1400. The provision making a neutral ship good prize for carriage of enemy goods seems to have been introduced about 1543. This was set forth in the ordinance of 1584 as article 69. The ordinance of 1681 strengthened this rule.

The treaty of Utrecht, 1713, between Great Britain and France makes definite provision in contravention of the principle of confiscation:

Art. XXVI. But if one party, on the exhibiting the abovesaid certificates, mentioning the particulars of the things on board, should discover any goods of that kind which are declared contraband or prohibited, by the nineteenth article of this treaty, designed for a port subject to the enemy of the other, it shall be unlawful to break up the hatches of that ship wherein the same shall happen to be found, whether she belong to the subjects of Great Britain or of France, to open the chests, packs, or casks therein, or to remove even the smallest parcel of the goods, unless the lading be brought on shore in the presence of the officers of the court of admiralty and an inventory thereof made; but there shall be no allowance to sell, exchange, or alienate the same in any manner, unless after that due and lawful process shall
have been had against such prohibited goods, and the judges of
the admiralty, respectively, shall, by a sentence pronounced, have
confiscated the same; saving always, as well the ship itself, as
the other goods found therein, which by this treaty are to be
esteemed free; neither may they be detained on pretense of their
being, as it were, infected by the prohibited goods, much less
shall they be confiscated as lawful prize; but if not the whole
cargo, but only part thereof shall consist of prohibited or contra­
band goods, and the commander of the ship shall be ready and
willing to deliver them to the captor who has discovered them, in
such case the captor, having received those goods, shall forthwith
discharge the ship, and not hinder her by any means freely to
prosecute the voyage on which she was bound.

The practice and opinion of the eighteenth century
was not uniform. Treaties also show the variation as during
the seventeenth century. Article XXVI of the treaty
of Utrecht mentioned above became in effect Article XIII
of the treaty of 1778 between the United States and
France. Article XIII of the treaty of 1800 between the
same powers, after enumerating articles contraband of
war, said:

All the above articles, whenever they are destined to the port
of an enemy, are hereby declared to be contraband and just
objects of confiscation; but the vessel in which they are laden, and
the residue of the cargo, shall be considered free and not in any
manner infected by the prohibited goods, whether belonging to
the same or a different owner.

Pillet, reviewing the attitude toward the carriage of
contraband, says:

La sanction de l'interdiction du commerce de la contrebande de
guerre est dans la confiscation des marchandises de contrebande,
confiscation qui doit être régulièrement prononcée par le tribunal
des prises compétent. Cette confiscation doit-elle s'étendre même
aux marchandises qui n'ont pas le caractère de contrebande, lors­
qu'elles sont comprises dans le même chargement?
L'ordonnance française de 1778 admettait que la cargaison
entière ainsi que le navire peuvent être confisqués lorsque la con­
trebande y figure pour les trois quarts de l'ensemble. Ailleurs,
cette proportion est abaissée à la moitié. La jurisprudence la
plus sévère, celle de l'Angleterre, admet d'autres cas encore dans
lesquels la marchandise innocente devra partager le sort de la
marchandise illicite. Il est fort à souhaiter que cette nouvelle
application de la doctrine de l'infection hostile disparaisse com­
plètement. Étendue à la totalité de la cargaison, la confiscation
revêt le caractère d'une peine, et cesse d'être ce qu'elle est en réalité, un moyen de défense employé par le belligérant contre un trafic particulièrement funeste à ses intérêts.

Le navire transporteur sera-t-il lui-même confisqué? Il règne sur ce point dans la doctrine la plus grande indécision, mais il paraît raisonnable d'étendre la confiscation au navire lorsque le transport de la contrebande a lieu à la connaissance de l'armateur ou du patron. Bien que cette mesure paraîse dépasser la limite stricte de la défense, elle est indispensable. Seule, elle permet de donner une sanction à la prohibition du commerce de la contrebande, lorsque le vaisseau n'appartient pas au même propriétaire que la marchandise. Sans prétendre donner à la confiscation du vaisseau un caractère pénal, on aperçoit aisément qu'elle est le seul moyen d'action du belligérant sur les armateurs neutres qui se livrent à ce genre de trafic.

On a quelquefois proposé de remplacer le droit de confiscation par un droit de préemption d'après lequel le belligérant saisissant serait simplement autorisé à acheter à leur prix courant dans le lieu de destination les objets de contrebande trouvés à bord des navires neutres. La préemption par elle-même paraît avoir été la première sanction en vigueur, et on cite une ordonnance française de 1543 qui est en effet dans ce sens. Elle fournissait un moyen de tempérer les rigueurs du droit dans les circonstances les plus favorables, par exemple, en cas de contrebande simplement relative. Mais l'usage maritime est généralement contraire à cet adoucissement et on peut craindre en effet qu'il ne soit une sanction bien insuffisante de la prohibition qu'il importe de maintenir. Le droit de préemption ne devra donc être appliqué que s'il est adopté par un traité commun aux deux belligérants et aux neutres intéressés, et aussi peut-être dans une hypothèse particulière que nous rencontrerons un peu plus loin.

En vertu d'une règle générale qui se justifie d'elle-même, les marchandises de contrebande échappent à la confiscation s'il apparaît qu'elles n'ont été mises à bord du vaisseau que pour le service même de sa navigation. (Les lois actuelles de la guerre, p. 325.)

French Instructions, 1870.—The Instructions Complémentaires issued by France during the Franco-Prussian War in 1870 make mention of the proportion of contraband.

9. Cas où le chargement rend le navire neutre saisissable.—Est passible de capture tout navire qui transporte des troupes, des dépêches officielles ou de la contrebande de guerre pour le compte ou la destination de l'ennemi. Toutefois, si la contrebande de guerre ne se trouve à bord que dans une proportion inférieure aux trois-quarts de la cargaison, vous pouvez, suivant les circon-
stances, soit retenir le navire lui-même, soit le relâcher, si le capitaine consent à vous remettre tous les objets de contrebande dont il est porteur. (Art. 6 des instructions générales du 25 juillet 1870.)

Ne sont pas réputées contrebande de guerre les armes et les munitions, en quantité telle que le permet la coutume, exclusivement destinées à la défense du bâtiment, à moins qu'il n'en ait été fait usage pour résister à la visite.

This rule was less severe than that of 1778, which prescribed that—

1. Fait défense S. M. à tous armateurs d'arrêter et de conduire dans les ports du royaume les navires des puissances neutres, quand même ils sortiraient des ports ennemis, ou qu'ils y seraient destinés; à l'exception toutefois de ceux qui porteraient des secours à des places bloquées, investies ou assiégées. À l'égard des navires, des États neutres qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés et lesdites marchandises seront saisies et confisquées; mais les bâtiments et le surplus de leur cargaison seront relâchés, à moins que lesdites marchandises de contrebande ne composent les trois-quarts de la valeur du chargement; auquel cas les navires et la cargaison seront confisqués en entier. Se réservant, au surplus, S. M. de révoquer la liberté portée au présent article, si les puissances ennemies n'accordent pas la réciproque dans le délai de six mois à compter de la publication du présent règlement.

English prize cases.—The English prize cases have often been cited as authority and as showing the development of the law in regard to contraband carriage because Great Britain has had such a large carrying trade.

The case of the *Ringende Jacob* of 1798 shows the attitude of the English court at the end of the eighteenth century. The first and second of the three points raised in this case bear upon the carriage of contraband. After speaking of the contention as to the ownership and character of the property, Lord Stowell says:

Three other grounds, however, have been taken on which it is contended that the vessel is liable to condemnation: First, on account of the use and occupation in which she was employed; secondly, on account of the contraband nature of the cargo; and thirdly, for violating a blockade.

On the former point reference has been made to an ancient treaty (Oct. 21, 1666) between England and Sweden, which forbids the subjects of either power “to sell or lend their ships for
the use and advantage of the enemies of the other," and as this prohibition is connected in the same article with the subject of contraband, it is argued that the carrying of contraband articles in the present cargo is such a lending as comes within the meaning of the treaty; but I can not agree to that interpretation. To let a ship on freight to go to the ports of the enemy can not be termed lending but in a very loose sense, and I apprehend the true meaning to have been that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction. It is, besides, observable that there is no penalty annexed to this prohibition. I can not think such a service as this is will make the vessel subject to confiscation.

But it is said there is a contraband cargo. That there are some contraband articles can not be denied. Hemp, the produce of Russia, exported by a Danish merchant, would be confiscable even under the relaxation which allows neutrals to export that article only where it is of the growth of their own country; but to a Dane hemp is expressly enumerated among the articles of contraband in the Danish treaty (July 4, 1780); and to say that a Dane might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. The hemp must certainly be condemned; but I do not know that under the present practice of the law of nations a contraband cargo can affect the ship.

By the ancient law of Europe such a consequence would have ensued; nor can it be said that such a penalty was unjust or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. (1 C. Robinson, Admiralty Reports, p. 89.)

In the case of the Jonge Tobais in the following year Lord Stowell set forth the accepted doctrine of the liability of the vessel when vessel and contraband cargo belonged to the same person:

Formerly, according to the old practice, this cargo would have carried with it the condemnation of the ship, but in later times this practice has been relaxed and an alteration has been introduced which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies
only to cases where the owners of the ship and cargo are different persons. Where the owner of the cargo has any interest in the ship the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction the whole of his property embarked in that transaction is liable to confiscation. (Ibid., p. 329.)

Lord Stowell regards the old rule of condemnation of the vessel for carriage of contraband as having a logical basis but as relaxed in modern practice. In 1801, in the case of the Neutralitet, he says:

The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose can not be innocent. The policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscable for that act. (3 ibid., p. 294.)

American decisions.—The United States courts have, in general, followed the doctrine of the British courts in regard to the carriage of contraband:

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured in delicto, to the penalty of confiscation, but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual cooperation on their part in a meditated fraud upon the belligerents—by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made in transitu, while the contraband goods are yet on board. (Carrington v. The Merchants Insurance Co., 1834, 8 Peters Supreme Court Reports, p. 495.)

Treaty provisions.—Article XVII of the treaty of 1794 (expired by limitation in 1807) between the United States and Great Britain limited the penalty for carriage of contraband to the delay consequent upon prize procedure:

It is agreed that in all cases where vessels shall be captured or detained on just suspicion of having on board enemy's property, or of carrying to the enemy any of the articles which are contra-
Treaty Provisions.

band of war, the said vessels shall be brought to the nearest or most convenient port; and if any property of an enemy should be found on board such vessel, that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment. And it is agreed that all proper measures shall be taken to prevent delay in deciding the cases of ships or cargoes so brought in for adjudication, and in the payment or recovery of any indemnification adjudged or agreed to be paid to the masters or owners of such ships. (Treaties and Conventions, 1776–1909, vol. 1, p. 601.)

The United States has a number of treaties containing the clause similar to article 18 of the treaty with Brazil of 1828:

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners 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 supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they can not be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according to law. (Ibid., p. 139.)

(See also article 19 of the treaty with Bolivia of 1858; article 19 of treaty with Colombia of 1846.)

Special regulations.—In the nineteenth century there were differences, as in early days, in practice in regard to what would make a vessel liable to condemnation for carriage of contraband. Municipal laws and regulations were not uniform. The French rule that if three-fourths of the cargo is contraband the vessel is contaminated does not seem to have gained recognition. A Prussian law of June, 1864, declares a vessel laden entirely with contraband is good prize. An Austrian decree of the same year is to similar effect. The Russian regulation published in 1900 provided that—

11. Merchant vessels of neutral nationality are subject to confiscation as prizes in the following cases: (1) When the vessels
are caught conveying to the enemy or to an enemy’s port; (a) ammunition, as well as objects and accessories for making explosions, independently of their quantity; (b) other objects contraband of war, in quantities exceeding, by volume or weight, half of the entire cargo.

Propositions as to proportion of contraband at International Naval Conference.—The proportion of contraband was made a ground for condemnation in some of the preliminary memoranda submitted in preparation for the International Naval Conference. The propositions show a considerable variation.

Germany:

Le navire transportant la contrebande de guerre est sujet à confiscation—

1. Si le propriétaire ou celui qui affrète le navire en totalité ou le capitaine ont connu ou dû connaître la présence de la contrebande à bord et que cette contrebande forme, par sa valeur, par son poids ou par son volume, plus d’un quart de la cargaison.

(International Naval Conference, British Parliamentary Papers, Miscellaneous, No. 5, 1909, p. 70.)

Spain:

Entre le système qui autorise la confiscation du navire transportant n’importe quelle quantité de contrebande, et le système qui ne consent une telle mesure que s’il y a en résistance ou fraude, on pourrait établir cette formule de transaction: si le capitaine ou l’armateur ont connu ou pu connaître la présence de la contrebande à bord, le navire sera responsable au capteur d’une rançon ou compensation équivalente à trois fois la valeur de la contrebande et au quintuple du montant du fret. Si la rançon n’était pas payée, le capteur ne pourra dans aucun cas procéder à des mesures d’exécution que contre le navire et tant que celui-ci restera entre ses mains. (Ibid., p. 71.)

France:

La marchandise neutre de contrebande trouvée à bord d’un navire ennemi est confisquée. Les navires neutres chargés de marchandises de contrebande destinées à l’ennemi sont arrêtés; les dites marchandises sont saisies et confisquées. Les bâtiments et le surplus de leur cargaison sont relâchés, à moins que les marchandises de contrebande ne composent les trois quarts de la valeur du chargement, auquel cas les navires et la cargaison sont confisqués en entier. (Ibid., p. 71.)
Japan:

Les navires ayant de la contrebande de guerre, ainsi que le chargement se trouvant à bord et appartenant au propriétaire du navire, sont sujets à la confiscation dans les cas suivants:

(a) Lorsque des moyens frauduleux sont employés dans le transport des marchandises de contrebande;

(b) Lorsque le transport des marchandises de contrebande est l'objet principal du voyage. (Ibid., p. 72.)

Netherlands:

La contrebande est sujette à confiscation.

Le navire transportant la contrebande n'est sujet à confiscation que:

1. Si une partie importante de la cargaison constitue de la contrebande, à moins qu'il n'apparaisse que le capitaine, resp. le frèteur, n'a pu connaître le vrai caractère de la cargaison. (Ibid., p. 72.)

Russia:

Art. 6. Les navires de commerce de nationalité neutre sont sujets à confiscation lorsqu'ils transportent:

(a) De la contrebande de guerre formant, par son volume, son poids ou sa valeur, plus d'un quart de toute la cargaison;

(b) Des objets de contrebande même en moindre quantité, si leur présence à bord du navire, de par leur nature même, ne pouvait évidemment ne pas être connue au capitaine.

Art. 7. Le navire transportant de la contrebande du guerre en quantité moindre d'un quart de la cargaison est passible d'une amende représentant la quintuple valeur de sa cargaison de contrebande. (Ibid., p. 72.)

The preliminary consideration of these propositions led to the following observations:

L'idée commune moderne est de considérer la confiscation comme une sanction et non comme un bénéfice ou une gratification pour le capteur.

En ce qui concerne soit le navire transportant de la contrebande, soit les marchandises autres que la contrebande, se trouvant à bord du même navire, la confiscation apparaît comme subordonnée soit à l'importance plus ou moins grande de la contrebande par rapport à l'expédition, soit à une Complicité réelle ou présumée, sans que l'une ou l'autre de ces considérations soit à elle seule unanimement consacrée.

The basis of discussion was accordingly formulated in somewhat general terms:

La confiscation du navire transportant de la contrebande ou des marchandises autres que la contrebande se trouvant à bord du
Proportion of Contraband.

mêne navire est subordonnée à l'importance plus ou moins grande de la contrebande par rapport à l'expédition ou à une complicité réelle ou présumée. Lorsque la complicité est retenue comme cause de confiscation les circonstances frauduleuses la font prêsumer. (Ibid., p. 73.)

Later in the discussion in the Conference the Netherlands delegate proposed to suppress the words, "ou des marchandises autres que la contrebande se trouvant à bord du même navire," as being contrary to the principles of the Declaration of Paris of 1856.

*Discussion on proportion of contraband at International Naval Conference.*—The suggestion of the Netherlands delegate that there might be conflict with the Declaration of Paris of 1856 led to considerable discussion. In the fourth session of the full Conference on December 11, 1908, Mr. Crowe, of the British delegation, said:

Par la rédaction adoptée pour l'article 9 des bases de discussion, on a eu en vue de concilier les différents systèmes en vigueur. Selon l'un de ces systèmes, si la contrebande à bord d'un navire dépasse les trois quarts du chargement, le navire et le reste du chargement, aussi bien que la contrebande elle-même, sont passibles de la confiscation. Selon un autre, la seule partie du chargement à condamner est la marchandise de contrebande elle-même et, selon un troisième, la contrebande et le chargement innocent appartenant au propriétaire de la contrebande peuvent être condamnés.

La question de savoir jusqu'à quel point les Puissances Signataires de la Déclaration de Paris et celles qui lui ont donné leur adhésion ont aujourd'hui le droit de confisquer des chargements autres que la marchandise de contrebande, mérite un examen attentif et ma Délégation n'aurait pas d'objections à ce que cette question fût prise en considération sérieuse par la Conférence.

Il est évident que la rédaction actuelle de cet article est excesivement vague, et il serait à désirer que la question fût réglée d'une manière plus précise par voie conventionnelle.

Ma Délégation trouve de la difficulté à se rallier à l'amendement de la Délégation des Pays-Bas, mais elle est prête à l'examiner dans un esprit de conciliation. (Ibid., p. 154.)

Baron Nolde, of the Russian delegation, spoke at some length, suggesting certain amendments:

Les règles du droit moderne en matière de pénalités pour le transport de contrebande ne sont pas identiques dans différents pays. Deux idées générales paraissent se dégager de l'étude de
ces règles: (1) les articles mêmes de contrebande sont confisqués, et (2) la peine doit être plus sévère quant il s'agit de transports qualifiés comme plus nuisibles, et moins sévère quand il s'agit de transports moins dangereux. Sans vouloir discuter pour la moment quels sont les cas où il y a transport dangereux donnant lieu à une peine supplémentaire, je constate que, dans tous les systèmes, on cherche à proportionner l'acte à réprimer et la mesure répressive. Telle est l'idée maîtresse qui paraît être acquise.

Or, cette idée fondamentale ne peut pas être réalisée avec justice si l'on se tient sur le terrain du système préconisé dans plusieurs législations modernes. Celles-ci ne connaissent que cette alternative: la confiscation du navire ou sa libération, c'est-à-dire tout ou rien. Il nous a paru que l'on pourrait trouver un moyen de procéder avec plus d'équité. Pour les cas moins graves de transports illégitimes, on pourrait s'abstenir de confisquer le navire, tout en punissant ces actes par une amende. L'idée d'une telle amende n'est pas tout à fait nouvelle. Jusqu'à la seconde moitié du XIXe siècle, l'on admettait que la confiscation du navire peut être remplacée par une rançon fournie par le capitaine. La rançon est admise, par exemple, pour ne pas citer les dispositions anciennes, dans les instructions françaises de 1870 (article 17) et dans le Manuel de Holland (1888), quoique à titre exceptionnel. Ce système nous paraît contenir une idée saine et conforme à la logique du droit existant. Pour rendre la peine équivalente au délit—but que l'on cherche à atteindre dans le droit moderne—il faut pouvoir la graduer. Ce n'est possible que si l'on fait revivre sous une forme nouvelle l'idée ancienne de rançon. C'est dans cet esprit que le Gouvernement russe a formulé les propositions contenues dans les articles 7 et 8 de son mémorandum (p. 56). Il a été heureux de constater qu'il s'est rencontré sur ce point avec le Gouvernement espagnol.

En conséquence, la Délégation russe a l'honneur de déposer l'amendement suivant, qui reproduit avec quelques modifications de forme les dispositions du mémorandum russe relatives à l'article 9 (Annexe 37):

Remplacer l'article 9 du projet par les dispositions suivantes:

Art. 9. Les navires de commerce de nationalité neutre sont sujets à confiscation lorsqu'ils transportent:

(a) de la contrebande de guerre formant, par son volume, son poids, ou sa valeur, plus d'un quart de toute la cargaison;

(b) des objets de contrebande, même en moindre quantité, si leur présence à bord du navire, de par leur nature même, ne pouvait évidemment ne pas être connue du capitaine.

Art. 9 BIS. En dehors des cas prévus à l'article 9, le navire transportant de la contrebande est passible d'une amende représentant la quintuple valeur de sa cargaison de contrebande. (Ibid., p. 155.)
Proportion of Contraband.

The British delegation later proposed the following as a substitute for the various suggestions before the commission:

La confiscation du navire transportant de la contrebande est permise si le propriétaire, ou celui qui a affréte le navire entièrement, ou le capitaine, a connu, ou a dû connaître, la présence de la contrebande à bord, et que cette contrebande forme plus de la moitié de la cargaison. (Ibid., p. 252.)

The question as to whether the liability for the carriage of conditional contraband should be the same as the liability for the carriage of absolute contraband was raised, and by some it was thought that from the nature of the articles included in these two categories there should be a distinction in treatment. As the report says:

M. le Vice Amiral Roëll demande à la Délégation de Grande-Bretagne quelques explications au sujet de cet article, pour mieux se rendre compte s’il répond entièrement aux idées de son Gouvernement. Cet article ne parle que d’une catégorie de contrebande, et il lui semble que le transport de contrebande conditionnelle ne saurait être jugé de la même façon, quant à la responsabilité du capitaine, que celui de la contrebande absolue. Il se pourrait très bien qu’un capitaine transportât une cargaison de riz, par exemple, destinée à un fournisseur ordinaire de l’ennemi sans toutefois connaître le vrai caractère de cette destination. Dans un cas pareil la pénalité de la confiscation du navire serait excessive. Si, au contraire, cette pénalité était subordonnée à la connaissance du vrai caractère de la destination, la Délégation des Pays-Bas aurait moins de difficulté à accepter l’article. Le comité d’examen devrait, cependant, en amender la rédaction en vue de rendre son intention plus claire.

To this a member of the British delegation replied:

M. Crowe dit que la dernière interprétation donnée à l’article par la Délégation des Pays-Bas est celle qui est conforme à l’idée qui a inspiré sa rédaction. Il s’agit d’établir si le capitaine du navire a connaissance du caractère de contrebande, absolue ou conditionnelle, de la cargaison. (Ibid., p. 201.)

Interpretation of “more than half the cargo.”—Questions at once arose as to how the words “more than half the cargo” were to be interpreted. Many suggestions were made. It was evident that many thought that the bulk of the cargo should be the standard, but it was shown that this standard would make possible many evasions of the real end sought by the formulation of such a rule.
There was considered at The Hague in 1907 also this question of the amount of contraband which when on board a vessel with the knowledge of the owner or captain would involve penalty to the vessel. The British proposition in 1908 was similar in this respect to the German proposition of 1907. The German proposition was as follows:

La contrebande de guerre est sujette à confiscation. Il en est de même du bâtiment qui la porte, si le propriétaire ou le capitaine du bâtiment a eu connaissance de la présence de la contrebande à bord et que cette contrebande forme plus de la moitié de la cargaison. (3 Deuxième Conférence Internationale de la Paix, p. 1157.)

The French proposition at The Hague in 1907 was general in its terms:

La contrebande absolue est sujette à confiscation.

Elle peut donner lieu à la confiscation du navire sur lequel elle est trouvée, si le capitaine a résisté à la saisie ou s'il est établi que le capitaine ou l'armateur ont connu ou pu connaître la nature du chargement prohibé. (Ibid., p. 1158.)

France had a rule in the eighteenth century which made the vessel liable when the amount of contraband on board amounted to three-fourths of the cargo. The German delegate expressed a willingness to accept the ratio of one-third or one-quarter, although the original German proposition had been one-half. The Russian delegate pointed out that a small portion of the cargo might have much greater value than a much larger bulk. The French delegation proposed to determine the liability of the vessel according to the "freight value" of the cargo indicated on the vessel's manifests. (Ibid., p. 1120.)

The Hague Conference of 1907 was not able to reach an agreement upon the subject of contraband, and the whole subject was again taken up at the International Naval Conference in 1908–9.

Proportion and destination.—At the International Naval Conference the French delegation, after speaking of the difficulties in determining the destination of contraband, says:

La proportion de la contrebande relativement à l'entier chargement apparaît, au contraire, comme une base juste et sûre de la
Proportion of Contraband.

confiscation. Ici on prend en considération, comme le dit avec raison, selon nous, le Mémorandum japonais, l'importance de la contrebande par rapport à l'expédition. L'assistance donnée à l'ennemi en violation de la neutralité est-elle le principal objet de l'expédition? Cette assistance a-t-elle une importance suffisante pour que le navire lui-même, grâce auquel cette assistance est donnée, soit confisqué? Sous cette forme, on conçoit très bien que la question soit posée et que la solution dépende de la réponse que justifieront les faits.

Reste à savoir comment apprécier cette importance, cette proportion.

Le texte, sur lequel la Commission délibère, dit simplement "que cette contrebande forme plus que la moitié de la cargaison." C'est peut-être insuffisamment précis. Est-ce la moitié en poids; en volume; en valeur? Doit-on tenir compte ensemble ou séparément de ces divers éléments d'appréciation? Doit-on les distinguer selon les marchandises? Bien que certains Mémorandums les aient adoptés, il est permis de penser que pratiquement ce sens d'une vérification parfois délicate, le plus souvent assez longue, lorsque dans un chargement considérable et varié la contrebande est de quelque importance. Va-t-on juger, en quelque sorte, à l'estime?—ce serait bien arbitraire. Peut-on procéder par des experts?—que de lenteurs, de frais et de complication.

À la Conférence de La Haye, la Délégation française avait proposé de consacrer comme critérium un élément facile à constater et qui précisément est ordinairement basé lui-même sur la valeur, le poids, le volume ou l'encombrement de la marchandise: c'est le fret. Non seulement le fret, toujours mentionné sur le contrat, permet indirectement de juger si telle ou telle marchandise est plus ou moins importante par sa valeur, son poids ou son encombrement, mais encore il représente aussi exactement que possible l'intérêt que le navire a dans le transport de la marchandise, et, souvent plus élevé s'il s'agit de contrebande, il sert à en révéler le caractère.

Notre Délégation prèle la Commission de vouloir bien apprécier si ces considérations sont exactes et si, dans ces conditions, le système le plus pratique et le plus sûr, pour frapper le navire transporteur de contrebande, n'est pas (1) de s'attacher simplement à l'importance de la contrebande par rapport à l'entier chargement; (2) de fixer cette proportion au moyen du fret.

Quant au quantum de la proportion, bien que la moitié soit un peu différente de la pratique française traditionnelle, le désir d'une entente et le souci d'une réglementation commune nous conduiraient à ne pas nous opposer à son adoption. (International Naval Conference, British Parliamentary Papers, Miscellaneous, No. 5, 1909, p. 288.)
It is evident that a single standard might be evaded with comparative ease. Suppose that the restriction should be that a vessel would be confiscated only when more than one-half its cargo by value was contraband. It might be possible to take as part of the cargo a single diamond which in weight or volume would constitute only an infinitesimal part of the cargo—would the vessel be exempt though the remainder of her cargo might be contraband? It would be manifestly easy to shift the freight rates so that the evidence might be misleading. It was therefore thought best to introduce in the Declaration of London several tests for determining the liability of the vessel.

Provision of the Declaration of London, 1909.—The final form was embodied in article 40 of the Declaration of London.

**Article 40.**—A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

The General Report interprets this article as follows:

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

But the question divides itself: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which ranged from a quarter to three quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also encourages practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods sufficiently bulky, or weighty in order that the volume or weight of the contraband may be less. A similar remark may be made as regards the value or the freight. The consequence is that it suffices, in order to justify condemnation, that the contraband should form more than half the cargo according
to any one of the points of view mentioned. This may seem severe; but, on the one hand, proceeding in any other manner would make fraudulent calculations easy, and, on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture, which is true in each of the cases specified. (International Law Topics, Naval War College, 1909, pp. 89, 91.)

Nature of the cargo.—In the situation under consideration the cargo consists of hay, canned meats, and flour.

By Article 24 of the Declaration of London—

The following articles and materials, susceptible of use in war as well as for purposes of peace, are, without notice, regarded as contraband of war, under the name of conditional contraband:

(1) Food.
(2) Forage and grain suitable for feeding animals.

The entire cargo would, if destined for warlike use, be of the nature of conditional contraband.

Destination of cargo.—In accordance with Article 33 of the Declaration of London—

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, 1909, p. 79.)

Article 34 and the General Report bearing upon it attempts to define enemy destination.

ARTICLE 34.—The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities or to a merchant, established in the enemy country, who, as a matter of common knowledge supplies articles and material of the kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place of the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband. In cases where the above presumptions do not arise, the destination is presumed to be innocent. The presumptions set up by this article may be rebutted.

Ordinarily contraband articles will not be directly addressed to the military or to the administrative authorities of the enemy State. The true destination will be more or less concealed. It
British View.

is for the captor to prove it in order to justify the capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom the articles are destined, or on the nature of the place for which the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy Government with articles of the kind in question. It may be a fortified place of the enemy or a place serving as a base, whether of operations or of supply, for the armed forces of the enemy.

This general presumption may not be applied to the merchant vessel herself which is bound for a fortified place, except on condition that her destination for the use of the armed forces or for the authorities of the enemy State is directly proved, though she may in herself be conditional contraband.

In the absence of the preceding presumptions, the destination is presumed to be innocent. This is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus established in the interest of the captor or against him admit proof to the contrary. The national tribunals, in the first place, and, in the second, the International Court, will exercise their judgment.

British view.—Mr. Norman Bentwich, summing up the British view of the effect of these articles relating to the condemnation, says:

According to existing English prize law, the ship carrying contraband is subject to condemnation if she has made forcible resistance to the captor, if she carries false or simulated papers, or if there are other circumstances amounting to fraud, or if she belongs to the owner of the contraband cargo. In other cases the ship is restored after condemnation of the cargo, but no compensation is paid for the loss of freight or time caused by the detention. (Cf. The Ringende Jacob, 1 C. Rob., 92.) Other countries, however, have condemned the vessel when the proportion between the noxious and innocent part of the cargo exceeded a certain fraction; in some cases when it was more than half, in others when more than two-thirds, in others, again, when more than three-fourths. The Declaration has established a uniform rule in place of this diversity of practice, according to which the vessel may be condemned whenever the contraband, reckoned either by value, or by weight, or by volume, or by freight, forms more than half the cargo. Further, when the vessel can not be condemned because the contraband is less than half the cargo by any of these measures, but there are circumstances which incriminate her in the carriage, and suggest knowledge by the master of
the nature of her cargo, the shipowner may be condemned to pay
the costs of the captor incurred in making and adjudicating upon
his prize. The same penalty would presumably be imposed also
when the vessel carried fictitious or fraudulent papers. Follow-
ing the existing practice, innocent goods which belong to the owner
of the contraband on board the same vessel may be condemned;
but innocent goods belonging to another shipper, even if he be an
enemy subject, must be released, though no compensation again is
paid to their owner for detention and loss of market. On the
whole, the deterrent powers of belligerents against contraband
trade have been increased by the Declaration, but not unreason-
ably, since the gains for carriage of contraband being notoriously
large it is fair to visit knowledge of the noxious character of the
cargo on the shipowner, when the contraband forms more than
half of the goods on board. (The Declaration of London, p. 80.)

Résumé.—It may happen that there may be treaty
specifications existing between States that make a case
fall under the first clause of Article 7 of the Convention
relative to the Creation of an International Prize Court.
This clause provides:

If a question of law to be decided is covered by a treaty in force
between the belligerent captor and a power which is itself or
whose subject or citizen is a party to the proceedings, the court is
governed by the provisions of the said treaty.

The Declaration of London might be of no effect if the
States at war, X and Y, should have a treaty containing
a clause like that in Article XIII of the treaty of 1799
between the United States and Prussia:

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 ad-
mitted to do it, and the vessel shall not in that case be carried
into any port, nor further detained, but shall be allowed to pro-
ceed on her voyage.

As the cargo consists of hay, canned meats, and flour,
articles which may be of use to the general population of
State Y, the actual destination to the use of the enemy
forces must be shown. The consignee is a well-known
commission merchant in a place that is not fortified and
not defended. The presumption, unless it is well known
that he furnishes the Government of Y, is therefore that
the cargo is innocent. From the statement of Situation V it can not be inferred that the commission merchant regularly furnishes the Government. If there are other ports from which supplies would more naturally be obtained, the presumption would be that these supplies were innocent. The presumption of innocence would therefore be favorable to the release of the vessel. The general rule for the naval officer would be that in case of doubt a vessel should be sent to a prize court for adjudication.

The doubt, with only such data as given as proposed in Situation V, is too great to warrant destruction of the neutral vessel under the provisions of the Declaration of London.

Under the provisions of the Declaration of London, which are presumed to be binding in this situation as proposed, it is evident that the cargo is of the nature of conditional contraband only if having a hostile destination, and hence the vessel carrying this cargo, if the cargo is bound for warlike use, should be sent to a prize court. The consignment to a commission merchant, even though established in an unfortified place, whose location is such as to make transportation to military bases easy, might be sufficient to justify the commander in sending the vessel to a prize court. The presumption would be that the cargo was innocent. It would be for the captor to prove the contrary.

From the discussions upon articles 33 and 34 at the International Naval Conference, it is evident that the prize court would probably condemn the entire cargo as contraband of war under the provision of article 39, which states, “contraband is liable to condemnation,” if the destination of any part was hostile or if the commission merchant were an enemy contractor.

Contrary to the practice of many States in late years, and also in contravention of certain existing treaties, Article 40 provides:

A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.
Proportion of Contraband.

SOLUTION.

If there were no treaty provisions to the contrary or regulations in contravention, and unless he is reasonably convinced of the enemy destination of the cargo, the captain of the cruiser of State X should allow the neutral vessel to proceed.

The prize court would probably not condemn the cargo.

The neutral vessel would probably not be good prize.

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