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International Law Topics and Discussions

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Topic X.

Is there sufficient ground for the recognition of certain acts as a distinct class under some such name as "unneutral service?"

Conclusion.

The category of "unneutral service," which has been admitted in decisions of the courts, explained in the works of the text writers, described in proclamations, and distinguished in practice, deserves and should receive full and explicit recognition.

Discussion and Notes.¹

Development of doctrine of neutrality.—It is now generally admitted that the rights and duties of neutrals in time of war are correlative. It was formerly claimed that the denial or grant of the same privileges to both belligerents constituted neutrality. Such a doctrine of neutrality might make it possible for a state to deny all the privileges which the first party to the war would especially need and which the second might not need, and to grant those privileges which the second might need and which the first might not need. It was seen that such a position was not neutral in fact, if sometimes so called. Gradually a more equitable view has come to prevail. Neutrality is at present held to demand "an entire absence of participation, direct or indirect, however impartial it may be."

The state is responsible for the observance of neutrality within its sphere of competence. The state is responsible for its own action or failure to act where its jurisdiction can reasonably be exercised. The neutral state can not be

¹A part of the following discussion appeared in the proceedings of the American Political Science Association, 1904, "Unneutral Service," George Grafton Wilson, p. 68.
required to assume the burdens of prosecuting the war, however. If certain articles are declared contraband of war, the belligerent making the declaration can not claim that the neutral state is under obligation to prevent its merchants from shipping such articles from neutral ports in the way of ordinary trade. To demand that the neutral prevent the sale of many articles included within the lists of contraband would be to put the burden of enforcing a belligerent's declaration upon the neutral, and this at the expense of the neutral's trade.

Neutrality is, however, binding not merely upon the state, but also upon the citizens of the neutral state. The state is responsible for its own direct or indirect participation in any violation of neutrality, as in the case where it allows its ports to be a place for the fitting out of hostile expeditions. It is not, however, responsible for the action of each of its citizens, nor can it be. The citizen is ordinarily informed by declaration of neutrality of the position which the state proposes to assume and the citizen is liable to certain consequences for violation of the provisions of the declaration.

As regards the citizen of the neutral state, the declaration usually makes known:

1. That the citizen himself will become liable to certain penalties which the neutral government may inflict in case he performs certain acts within the jurisdiction of the neutral state which may lay the state open to claims of indemnity because of failure to observe neutrality, e. g., if within the jurisdiction of the neutral state he fits out an hostile expedition or accepts and exercises a commission from the belligerent.

2. That the citizen’s property will become liable to certain treatment by the enemy if he undertakes certain acts, e. g., carriage of contraband to the belligerent, or violation of the blockade, when the goods or both goods and vessel may be seized by the belligerent.

The penalty for the acts of the first class falls upon the person of the guilty neutral, and if found guilty within its jurisdiction the penalty is imposed by his own state. The penalty for acts of the second class falls upon the
goods, or goods and vessel, and is inflicted by the belligerent. In this latter case the neutral person is not regarded as guilty of offense and is not made a prisoner of war.

There is a third class of acts which partake somewhat the nature of the acts of the first class which are forbidden and penalized by the neutral state. These are often committed beyond the jurisdiction and responsibility of the neutral state, and when undertaken by the neutral citizen do not involve the neutral state in liability unless the state is in some way a party to the acts.

Various attempts have been made to bring these acts under one of the first two classes mentioned above. Attempts also have been made to assimilate the acts to the carriage of contraband or violation of blockade. Some of the acts have been considered analogous to contraband. The acts of this third class differ very widely, however, in nature, intent, and penalty, from the carriage of contraband or violation of blockade. The nature of the carriage of contraband is commercial, the intent is to obtain exceptional profits because of the special demands of the state at war, and the penalty is the confiscation of the contraband goods. Thus considered, the idea of contraband becomes reasonably clear, though the applications of the principles underlying the doctrine of contraband may not always be easy in concrete instances. It is natural that the attempt should be made to include the forms of service which the neutral should not undertake under the laws of contraband, because the idea of contraband was clear long before there was any clear idea of neutrality. Grotius, in 1625, makes an excellent classification of contraband, upon which little improvement has been made. His conception of neutrality is, however, very far from the modern idea. Indeed, the current ideas of neutrality have for the most part developed within one hundred years. Many writers did not fully comprehend this development and tried to extend the old nomenclature of contraband and blockade to cover new conditions possessing characteristics which did not admit such classification. It would be a difficult problem so to extend the proper doctrine of contraband as to cover
certain acts which have been sometimes classed as analogous to contraband. Even while using the term "analogues of contraband," speaking of the analogy which the carriage of military dispatches and persons possesses to the carriage of articles contraband of war, admits that it is "always remote."

One of the acts most frequently classed as analogous to the carriage of contraband is the carriage of dispatches for the enemy. Upon this subject there has been much discussion, especially since the attempted defense of the action of the United States in the case of the Trent in 1861.

**British opinions distinguishing service from contraband.**—The difference between the carriage of contraband and the aid afforded by the transmission of information was early recognized by Sir William Scott. He, in the case of the Atalanta in 1808, said:

> If a war intervenes and the other belligerent prevails to interrupt that communication (between mother country and colony), any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of limited nature; but in the transmission of dispatches may be conveyed the entire plan of the campaign that may defeat all the projects of the other belligerent in that quarter of the world. * * * The practice has been, accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. (6 C. Rob., 440.)

This opinion of the great English jurist, rendered early in the nineteenth century, shows that the transmission of dispatches of varying character can not properly be put in the same category with contraband because so different in nature and results.
In other cases Great Britain has recognized that penalties may attach directly to service.

In the case of Burton v. Pinkerton, in Great Britain, in 1867, it was held—

That to serve on board a vessel used as a storeship in aid of a belligerent, the fitting out of which to be so used is an offense within the seventh section, is "serving on board a vessel for a warlike purpose in aid of a foreign state," within the second section. (L. R. Q. Exch., 340.)

The vessel in question was the Thames, which was serving as a storeship for Peruvian war vessels in the war between Peru and Spain.

By section 8 of the foreign enlistment act, 1870, "if any person within Her Majesty's dominions, without Her Majesty's license, dispatches any ship with intent that the same shall be employed in the military or naval service of any foreign state at war with any friendly state, the ship in respect of which any such offense is committed and her equipment shall be forfeited to Her Majesty."

Recent British opinions.—The British authorities, in 1904, reaffirmed positions previously taken. They recognized such acts as different in nature from the carriage of contraband, and as involving different penalties. The acts were regarded as practically acts in the naval service of one of the belligerents. This is seen in the following letter, which was, by direction of the Marquis of Lansdowne, addressed to the Chamber of Shipping of the United Kingdom, to the Association of Chambers of Commerce of the United Kingdom, and to certain other associations:

**FOREIGN OFFICE, November 25, 1904.**

Sir: On the 25th ultimo a letter was received by the foreign office from Messrs. Woods, Tyler & Brown, asking whether it was permissible "for British shipowners to charter their boats for such purposes as following the Russian fleet with coal supplies;" and by the Marquis of Landsowne's directions they were informed that "it is not permissible for British owners to charter their vessels for such a purpose."

In view of the numerous inquiries which have been addressed to His Majesty's Government on this subject, I am instructed to explain that action of the kind described in Messrs. Woods' letter might render those concerned liable to proceedings under subsections 3 and 4 of
the eighth section of "the foreign enlistment act, 1870." (33 and 34 Vict., cap. 90.) This section, so far as it is material, runs as follows:

"8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts, that is to say—

"(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

"(4) Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

"Such person shall be deemed to have committed an offense against this act, and the following consequences shall ensue:

"(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

"(2) The ship in respect of which any such offense is committed, and her equipment, shall be forfeited to Her Majesty."

The interpretation clause, section 30, defines "naval service" and "equipping" as follows:

"'Naval service' shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, storeship, privateer, or ship under letters of marque; and as respects a ship include any user of a ship as a transport, storeship, privateer, or ship under letters of marque.

"'Equipping' in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly.

"'Ship and equipment' shall include a ship and everything in or belonging to a ship."

A similar question arose in 1870 during the Franco-German war, and on the 1st of August of that year a question on the subject was put to and was answered by Mr. Gladstone, then prime minister. The foreign enlistment act then in force was that of 1819 (59 Geo. III, cap. 69), containing provisions similar upon this point to those of the act of 1870, which was about to replace it and which received the royal assent on the 9th of August. The question and answer were as follows:

"Mr. Stapleton asked the first lord of the treasury whether his attention has been called to the report that the French fleet in the Baltic is to be supplied with coal direct from this country; whether it
would be consistent with neutrality to allow any vessels, either French, English, or others, to carry coal direct from this country to a belligerent fleet at sea; and whether English vessels so engaged would be entitled to the protection of their country if the other belligerent should treat them as enemies, considering them part of the armament to which they were acting as tenders.

"Mr. Gladstone replied: 'Sir, the House has already been apprised on more than one occasion that there is nothing in a general way to prevent the exportation of coal from this country. If either of the belligerents capture those vessels supplying coal, the question whether it is contraband of war will be a question for the consideration of the court of the captors. But the honorable gentleman has called attention to a particular case, and although the exportation of coal is not generally prohibited, exporters being warned that if it be supplied to either of the belligerents they run the risk of capture, yet of course the case reported, which I can neither affirm nor deny, as I have no more knowledge of it than he has—that is to say, the knowledge derived from general rumor—presents itself under a somewhat different aspect, and in that form the question has been referred to the law officers of the Crown. They have given their opinion, which we have adopted, that if colliers are chartered for the purpose of attending the fleet of a belligerent, and supplying that fleet with coal for the purpose of enabling it to pursue its hostile operations, such colliers would to all practical intents and purposes become storeships to that fleet, and if that fact were established they would be liable, if within reach, to the operation of the English law under the provisions of the foreign enlistment act. It will be the duty of the Government, and they will act upon that duty when such reports arise, to institute searching inquiries into the existence of any such case.'"

Although, therefore, neutral traders may carry on trade even in contraband with belligerents, subject to the risk of capture of their goods, it is necessary that such traders should bear in mind the condition of the law of this country as set forth in the foregoing enactments, which, moreover, have been applied recently by orders in council in British protectorates and also in countries where the King exercises extraterritorial jurisdiction over his own subjects.

I am, etc.,

(Signed) F. A. Campbell.

American opinions distinguishing service from contraband.—The United States courts as well as the British courts have recognized the difference in nature between commerce in contraband and commerce undertaken in the enemy's employ.

In the case of the Julia, Story rendered the opinion of the United States Supreme Court in 1814, to the effect "that the sailing on a voyage under the license and pass-
port of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war." (8 Cranch, 181.)

The opinion rendered in the case of the Julia was subsequently followed with approval in other cases. (The Aurora, 8 Cranch, 203; the Hiram, 8 Cranch, 444; the Ariadne, 2 Wheaton, 143.) In all these cases subjects of one of the belligerents accept the service of the other and sail under his license. The principle applies equally to a neutral accepting such service for one of the belligerents.

Indeed, it may not be necessary that the master of a vessel be a knowing party to the undertaking which aids the enemy. Lord Stowell has held that "It will be sufficient, if there is injury arising to the belligerent from the employment in which the vessel is found. The master may be ignorant and perfectly innocent. But if the service is injurious, that will be sufficient to give the belligerent the right to prevent the thing from being done." (6 Rob., 430)

Not merely in court decisions, but in the opinions of text writers, distinctions are made in the acts of neutrals. Dana, in note 228 to Wheaton, speaking of the carrying of hostile persons or papers, in contrast to contraband, says:

But the subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent. * * *

Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country or in neutral ports, or how far they are apart or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination, and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged. (Wheaton, D., International Law, note 228.)

The distinctions clearly made in the early half of the nineteenth century seem to have been somewhat neg-
lected in the latter half, and from this neglect confusion in treatment and forced constructions have arisen.

Recent continental opinion.—Kleen, writing of this attempt to extend the doctrine of contraband to cover services, persons, etc., says:

Quelquefois ont été rangés parmi les articles de contrebande de guerre certains objets qui n'y appartiennent pas, bien que leur transport pour le compte ou à destination d'un belligérant puisse être interdit. Non seulement chez des publicistes mais aussi dans des lois et traités, certaines personnes et communications sont considérées comme une espèce de contrebande, du moment qu'elles ont été apportées à un ennemi ou transportées à cause de lui, de manière à le renforcer ou l'aider dans la guerre, soit matériellement soit même intellectuellement. C'est ainsi que se rencontrent depuis longtemps sur les listes de contrebande des objets tels que "soldats," "troupes," etc., dernièrement aussi "documents."

Comme toutefois cet élargissement de la notion de la contrebande de guerre se conciliait peu avec la terminologie juridique, les personnes et les correspondances n'étant ni des marchandises ni des munitions, tandis que la contrebande a été de tout temps définie comme telles, les choses ainsi intruses dans sa catégorie n'y furent pas toujours rangées de la même façon que les autres objets prohibés, ni sans restriction. Parfois, il est vrai, on les trouve simplement insérées dans les listes comme des articles de contrebande ordinaires. Mais d'autres fois elles y sont ajoutées ("assimilées") sous d'autres dénominations, un peu modifiées, par exemple sous la qualification de contrebande improprement dite ou dans le sens figuré, "quasi-contrebande," "analogues de la contrebande," etc. (La Neutralité, vol. 1, p. 452.)

Pillet, after speaking of contraband in the ordinary sense, says:

La théorie de la contrebande a trouvé sa place dans une dernière hypothèse bien différente de celles que nous avons considérées jusqu'ici. C'est dans le cas où un navire neutre transporte pour le compte de l'ennemi des troupes, des dépêches, ou certains hauts fonctionnaires, des ambassadeurs par exemple. On appelle ce transport contrebande par analogie. L'analogie, il faut ici le reconnaître, est assez lointaine; il ne s'agit plus de marchandises mais de personnes, et la sanction du transport illicite ne peut consister que dans la seule condamnation du vaisseau. (Les Lois Actuelles de la Guerre, par. 218, p. 330.)

Names given to service.—Whatever the name, a considerable range of actions involving neither the doctrine of contraband nor the doctrine of blockade should have some distinguishing name. Various names have been from time
to time given to some of these actions, such as "accidental contraband," "analogues of contraband," "enemy service," "unneutral service," etc. The terms involving the use of the word "contraband" are admittedly inappropriate and forced. The term "enemy service" would be ambiguous because often used in a sense not involving any of the actions here discussed. The phrase "unneutral service" seems to be the least ambiguous and most distinctly descriptive. The decisions of the courts and the opinions of the writers point clearly to the fact that it is the nature of the service which must be considered in certain cases, while the nature and destination of the goods in case of contraband, and the military condition of the place in the case of blockade, determines the penalties.

Unneutral service and contraband.—Professor Lawrence recently very properly pointed out that: "In truth between the carrying of contraband and the performance of what we may call unneutral service there is a great gulf fixed." (Principles of International Law, p. 624.)

We are now in a position to distinguish clearly between the offense of carrying contraband and the offense of engaging in unneutral service. They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile but warlike. In order that a cargo of contraband may be condemned as a good prize, the captors must show that it was on the way to a belligerent destination. If without subterfuge it is bound to a neutral port the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service the destination of the captured vessel is immaterial. The nature of her mission is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty of carrying contraband is the forfeiture of the forbidden goods, the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel, the goods on board being condemned when the owner is involved or when fraud and concealment have been resorted to.

Nothing but confusion can arise from attempting to treat together offenses so widely divergent as the two now under consideration. Ibid., p. 633.
Dupuis distinguishes the penalty for carriage of contraband and that for unneutral service. He says:

S'agit-il de contrebande de guerre, c'est d'ordinaire une simple aventure commerciale que tente l'expéditeur et que sert le navire chargé du transport, pour tous deux, le mobile habituel est l'intérêt, l'espoir d'un bénéfice à réaliser. S'agit-il de transports de troupes, d'agents ou de dépêches ennemis, l'ordre d'envoi est dû à de tout autres motifs; ce sont des considérations de guerre qui le dictent; le navire qui l'exécute ne se fait pas l'instrument d'une affaire dont le contre-coup n'atteint qu'indirectement l'ennemi; il se fait le complice d'un acte de guerre dirigé contre lui. Si l'attrait du gain peut être l'unique mobile de sa complicité, il n'en reste pas moins que aide qu'il procure à l'un des belligérants est d'un tout autre ordre que le transport de contrebande de guerre; il revêt un caractère plus grave et une teinte d'hostilité beaucoup plus accentuée. C'est assez pour modifier la nature de l'infraction et pour justifier une sanction plus rigoureuse.

Autorisées par la gravité de l'acte, les sévérités plus grandes de la répression sont d'ailleurs commandées par des nécessités pratiques. Il est plus aisé de dissimuler la présence à bord d'agents ou de dépêches que celle de marchandises de contrebande; l'infraction est d'autant plus facile à commettre que la surveillance est plus facile à déjouer; il faut, pour en détourner, que le risque moins grand d'être découvert soit compensé par le risque plus redoutable d'une sanction plus rude en cas de surprise. Aussi ne se contente-t-on pas d'empêcher troupes, agents ou dépêches surpris de parvenir à destination; la confiscation frappe, en principe au moins, le navire qui les porte. (La Guerre Maritime et les Doctrines Anglaises, p. 282.)

Forms of unneutral service.—As states have drawn nearer together through the elimination of the barriers of time and space in matters of communication, the possibilities of unneutral service have greatly multiplied. It would not be possible to be neutral in modern days and to maintain with Grotius that "it is the duty of those who have no part in the war to do nothing which may favor the party having an unjust cause, or which may hinder the action of the one waging a just war, * * * and in a case of doubt to treat both belligerents alike, in permitting transit, in furnishing provisions to the troops, in refraining from assisting the besieged." (De Jure Belli ac Pacis. Lib. III, C. XVI, iii, i.)

Modern neutrality proclamations have by various circumlocutions tried to prohibit acts involving assistance by neutral subjects in the performance of warlike acts. The
proclamation of the United States of February 11, 1904, issued in consequence of the Russo-Japanese war, after recognizing the general principle, "free ships, free goods, except contraband of war, and free goods always free, except contraband of war," in a qualified way warns its citizens against unneutral service, saying "that while all persons may lawfully, and without restriction because of the aforesaid state of war, manufacture and sell within the United States 'arms and munitions of war,' and other articles ordinarily known as 'contraband of war,' yet they can not carry such articles upon the high seas for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade which may be lawfully established and maintained during the war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf."

The distinction is clearly made in the same war in the proclamation of the Netherlands Government to its citizens in which "their attention, and especially that of captains, shipowners, and ship brokers, is directed to the danger and risks consequent on the nonobservance of efficient blockade of the belligerent parties, the conveyance for them of contraband of war or military dispatches (unless in the way of regular postal service), and the execution of any other transport service in their interest." The "Instructions to Blockading Vessels and Cruisers" issued by the Navy Department of the United States, June 20, 1898, as General Order, No. 492, section 16, provides that "a neutral vessel in the service of the enemy in the transportation of troops or military persons is liable to seizure;" and in section 15, that "a neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure, but not when she is a mail packet and carries them in the regular and customary manner."

Hall has given considerable attention to what he terms "analognes of contraband." He says:

With the transport of contraband merchandise is usually classed analogically that of dispatches bearing on the conduct of the war and
of persons in the service of a belligerent. It is, however, more correct
and not less convenient to place adventures of this kind under a dis­
tinct head, the analogy which they possess to the carriage of articles
contraband of war being always remote. They differ from it in some
cases by involving an intimacy of connection with the belligerent
which can not be inferred from the mere transport of contraband of
war, and in others implying a purely accidental and almost involuntary
association with him. They are invariably something distinctly more
or something distinctly less than the transport of contraband amounts
to. When they are of the former character they may be undertaken
for profit alone, but they are not in the way of mere trade. The
neutral individual is not only taking his goods for sale to the best
market, irrespectively of the effect which their sale to a particular
customer may have on the issue of the war, but he makes a specific
bargain to carry dispatches or persons in the service of the belligerent
for belligerent purposes. He thus personally enters the service of the
belligerent, he contracts as a servant to perform acts intended to affect
the issue of the war, and he make himself in effect the enemy of the
other belligerent. (Hall, International Law, 5th ed., p. 673.)

A neutral vessel becomes liable to the penalty appropriate to the
transport of persons in the service of a belligerent, either when the
latter has so hired it that it has become a transport in his service and
that he has entire control over it; or when the persons on board are
such in number, importance, or distinction, and at the time the
circumstances of their reception are such as to create a reasonable
presumption that the owner or his agent intend to aid the belligerent
in his war.

In the transport of persons in the service of a belligerent the essence
of the offense consists in the intent to help him; if, therefore, this
intent can in any way be proved, it is not only immaterial whether
the service rendered is important or slight, but it is not even necessary
that it shall have an immediate local relation to warlike operations.
(Hall, International Law, 5th ed., p. 676.)

The Russian declaration of February 14, 1904, section
7, states that—

There are assimilated to contraband of war the following acts, for­
bidden to neutrals: The transport of enemy troops, the dispatches or
correspondence of the enemy, the furnishing of transports or ships of
war to the enemy. Neutral vessels guilty of forbidden acts of this
character may be, according to circumstances, seized and confiscated.

The position taken by Russia is entirely justifiable, and
the persons concerned in the service become prisoners of
war. Hall sets forth the contrast as follows:

It will be remembered that in the case of ordinary contraband trade
the contraband merchandise is confiscated, but the vessel usually
suffers no further penalty than loss of time, freight, and expenses. In the case of transport of dispatches or belligerent persons the dispatches are of course seized, the persons become prisoners of war, and the ship is confiscated. The different treatment of the ship in the two cases corresponds to the different character of the acts of its owner. For simple carriage of contraband the carrier lies under no presumption of enmity towards the belligerent, and his loss of freight, etc., is a sensible deterrent from the forbidden traffic; when he enters the service of the enemy seizure of the transported objects is not likely to affect his earnings, while at the same time he has so acted as fully to justify the employment towards him of greater severity. (Hall, International Law, 5th ed., p. 678.)

Halleck (International Law, 3d ed., Baker, Vol. II, Ch. XXV) says of a place blockaded in distinction from a place besieged:

But there is an important distinction, with respect to neutral commerce, between a maritime blockade and military siege. The object of a blockade is solely to distress the enemy, intercepting his commerce with neutral states. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place, by capitulation or otherwise, into the possession of the besiegers. It is by the direct application of force that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence every besieged place is for the time a military post, for even when it is not defended by the military garrison its inhabitants are converted into soldiers by the necessity of self-defense. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce and in deciding questions of capture.

It might be inferred by parity of reasoning that when a port is under a military siege neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable in the two cases to neutral commerce. Although the legal effects of a siege on land that is purely a military investment of a naval or commercial port may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is the reduction of the place. All
writers on international law impose upon neutrals the duty of not interfering with this object. To supply the inhabitants of a place besieged with anything required for immediate use, such as provisions and clothing, might be giving them aid to prolong their resistance. It is, therefore, a clear departure from neutral duty to furnish supplies, even of possible utility, to a port in a state of siege, although communication by sea may be open. It would be a direct interference in the war, tending to the relief of one belligerent and to the prejudice of the other; and such supplies are justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. Hence, although the prohibition of neutral commerce with a port besieged be not entire, yet it will extend to all supplies of even possible utility in prolonging the siege.

From the discussion thus far it is evident that the forms of unneutral service which have been hitherto most common are—

1. Carriage of enemy dispatches or correspondence.
2. Carriage of enemy persons.
3. Enemy transport service.

In recent wars, auxiliary coal, repair, supply, cable ships and the like have become of great value. Neutrals may easily engage in such service, and it would be very difficult to extend the doctrine of contraband or of blockade so as to cover their action.

While it might be possible to extend the doctrine of contraband to cover the carriage of certain enemy persons and dispatches, it would be very difficult to extend it so as to cover the service which might be rendered to the enemy by a submarine cable or by the wireless telegraph. Of the use of the submarine cable Capt. C. H. Stockton, U. S. Navy, says:

Besides the contraband character of the material of a telegraph cable, in use or en route, as an essential element of belligerent communication which renders it liable to seizure anywhere out of neutral territory, there is another phase of this question, and that is in regard to the nature of the service afforded by such a communication by a neutral proprietor to a belligerent.

This service is in the nature of both an evasion of a blockade and, what has been termed of late years, of unneutral service. It does not matter in this phase whether the cable be privately or state owned, so far as the technical offense is concerned, though the gravity and consequences are naturally much more serious in the latter case. Let us
take, as an instance, the case of a blocked or besieged port, as Habana or Santiago were during the late hostilities. The communication of information or of dispatches, or of means of assistance which can be made by such means, is an unneutral service, and would resemble also the violation of blockade by a neutral vessel carrying dispatches, the capture of which on the high seas outside of territorial jurisdiction would be a justifiable and indisputable act of war.

Extend this to a country or port not blockaded or besieged, and you would yet find the cable owned, let us presume, by a neutral, the means of performing the most unneutral kind of service, of a nature which, done by a ship, would most properly cause its seizure, condemnation, or destruction by the offended belligerent. (Proceedings U. S. Naval Institute, Vol. XXIV, 3, p. 453.)

Pilotage by a neutral of an enemy vessel, the repetition of signals for the benefit of the enemy by any means, “to supply the inhabitants of a place besieged with anything required for immediate use” (Halleck, International Law; Baker, Vol. II, Chap. XXV), and many other acts, the number of which will continually increase with the development of means of communication, and transmission must be provided against by something beyond the laws of contraband and of blockade.

British Manual.—Chapter VII of the British Manual of Naval Prize Law is upon “Neutral vessels, acting in the service of the enemy.” Holland makes the note on this title of the chapter that—

Vessels engaged in the carriage for the enemy of military persons or dispatches have sometimes been described as engaged in the carriage of “Contraband.” See the note to Friendship, 6 Rob., 420. It is conceived that this use of the term is misleading.

The regulations of this chapter are as follows:

**Acting as a Transport.**

88. A Commander should detain any Neutral Vessel which is being actually used as a transport for the carriage of soldiers or sailors by the Enemy.

89. The Vessel should be detained, although she may have on board only a small number of Enemy Officers, or even of Civil Officials sent out on the public service of the Enemy, and at the public expense.

90. The carriage of Ambassadors from the Enemy to a Neutral State, or from a Neutral State to the Enemy, is not forbidden to a Neutral Vessel for the detention of which such carriage is therefore no cause.
CONCLUSION.

EXCUSES TO BE DISREGARDED.

91. It will be no excuse for carrying Enemy Military Persons that the Master is ignorant of their character.

92. It will be no excuse that he was compelled to carry such Persons by Duress of the Enemy.

LIABILITY OF VESSEL, WHEN IT BEGINS, WHEN IT ENDS.

93. A Vessel which carries Enemy Military Persons becomes liable to detention from the moment of quitting Port with the Persons on board and continues to be so liable until she has deposited them. After depositing them the Vessel ceases to be liable.

PERSONS NOT TO BE REMOVED.

94. The Commander will not be justified in taking out of a Vessel any Enemy Persons he may have found on board and then allowing the Vessel to proceed; his duty is to detain the Vessel and send her in for Adjudication, together with the Persons on board.

PENALTY.

95. The penalty for carrying Enemy Military Persons is the confiscation of the Vessel and of such part of the Cargo as belongs to her Owner.

Conclusion.—Such acts, as mentioned in the British Manual, and many others, are in the nature of unneutral service. Under some title—and "unneutral service" seems better than any thus far proposed—these acts must be recognized as in a distinct category. Their nature is hostile, because such service should primarily be performed by belligerent agents and agencies. The neutral agent in undertaking the act identifies himself with the belligerent to an extent which makes him liable to the treatment accorded to the belligerent. He is therefore liable to capture as an enemy, and his goods are liable to the treatment accorded to the enemy under similar conditions. The agent may be made a prisoner of war, and the agency may be seized, confiscated, or, in certain instances, so treated as to render it incapable of further rendering unneutral service.

The clear recognition of this category of unneutral service which is gradually manifest will in a measure remove
the confusion resulting from certain forced interpretations of principles of international law. Such principles, as those of contraband and blockade, were formulated at a period when modern ideas of neutrality were unknown and when such ideas, if advocated, would perhaps have been regarded as entirely visionary. Acts which differ in nature, in intent, and in penalty, as do acts involving contraband or blockade from those involving unneutral service, should no longer be confused. The category of "unneutral service" which has been admitted in decisions of the courts, explained in the works of the text writers, described in proclamations, and distinguished in practice, deserves and should receive full and explicit recognition.