GROWTH OF BELLIGERENT RIGHTS OVER NEUTRAL TRADE.

The process of international stock-taking which follows war reveals a growth of international law. Out of the welter of violations, alleged violations, denials, interpretations and new practices, international law emerges with certain definite modifications, due to the adaptation of the rules to new circumstances and changed conditions, which have come into being since the last war. This growth does not necessarily include all the extensions proposed and practiced by belligerents during the course of the war, although many of those extensions may form the basis for the law in its expanded form. A belligerent cannot alter international law in his own favor during the course of a war, but if he could not interpret the old law to suit the new conditions, the law would be self-destructive by simply having no relation to the world it is intended to rule. Such of these interpretations as are not valid, according to the findings of subsequent international practice, are called in this connection "extensions" of the law, and such interpretations as are due not solely to the wish of a single belligerent but are dictated by universal economic and geographic facts and consequently may become valid rules, are, for the purposes of this discussion, called "growths." To put the matter succinctly, the growth is what is left when all of the "extensions" have been tried in the balance of international practice.

That department of the law which relates to the conflicting interests of neutrals and belligerents has peculiar interest to the United States, both on account of the traditional foreign policy of that nation, and on account of that nation's share in the formation of this law. The right of a belligerent to restrain neutral commerce from carrying aid to his enemy, was asserted by both groups of belligerents in the World War. The extensions of practice laid down and followed by Germany in this field we will pass by, because
in that final court of appeal to which she committed her case, Germany lost the decision. But Great Britain made novel assertions, which we cannot so lightly dismiss. Not merely because Great Britain was on the victorious side, but also because all those powers associated with the Entente Allies, including finally the United States, participated with Great Britain in the benefits of those new interpretations of the rules. The purpose of our inquiry is to discover as far as possible whether the interpretations made by Great Britain are to be considered in the nature merely of extensions, or whether, when all the smoke is cleared away, they may not find place in the expanded Law of Nations.

It is, of course, an inquiry which involves the ancient discussion of the legal nature of international law. Is it law? At what point does a new practice become law? What is it without sanction? Such are the pitfalls into which the incautious investigator is apt to stumble when bent on a practical, rather than on a philosophical inquiry. Though anxious to avoid this set of problems, it is necessary, nevertheless, to understand one point in the philosophical aspect of the subject. That point need not be settled, but it should be understood. That is the interesting fact that in the law of neutral and belligerent rights, the offense consists in getting caught. The matter is put thus crudely, not merely for the sake of clearness, but also because it expresses the actual state of the law on this subject. A neutral merchant has a right in international law, to send goods to a belligerent. If he send arms and munitions he does not involve his country in any act of neutrality; the shipment is legal and the trade is lawful. But if he gets caught, he is penalized by the loss of his goods. A belligerent has a right to prevent certain goods from reaching his enemy for his military use; and those are the very goods which the neutral has a legal right to ship. It is here that a confusion of terms arises. The trade in contraband articles has been termed "illegal,"

1 See Sec. Lansing to Ambassador Penfield, Aug. 12, 1915, for a good summary of the law on this subject. In International Conciliation Pamphlets No. 96.
"illicit" and "unlawful" by certain jurists, who did not thereby mean to imply that the trade was forbidden in international law. Judge Story used the expression "illicit or contraband trade" and Chief Justice Chase remarked "the conveyance by neutrals to belligerents of contraband articles is always unlawful, etc." It is an unfortunate inadequacy of legal terminology which produces confusion of words here, but that is no reason why there should be any confusion of thought. Kent has put the law correctly, "A trade by a neutral in articles contraband of war is a lawful trade, though a trade, from necessity, subject to inconvenience and loss." Dr. Lushington tried to rationalize the matter by talking about "limited illegality," but Phillimore does better in his statement, "The carrier of contraband may violate the proclamation of the neutral state of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offense is, by the general law of nations, left to the belligerent who has the right of capture." The belligerent must be his own policeman, for a neutral is under no obligations to stop its nationals from shipping contraband. Yet after forcing the belligerent into this position and making him his own policeman, the neutral then complains at the policeman's methods, and here comes in the whole controversy which is our subject. It has been suggested that the extreme belligerent view assumes "the right of a belligerent to prevent certain goods from reaching the country of his enemy for his military use" while the extreme neutral view assumes "the right of a neutral to continue his commerce with both belligerents." The forces of the two views are bound occasionally to conflict, and the resultant of these forces is the law on the subject. Our task is to discover whether the traditional neutral or the

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2 Carrington v. Insurance Co., 8 Peters, 495 (1834). (In the "Santissima Trinidad." 7 Wheat. 283 (1822) Story states the law correctly.)
3 "Peterhoff," 5 Wallace 28 (1866).
4 Seton v. Low, 1 Johnson (N. Y.) 1, (1799).
5 The "Helen," L. R. 1 Adm. & Ecc. 1, (1865).
6 The "International," 3 Adm. & Ecc. 321 (1871).
7 E. C. Stowell, 102 N. Y. "Nation" 514.
traditional belligerent viewpoint has emerged from the world war with the greater confirmation and recognition. In other words has the law expanded in favor of the neutral or of the belligerent? For purposes of convenience we will treat the subject separately under the headings of contraband, blockade and continuous voyage. These are more or less arbitrary divisions of the law, which originally had distinct and definite provinces. Whether they are still distinct and separate remains to be seen, but at any rate they afford useful compartments into which to arrange our facts and our thoughts.

I. The Law of Contraband of War.

Grotius' classic tripartite division has always in the past guided the practice of the law of contraband. Absolute contraband consisted of articles which were absolutely for military use, and might be captured anywhere by a belligerent, if they were on route to his enemy on the sea, or by way of belligerent territory. Conditional contraband consisted of those articles which could be treated as contraband only on the condition that they were bound for the armed forces of the enemy, and not to his civil population. Non-contraband is self-descriptive. As late as the London naval conference of 1909 serious and sincere efforts were being made to classify articles of commerce specifically and by name into one or another of these three divisions. But during the world war something happened and the distinctions disappeared. It was not so much what some sea-power dictated, but what economic fact dictated, that caused this change. What, after all, was the ultimate significance of those familiar catch-word expressions, "a nation in arms," "the mobilization of industry," "the pooling of national resources," "feed the guns," and a dozen others which formed the titles for newspaper and magazine articles in the years of war? How frequently is it realized how completely these expressions sever the old order from the new? How is it possible to discuss the distinction between food destined to
a civil population and food destined to military forces, when no such distinction in fact exists. What is the value of the old distinction between articles which can and articles which cannot be adapted to military use, when by the mobilization of industries and resources, every agency within a nation becomes a cog in the military machine? A French writer has it: "We must ask the reader to take us quite literally, when we state that the whole of the living forces of the country are absorbed in war" and "the expression 'a nation in arms,' is no longer an extravagant figure of speech, it is nothing but the strict truth," and "the state by assuming control of their (industries) productive effort, which conditions the operation of armies, makes them, so to speak, an expansion of military activities." In the light of these expressions what becomes of the old Grotian classification?

As between absolute and conditional contraband, the world is confronted with a new situation. At the outbreak of the world war, the question of what, specifically, was conditional and what, specifically, was absolute contraband had after centuries of disagreement, in which every nation had been a law unto itself, been codified in the so-called Declaration of London of 1909. But while the specific designation of certain articles into certain classes was a useful guide, it was not, at the outbreak of the war, international law. For it had not as yet been ratified by all the powers, and Great Britain, perhaps the most important of all the powers in such a question, had failed to ratify the code. Hence the United States Department of State truly said, after its vain efforts to get all the belligerents to adhere to the Declaration of London, that the great neutral would "insist that the rights and duties of the United States and its citizens, in the present war be defined by the existing rules of international law and the treaties of the United States, irrespective of the Declaration of London." This meant in effect that each nation would lay down its own

lists of contraband, subject to the vague general limitations of Grotius' definition. Under this practice each belligerent published its contraband list. Then Great Britain began that series of practices which hurt neutrals. By successive Orders in Council, she steadily increased her lists of absolute contraband and at the same time diminished the lists of conditional contraband. By taking articles from the conditional list and adding them to the absolute list she was illustrating the reaction of the law of war to modern economic conditions. Belligerents were told "food will win the war," why not then regard food as absolute contraband as much as gunpowder? Motor trucks could not move without lubricating oil and gasoline, and without motor trucks Germany's spectacular advances would have been impossible. Why, then, are not petroleum products in the same class with machine guns? The facts of the economic organization of the world were such that Germany very early instituted a "food administration." As soon as that was done the last vestige of distinction between food destined for civil population and food destined for the military forces disappeared, and this public administration of food was "one of the reasons actuating His Majesty's Government in deciding to bring the cargo of the 'Wilhelmina' before a prize court." The "Wilhelmina" was a ship carrying food (conditional contraband) to Hamburg.

But such practice could not stop here. Was it the British Government or the logic of economic development which finally announced "the circumstances of the present war are so peculiar that His Majesty's Government considers that for practical purposes the distinction between the two classes of contraband (absolute and conditional) has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war, that no real distinction can now be drawn between the armed forces and the civil population.

Since the enemy government has taken control by a series of decrees and orders of practically all the articles on this list of conditional contraband, they are now available for government use. So long as these exceptional conditions continue, our belligerent rights with respect to the two classes of contraband are the same, and our treatment of them must be identical." But are these "exceptional conditions" ever going to cease to "continue"? With a greater degree of governmental control everywhere, and with more and more governmental ownership, does not the distinction between governmental and private enterprise become more and more indistinct? Moreover we have but to look at the kind of articles which under the new circumstances are useful for military purposes, to see that they include practically everything which under the old system was conditional contraband, yet which in modern war, with the governmental administration of so many agencies, become almost ipso facto, absolute contraband. Observe the operation of the notorious "Rathenau Plan" under which Germany plundered conquered territory. Under this system Germany requisitioned "individual and firm name plates, in and on houses, door knobs and knockers, the metal decorations on doors and carriages, etc.," and "velvets, plush and silk textiles" and "curtain rods, stein covers, stair rods, clothes hangers and gas fixtures." "Thoroughness" and "efficiency" were the order of the day in these seizures, and it may be said quite literally that the German officials seized every imaginable variety of article capable of either peaceful or military use, and used those articles for the support of the German war machine. Not only articles adaptable to both uses, but articles which in their component parts, constituents or derivatives might be useful to the war ma-

11 Preface to list of Contraband Articles presented by the British Foreign Office to both Houses of Parliament, April 13, 1915, reprinted in Amer. Journal of International Law, X, spec. number (1916).

12 For discussion of the details of the Rathenau Plan see "German Treatment of Conquered Territory," No. 8 of series published by U. S. Committee on Public Information. Official texts will be found in "German Legislation for the Occupied Territories of Belgium," ed. by Huberich and Nicol-Speyer (Hague, 1915-17).
chine were requisitioned. The economics of modern war seems to have obliterated both the difference and the distinction between goods susceptible to war-like purposes and goods susceptible to both war and peace purposes. The reason for that is plain on an examination of the list of so-called conditional contraband articles under the Declaration of London. Scrutiny of the list will disclose the fact that every one of the articles for which it was supposed a special rule might be made, is of such a character as to be not merely possibly useful in war, but absolutely indispensable in modern warfare. That list made up with such effort in 1909 contains articles of such nature that every item is necessary to a warring nation’s army, and so necessary that it would be folly to think of winning the war without it. The Declaration of London would have presumed that submarines, fuel and lubricants, aeroplanes, telegraph and wireless instruments going to Germany in the World War might have had an innocent destination!

But even with all this, there at least remained the distinction between contraband and non-contraband, and so long as other questions were not involved it might have been presumed that non-contraband was free from molestation. But here the same economic facts come into play. The expression “mobilization of resources” involves a recognition of the interdependence of industries, the subordination and adaptation of all industries to the war machine, the questions of “essential” and “non-essential” industries, priority lists and numerous other processes which indicate how all articles of commerce may become in one way or another related to and subject to the demands of the war machine. In support of this sweeping statement it is interesting to note the terms of the President’s proclamation of February 16, 1918, in extending the executive control of exports and listing certain articles which might not be exported without license. Presumably commerce in these articles was of importance to the war machine. In listing them we find such expressions

19 Arts. 24, 34, 35 of Declaration of London.
as certain articles and "machines for their manufacture or repair, component parts thereof, materials or ingredients used in their manufacture, and all articles convenient or necessary for their use," and this, "animals of every kind, their products or derivatives," and this "all non-edible animal or vegetable products" and this "all metals, minerals, mineral oils, ore and all derivatives and manufactures thereof." If further interesting and eloquent facts be required on this subject one might turn to the list of articles supplied to the various branches of the army by the Supply Service of the Quartermaster Corps. While designed for quite a different purpose it reveals what an interesting variety of articles, which at first glance one might say were of no practical military use, are in fact supplied for military purposes. "School-books, cork-screws, cuspidors, pencil-sharpeners, rat-traps, whistles, clothes-pins, assorted hair, lamp and window shades" will all be found listed. One English writer informs us that "a short time ago one of the neutral powers attempted to make a list of contraband and submitted the question to its military experts and scientists. After devoting considerable study to the subject, they reported that "with the exception of human hair, there was not a single element or substance which could not in some way be made to serve a military purpose." After all, is it not a fair question to ask whether these modifications and interpretations which Great Britain has made may not soon be recognized as the logical outcome of a present day social and economic condition which is not going to change back again just because the war is ended?

II. THE LAW OF BLOCKADE.

Said the German Chancellor (Bethmann-Hollweg) to the Reichstag, " . . . Great Britain and her allies have ridden roughshod over all neutral rights of trade and intercourse with the central European states. . . . England

14 See War Trade Board Journal, Mar. 1918, pp. 4-5.
15 See Manual of the Quartermaster Corps of the U. S. Army, par. 2207.
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went so far as to forbid such humane acts on the part of American philanthropists as the sending of milk to German children! The last Order in Council threatens trade with new unlawful aggravations of the blockade rules, against the previous violations of which the American Government has already protested."17 By way of eliminating the extraneous matter of the milk and proceeding right into the law of blockade itself, let us notice the remark "England can no more permit milk to go to Germany than she can permit food stuffs or cotton or explosives; because, among other reasons, milk can be converted into explosives, and the tin cans in which condensed milk is packed make excellent trench bombs."18 After all Germany boasted too many times about her chemists and she could not complain if at last she was taken seriously. Moreover, some of the "potatomasher" hand grenades used by the German troops certainly looked as if they had been made out of old empty tin cans. But this is aside from the law of blockade. The Chancellor branded the British blockade as illegal. There has been much discussion on the point of what constitutes a legal blockade, largely because the British and Continental lawyers have been at variance on the method of enforcement. But essential points are common to both schools: a blockade is the shutting off of a part or all of an enemy’s coast line and forbidding all ingress thereto or egress therefrom by sea;19 a blockade is a wholly maritime affair;20 to be binding it must be effective;21 the blockading government should give formal notice of blockade through the regular diplomatic channels,22 after which neutrals are on notice and may not attempt breach of blockade without risking

19 See, for instance, Lawrence, International Law, 5th ed., par. 246.
20 The "Peterhoff," 5 Wallace 28 (1861).
22 Recognized by Declaration of London, Arts. 8–13, upon which, however, the doctrine does not depend for its legality, because the Declaration did not become law.
the loss of both cargo and ship.\textsuperscript{23} Such were the rules under which Great Britain might have shut off her enemy. But at the outset she did not avail herself of this privilege. Instead she changed the contraband lists until there was nothing left in the conditional contraband class, and the case might have rested there and been fought out without any question of technical blockade ever having been raised. But the employment of the "war-zones" resulted in more and more rigid practices on both sides until Germany had announced the policy which finally led the United States into the war, and Great Britain had adopted a policy which forbade any vessels from coming in or going out of German ports. The competition of German decrees and British Orders in Council is somewhat analogous to the Decrees of Napoleon and the Orders in Council of Pitt and others during the Napoleonic wars, and having in mind the fact that most of that competition of Napoleon's day was simply a case of England and France striking wildly at one another in utter disregard of the most elementary neutral rights which were clear "extensions" and never became "expansions" of international law, we can examine the practices of the world war the more dispassionately. The Order in Council of March 11, 1915, was not called a "blockade" but was denominated "steps for restricting further the commerce of Germany."\textsuperscript{24} In a sense the German Chancellor was justified in assuming that this was to all intents and purposes a blockade, because its terms forbade further commerce with the German ports. Unofficially the British officials spoke of the process as a blockade, and to the newspapers and general public it was always a blockade. But as the Prime minister explained to the House of Commons, "In dealing with opponents who have openly repudiated all the restraints both of law and of humanity, we are not going to allow our efforts to be strangled in a network of judicial niceties" for "there is no form of economic pressure to which we do not consider ourselves entitled to resort."\textsuperscript{25}

\textsuperscript{23} The "Adula" 176 U. S. 361 (1899).
\textsuperscript{24} Reprinted in International Conciliation Pamphlets, No. 95, p. 45.
\textsuperscript{25} 70 Hansard 600, Mar. 11, 1915.
“Economic pressure” is the key-word of the problem. That is a belligerent right insofar as it can be applied without violating the sovereign rights of neutrals and the ordinarily accepted standards of humanity in dealing with an enemy, which last, in its internationally legal sense, has never been meant to forbid the starving of civilian populations as a method of pressure. This may seem harsh, and in fact may be wickedly immoral, but it is the accepted practice and hence the law. But in applying this new form of economic pressure, it was really immaterial whether Great Britain used the word “blockade” or not, because inasmuch as all German commerce had long since been almost extinguished at sea, the real question was with regard to shipments via neutral states. But an examination of the Order in Council will disclose the fact that far from “extending” the rules of blockade Great Britain was not even taking full advantage of them, for she was not confiscating vessels, but only cargoes. What had actually happened was that Great Britain was employing the so-called “Doctrine of continuous voyage.” As the Minister for Foreign Affairs explained to the Commons, “We are applying the doctrine of continuous voyage, and it is being applied now. On what other grounds are the goods to neutral ports being held up but on the grounds of continuous voyage? If you had established the old technical blockade you would no doubt have been entitled to confiscate more largely ships and goods than at the present time. While you stop now and detain them, and do not let the goods go through, you do not confiscate as largely as you would if you had the old technical blockade. . . . What we want to do is to prevent goods from reaching or coming from the enemy country and that is what we are doing.”

No one would doubt the right of a belligerent not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place,” but if a

27 Sir William Scott in the “Frederick Moltke,” 1 C. Rob. 86 (1798).
belligerent chooses to exercise that right without asserting her belligerent's rights to the full, certainly she cannot be accused of "extending" the rules at all. The real object of our search does not lie in the field of the law of blockade at all, but, as Sir Edward Grey pointed out, in the field of the law of "continuous voyages." 28

III. THE LAW AND THE DOCTRINE OF CONTINUOUS VOYAGES.

Suspending for a moment our discussion of the growth of the laws of contraband and blockade, we must review another and, in its origin, totally distinct, doctrine. That this is one of the most intellectually picturesque phases of international law is evidenced by the voluminous studies on the subject. Avoiding a comprehensive and exhaustive analysis which might lead us astray from the main line of development to its latest stage, we will begin with an incident which preceded even Grotius. In 1604, during a war between Spain and Holland, two Venetian vessels (neutrals) were engaging under license from Spain in a certain Spanish trade which was ordinarily reserved to Spanish vessels exclusively. The Dutch seized the vessels on the ground that the Venetians had by this act lost their neutral character. 29 The documents are scanty here, so too much should not be concluded herefrom. But the incident foreshadows the celebrated "Rule of the War of 1756." 30

(a) Rule of the War of 1756.

Keeping in mind the fact that we are dealing with the right of a belligerent to interfere with neutrals carrying aid to his enemy, in so far as that can be done without infringe-

28 It is unfortunate for the sake of clearness that Great Britain did employ the word "blockade" in her official papers, because though justified on grounds of brevity of expression, it distracted attention from the true legal character of the case. See "Statement of Measures Adopted to Intercept the Sea-borne Commerce of Germany," Jan. 1916. Int. Con. Pam. No. 101, p. 1 ff.
29 Calendar of State Papers, Venetian (1603-07) No. 184.
ment of sovereign neutral rights, our attention is turned to that Seven Years War in Europe in which Frederick the Great was attempting to defend his ill-gotten gains in Silesia against Maria Theresa of Austria. In that struggle, the naval phase was, as usual, fought out between France and England. Equally, as usual, England mastered the sea and cut off France from her colonial commerce by destroying the French carrying trade with the West Indian Islands. The Eighteenth Century was the era of the monopolistic colonial policy whereby none could trade with the colony save the mother country. Hence, since the French merchant marine was swept from the seas, there were no vessels to bring to the Parisian those essential constituents of his *petit déjeuner*, coffee, chocolate and sugar. Moreover the Frenchman was deprived of his after-dinner smoke, and to remedy the situation France hit upon that method which Spain had used a century and a half earlier, and licensed Dutch ships to enter the colonial trade, in lieu of the lost French ships. Great Britain could not tolerate such an evasion of her belligerent rights by the interposition of a colorably innocent neutral agent who took advantage of his neutrality to aid France and negative the hard-won victory of British sea power. What Great Britain did is expressed by Lord Mansfield, “The rule is that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship and is liable to be taken.” Or as stated in Lord Loughborough’s dictum, “... the Dutch being excluded from the French Islands in the West Indies in time of peace, and only admitted in time of war to cover their trade, their ships ought to be considered as adopted French and therefore lawful prize.” Such was the “Rule of the

31 See “A Short State of the Progress of French Trade and Navigation” by M. Postlethwait, London, 1756, warning Englishmen of the variety of the produce of the French West Indies, and what that produce was.
34 Brymer v. Atkins, 1 H. Blackstone 165, C. P. (1789).
War of 1756," that a vessel might not engage in time of war in a trade from which it was excluded in time of peace.

(b) The Device of the "Broken Voyage."

With the Wars of the French Revolution the rule of 1756 began its career of development and controversy. For between 1756 and 1789 there appeared in the family of nations that newcomer who was destined to be the great exponent of the rights of neutrals. In the war of the closing years of the eighteenth century, French commerce was again swept from the seas, and again France had to fall back on the neutral carrying trade to get her colonial produce. But a new economic factor had entered. She had granted to the United States in time of peace the right to trade from the French West Indies to the United States, but not as yet, of course, to take produce from the French West Indies to France. From this developed the device of carrying goods from the West Indies to an United States port, and then transshipping them as American goods to France, thus breaking the voyage to give the goods a neutral color. At this point occurred the famous case of the "Polly" in which Sir William Scott gave countenance to the evasive practice. Whatever its character in law or in history, there is no doubt that from the economic point of view, this decision was misleading. For this vessel was carrying West Indian products to the Mother country by way of Marblehead, Massachusetts, where the goods were landed, duties paid thereon, and the same goods reloaded and shipped to Europe. The practice was in terms approved by Scott, despite the fact that the King's Advocate requested him to rule "that it would be the most nugatory thing in the world to say that a trade which is not allowed to be carried on direct should become legalized or allowed by mere transshipment in America." But the Court did not so rule and United States merchants jumped into this trade with enthusiasm.

34 The "Polly," 2 C. Rob. 361 (1800).
35 Ibid., 364.
Avoiding the ancient controversy as to whether Scott subsequently reversed his own decision, after he had allowed numerous business enterprises to be initiated on the assumption that the rule in the case of the "Polly" was law, we notice that in the case of the "William" the law forbade the device of the broken voyage. 37

(c) The Doctrine of Continuous Voyage.

The "Polly" was a case in a court of first instance, decided by Sir William Scott. The "William" was a decision of the Appellate Court, six years later, by Sir William Grant. As between the two, there cannot be much doubt which is law. The case of the "Essex"3 in which Scott had in 1805 applied the rule of 1756 to "broken voyages" had preceded the case of the "William" by one year, and the weight of the two enables us to say that the "Polly" is without particular significance for the purposes of this inquiry. But notice must be made of it for nearly a hundred years later Henry Adams was still pouring the broadsides of American indignation at Great Britain. "On July 23, 1805," says the American historian, "Scott pronounced judgment in the case of the 'Essex.' Setting aside his ruling in the case of the 'Polly,' he held that a neutral cargo which came from Martinique to Charleston and thence abroad 'was a good prize.' Pitt's moral sense had been blunted by the desperation of the political struggle, but the same excuse does not apply to Sir William Scott, no good historian was ever a good lawyer: whether any good lawyer could be a good historian might equally be doubted. In law, Sir William Scott was considered one of the greatest judges that ever sat on the English bench, in history he made himself and his court a secret instrument for carrying out an act of piracy."39

The law as laid down in the case of the "William" takes cognizance of the economic development which made

37 The "William," 5 C. Rob. 385 (1806).
38 Not reported; quoted in report of the "William" supra.
possible an evasion of the spirit of the law, while nominally obeying its letter, and got to the bottom of the matter in these words, "The truth may not always be discernible, but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give the transaction its character and its denomination." Grant ruled exactly as the King's Advocate in the case of the "Polly" had asked Scott to rule. In his review of the cases Grant came to the conclusion that the interposition of a neutral port and the performance of the paper-work of mixing the goods with the goods of the neutral were not bona-fide transactions, but considered the voyage from the colony to the Mother Country in Europe a "continuous voyage" which the rule of 1756 had been designed to prevent. So by the end of the Napoleonic period the law seems to have stood thus: that inasmuch as a neutral could not be permitted to do indirectly what he was forbidden to do directly, the interposition of a neutral agent or port could not break the continuity of a voyage from a colony to its Mother country, and the rights of neutrals in the matter were limited to their peace-time rights. Such limitation would be enforced by the belligerent.\footnote{An American investigator has come to the conclusion that the doctrine of continuous voyage was applied by English courts as early as 1761 with regard to contraband, and as early as 1762 with regard to enemy trade. L. H. Woolsey: 4 Amer. Jour. Internat. Law, 823, 847.}

The next great group of cases are the American civil war cases,\footnote{The growth of the doctrine from enemy trade to contraband was recognized by the French court in the Crimean war, in seizing a cargo of saltpeter bound in a neutral Dutch ship, from neutral Lisbon to neutral Hamburg, but designed for transshipment to Riga (belligerent port). See Revue de Droit Internationale, XXI, 55.} wherein the doctrine is applied not to enemy colonial trade \textit{via} neutrals, but to enemy contraband and blockade running trade \textit{via} neutrals. Just as a new economic factor, the United States, came into the situation between 1756 and 1789, so between 1815 and 1861 there entered a new economic fact. The southern states developed agriculturally without developing industrially, so that when the civil war in America broke out, the Southern Confederacy
had to look to England for many goods which could no longer be drawn from the northern states. A short distance off the coast of Florida lay the British colonial port of Nassau, in the Bahamas, and in this sleepy West Indian town suddenly developed a thriving trade which the colony alone would never have warranted. Northern cruisers stopped and captured the British vessels en route from Liverpool to Nassau and made prize of them. Protests went up that this was an interference with neutral trade from one neutral port to another neutral port. But the United States courts upheld the rule that inasmuch as trade direct from Liverpool to the Confederacy was forbidden by the blockade, the British merchants could not under the general principle of the doctrine of continuous voyage interpose a colorably innocent neutral port in order the more conveniently to run the blockade.

Unfortunately all the American Civil War cases involve also the laws of contraband and blockade and we cannot get a pure doctrine of continuous voyage case. But this fact is illuminating to the extent that there is visible the beginning of the merging of the three doctrines of contraband, blockade and continuous voyage into a general law of the restraint of neutral commerce. Since the entire coast of the Confederacy was under blockade, any vessel trying to reach it via Nassau was ipso facto also trying to break the blockade. The "Bermuda" was a neutral vessel bound from neutral Liverpool to neutral Nassau with a cargo intended for the Southern Confederacy, after touching at Nassau. The court affirmed the condemnation in these words, "the interposition of a neutral port between a neutral departure and a belligerent destination has always been a favorite resort of blockade runners and contraband carriers, but it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as the intent remains unchanged, no matter what stoppage or transshipment intervenes."42

42 The "Bermuda," 3 Wallace 514 (1865).
This expression “ultimate destination” now becomes the significant factor in the law.

(d) Doctrine of Ultimate Destination.

Two cases illustrate the growth of the law during the American Civil War, one as regards blockade alone, and one as regards contraband alone. The case which illustrates the application of the law to breach of blockade without involving contraband is that of the “Circassian.” This was a vessel with a cargo of non-contraband goods bound from Bordeaux to Havana, thence intending to run the blockade to New Orleans. That such a device to evade belligerent rights could not be tolerated was announced by the court affirming the capture. After discussing the cargo “no part of which was contraband” Chief Justice Chase said, “The vessel was chartered and her cargo shipped with the purpose of forcing the blockade. The destination at Havana was merely colorable.”

The case which involves application of the law to contraband without involving blockade is that of the “Peterhoff.” The question of blockade was ruled out in so many words, because a blockade was a purely maritime affair, and this was a vessel with part contraband cargo bound from neutral England to neutral Mexico. Yet the contraband part of the cargo was condemned under the law, as their ultimate destination was shipment over land to Texas, even if the Federal blockade could not apply to the neutral Mexican port. “The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful and such articles may always be seized during transit by sea.”

One of the very clearest expositions of the law by an American jurist was made in a lower court decision in which

44 The “Circassian,” 2 Wallace 135.
45 The “Peterhoff,” 5 Wallace 28 (1866). The Mexican neutral destination was the port of Matamoras, just across the Rio Grande from belligerent Brownsville, Texas.
GROWTH OF BELLIGERENT RIGHTS

was quoted an Ordinance of the Continental Congress in relation to restraining neutral trade by declaring it lawful to capture all "contraband goods, wares, merchandises, to whatever nation belonging, although found in a neutral bottom, if destined for the use of the enemy." If the word "use" as here employed is understood in its technical economic sense, as the satisfaction of some want, the meaning of the word will be illuminated, not restricted. It is the prevention of goods with economic value for the prosecution of war from reaching an enemy that is the basis of the problem. Further on, the same judge says, "The commerce is in the destination and intended use of the property laden on board of the vessel, and not the incidental and ancillary and temporary voyage of the vessel, which may be but one of the many carriers through which the property is to reach its true and original destination." This point of ultimate destination should never be lost sight of in observing the development of the law.

The formation of a general rule of the law as it stood at the end of the American Civil War has frequently been attempted. One writer whose comprehensive and exhaustive analysis of all of the British, American and Continental European cases is worthy of careful study, has come to the conclusion that the essence of the rule is "a person cannot be permitted to do by indirection what he is forbidden to do directly, and that a fraudulent act is none the less fraudulent and objectionable because it is concealed beneath the form of legality." Certainly that factor is traceable throughout the cases in which neutrals have sought to give their forbidden trade an immunity bath by the interposition of a neutral agent. But the difficulty with the rule as above stated is the question, "How are belligerents to know when a neutral is trying to do by indirect what he is forbidden to do directly?" This element is partially supplied by another

writer who, after an examination of the early English practice, contends that "the-controlling element running through the early cases of direct breach of the enemy trade, contraband or blockade, appears to be that of the intention, and that the same element runs through the early cases of indirect breach of the rules of enemy trade, that is, cases in which the doctrine of continuous voyage has been applied or discussed." A case in point is the "Springbok," in which Chase declared, "We do not now refer to the cargo for the purpose of determining whether it is liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, contraband or not, it could not be condemned if really destined for Nassau and not beyond, and contraband or not it must be condemned if destined for any rebel port, for all rebel ports were under blockade." In other words, whether a neutral is trying to aid the enemy indirectly when forbidden to do so directly will be determined by the intent, and the intent may in part be determined by the character of the cargo. So far, so good, but was this international law in the sense of its being generally accepted?

To answer this concisely we may say that, on the whole, it was and is law. It is true, the doctrine had to fight hard for recognition on the continent of Europe, but France had followed it in the Crimean War and Italy in her Abyssinian war, and by the close of the nineteenth century recognition was fairly general. Bluntschli epitomized the law in his "Si les navires ou marchandises ne sont expediés à destination d'un port neutre que pour mieux venir en aide a l'ennemi, il y aura contrebande de guerre et la confiscation sera justifiée." The acceptance was so general that when the London Naval Conference met in 1909 it attempted to

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48 The "Springbok," 5 Wallace, 1 (1866). N. B., this also distinguishes the law as applied to contraband alone and as applied to blockade alone.
49 The "Doelwijk," J. B. Moore, Dig. VII, 744. Dutch vessel carrying arms to neutral African port for shipment overland to belligerent.
50 Bluntschli: Droit Internationale Codifié, par. 813.
reduce the whole thing to writing. While not, per se, law, yet that document, except on a few points, states rules embodying long standing practices and, as such, was binding on belligerents whether they had accepted the declaration or not. In the light of our discussion so far, what is significant about the declaration is in the rules there formulated for ascertaining the intent of the neutral. "Absolute contraband is liable to capture if it is shown to be destined to the territory belonging to, or occupied by, the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport overland." But as to conditional contraband, unless the goods were consigned "to the enemy authorities, or merchants established in the enemy country, when it is well known that such merchant supplies articles of this kind to the enemy," or to an enemy base of supplies, the goods are presumed to have an innocent destination. Nevertheless, "the presumptions laid down in this article admit of proof to the contrary." Let us fasten our attention on that word "presumption," for around it the controversy now rages. The Declaration of London seems in the main to put the burden of proof on the captor. The chief crime alleged against Great Britain in the late war is that she switched that burden to the neutral. This aroused one American (then neutral) writer to protest "the effect of this order was to extend the application of the rule of continuous voyage to the carriage of conditional contraband and to reverse the established rule, which places upon the captor, and not upon the owner, the burden of proving the hostile destination." Another American critic expressed the opinion, "What directly concerns us is that our trade with the Central Empires is cut off, and our trade with the neutral neighbors of these empires is limited by measures of at least doubtful legality. If they constitute an exten-
sion of the law of blockade, they seem to us to stretch this law to the breaking point."

But there are other elements besides the legal and the economic which enter into the situation. In 1861 August Belmont, the New York agent of the Rothschilds, sought in a lengthy interview to lay before Lord Palmerston the righteousness and justice of the Northern cause in the American Civil War. All he could elicit from Palmerston was, "We don't like slavery, but we want cotton and we dislike your Morrill tariff." The sting of those words "we want cotton" in response to a recital of the cause of liberty needs no comment. In reviewing the attacks on Great Britain during the days of American neutrality in the world war the statement "what directly concerns us is that our trade with the Central Empires is cut off" stands today in a different light from what it did when it was uttered. But more than that, if we examine the terms of the celebrated Order in Council which is alleged to have switched the burden of proof, it will at least raise a doubt as to whether Great Britain really did "extend" international law.

The Order in Council ruled "that conditional contraband shall be liable to capture on board a vessel bound for a neutral port, if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee, or if they show a consignee" in enemy territory. "In the cases covered by the preceding paragraph . . . it shall lie upon the owner of the goods to prove that their destination is innocent." This was the source of the trouble. But is it a "stretching" or "extension" of the law to shift the burden of proof in a case where the neutral merchant deliberately arouses suspicion by consigning his shipment to an anonymous consignee? The United States did that very thing fifty years earlier, when Chase declared "that some other destination than Nassau was intended may be in-

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85 J. W. Foster: Century of American Diplomacy, 373.
ferred from the fact that the consignment shown by the bills of lading and manifest was 'to order or assigns.' Moreover the British Foreign Office adduced evidence to demonstrate that the trade of small neutrals contiguous to Germany in articles badly needed by Germany was increased so tremendously during the early months of the war that he would be very obtuse indeed who would blind himself to such facts. The case of Denmark was particularly instructive. Normally an exporter of meat and meat products, she suddenly became a tremendous importer. It could not be alleged that this was because her trade with Germany was curtailed by German needs during the war, because Denmark exported meat to Germany and did not import meat therefrom. It was perfectly obvious that these tremendous shipments of meat and meat products (fats, of course) were simply going to Germany by the same old ruse which Holland had refused to tolerate in 1604, which England had refused to tolerate in the Napoleonic wars, which France had refused to tolerate in the Crimean War, which the United States had refused to tolerate in the Civil War, which Italy had refused to tolerate in her Abyssinian War and which if a belligerent had endured it, he would have been permitting his "eyes to be filled with the dust of theories and technicalities and blinded to the realities of the case."

But let us admit the extreme contention, that Great Britain did "shift the burden of proof in an unprecedented manner." What is the nature of a burden of proof and the rule of presumption? "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters, for the general purpose of some given inquiry . . . presumptions, assumption, taking for granted, are simply so many names for an act or process which aids or shortens the inquiry or argument." Since the law of restraint of neutral commerce is no question of criminal law "the test

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87 The "Springbok," op. cit. 25.
88 Sir E. Grey to American Ambassador, Feb. 10, 1915, Int. Con. Pamphlets, No. 95, p. 34.
as to the burden of proof is simply to consider which party would be successful if no evidence at all were given, or if no more evidence were given at this particular point in the case, because it is obvious that during the controversy in litigation, there are points at which the onus of proof shifts, and at which the tribunal must say, if the case stopped there it must be decided in a particular way. Such being the case it is not a burden which rests forever on the person on whom it is first cast, but as soon as he in turn finds evidence which prima facie rebuts the evidence against which he is contending, the burden shifts until there is evidence which satisfies the demand."60 That is why, when the doctrine of continuous voyage came before the British Court in the world war, the court replied to the neutral, "It is not a crime to dispatch contraband to belligerents . . . but the argument proceeded as if it were as essential for the captors to prove intention as strictly as in a criminal trial.61

As has been observed, the crux of the matter is not on methods of proving intention, a question of procedure and not of substantive law at all! The real point of which the critics have completely lost sight is that if the neutrals would assume the burden in these cases of anonymous consignee, business would be finished much more quickly. One cannot read the diplomatic correspondence between Great Britain and the United States in the early days of the World War without being impressed with the fact that what annoyed Americans as much as anything else was the delay to which their business rights were being subjected. Yet when Great Britain employed a well-known legal device to "shorten the inquiry," complaints were made that she was "extending" international law.

The expression "the burden of proof shifts" throws some light on the question as to whether the British modi-

60 The "Kim" 113 Law Times Reports, 1002 (1915): "As to the modifications regarding presumption and the burden of proof . . . these are matters really affecting the rules of evidence and methods of proof in this court, . . . I fail to see how it is possible to contend that they are violations of any rule of International Law."

61 Ibid.
fications are "growths" or "extensions." The purpose of
the distinction is primarily to direct the attention to the
development of the law in response to the conditions of
civilization and the development in response to the wishes
of persons. The law "grows" because of its own dynamic
qualities, because being a living thing, it must adjust itself
to new environmental influences or else die of inanition and
neglect. The law is "extended" by some agent outside itself,
and such extension is certainly questionable. "Growth" is
the response of the law to the economic and social influences
and the enlightened moral sense of the community. "Ex-
tension" is merely a forcible and conscious change by an indi-
vidual party, and may or may not be in accord with
the demands of the times, and hence may or may not be
of ultimate or permanent significance. By using the ex-
pression, "the burden of proof shifts," the writer on evidence
does not say "so-and-so shifts the burden of proof." There
is all the difference in the world; and that we are living in
an age of the shifting of the burden of proof is another illus-
tration of the fact that what Britain did was in the nature of "growth" rather than of "extension." The bill for the
enforcement of the prohibition amendment to the Constitu-
tion of the United States, as originally passed by the House
of Representatives, is an interesting and highly significant
element of the fact that in a world where increased govern-
mental control is the order of the day, the burden of proof is
shifting all along the line. The clause of that bill, "The
possessor of such liquors, however, bears the burden of
proof that the liquor was acquired and is possessed lawfully"
is certainly a serious blow at the old doctrine that a man is
presumed innocent until proved guilty. Yet it is but one phase of the whole trend of modern history. Civilians who
became officers in the United States Army during the World
War were constantly irritated at the presumption everywhere
existing in the system that they were dishonest and putting
upon them the burden of proving that they were not.
Whether this shifted burden of proof is ultimately to
be accepted as international law is, of course, yet in the realm
of theory. But it is significant to note the opinion thereon of the Institute of International Law (an association of the publicists of all nations). In a meeting in 1882 that association condemned the whole doctrine of continuous voyage. In 1896, they not only reversed themselves and approved the doctrine, but approved it in these words, "A destination for the enemy is presumed when the carriage of goods is directed toward one of his ports, or toward a neutral port, which, by evident proofs arising from incontestable facts, is only a stage in the carriage to the enemy, as the final object of the same commercial transaction." A glance at the map will reveal the fact that two railways make Copenhagen but a stage in the journey from New York to Berlin, while a perfect net-work of lines makes Rotterdam but a stage in the journey from Buenos Ayres to Cologne. During the world war one investigator gave an interesting demonstration of the fact that "Germany has been making a maximum use of her small (neutral) neighbors, in a highly profitable mutual arrangement to counter what would otherwise be the disastrous effects of the loss of control of the seas." The economic facts of the case are surely "incontestable."

It was before the day of steam, electricity, wireless telegraphy and aeronautics that Adam Smith remarked of the Art of War, "The state of the mechanical arts with which war is necessarily connected, determines the degree of perfection to which it is capable of being carried at any particular time." If true in 1776, how much more true today? In the late world war every worker at the "mechanical arts" was part of the war machine, and why then is there not full justice in the statement, "In the peculiar circumstances of the present struggle, where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable
that the burden of proof should rest upon the claimant" that his shipment had a neutral destination.\textsuperscript{64} It is in a sense, economics and political and social philosophy which have demanded the change in the law, rather than the wishes of any particular state or nation. Lord Stowell's remark, "All law is resolved into general principles; the cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite,"\textsuperscript{65} goes to the bottom of the matter. But it seems that his use of the expression "extended application" would be better understood as "growth" of the law.

**Conclusion: The Growth of the Law.**

It is not pretended that the conclusions reached here are law; for international law gains its legal nature as well as its legal force by the acquiescence of nations and not through the presentations of writers. But it is fair to ask whether this is not the direction which the trend of legal and historical development is taking. The growth seems to be in the direction of increasing the rights of belligerents and diminishing the rights of neutrals to carry on their commerce undisturbed by war. If this is the case, such growth is certainly contrary to the traditional position of the United States in its foreign relations. If the conclusions here reached be correct, it is important that their ultimate significance be understood. In the past, the belligerent has been his own sanction in the international law which affected his rights. But the neutral has always been reduced to protests and to collecting damages later on. But this does not always do justice under the law. The twentieth century saw the final payment of claims of United States merchants which were incurred by the actions of France in the eighteenth century. The so-called French Spoliation Claims give pause to him who would let belligerent aggression continue un-

\footnote{\textsuperscript{64}Sir Edward Grey.}
\footnote{\textsuperscript{65}The "Atalanta," 6 C. Rob. 440, 458 (1868).}
checked and then try to satisfy the claims with the collection of damages when the war is over. In that interesting set of cases the combined delays of the French in making payment, of the Court of Claims in making awards, of the Senate Committee on Foreign Relations in making recommendations, of the House Ways and Means Committee in making appropriations led to the report in 1913 in which numerous claims were dismissed for non-prosecution. No wonder; many of the people interested had long since been dead.

In connection with the future application of the law of continuous voyages, it is well to note the character of some of the new national states which the war has summoned into existence. Four, at least, have warlike historical traditions and propensities which do not augur well for the future peace of the world. In case war breaks out, we have to notice that two of them, Czecho-Slovakia and Hungary, have no sea-coast, while two others, Poland and Jugo-Slavia, can be blockaded by cutting off the single entrance at the mouth of the Vistula or the Straits of Otranto. These are the very conditions which provoke the controversies on the law of continuous voyages. Such controversies can only be avoided by some satisfactory statement of the law such as a Hague Conference, or some department of the League of Nations is qualified to make. This the London Naval Conference attempted to do, but its recommendations were not binding upon the belligerents. This introduces one of the most important elements of all, namely, how, after the law has been reduced to writing, is that law to be enforced by neutrals as against belligerents? That, of course, is the problem of political science under the League of Nations. This article has been limited to a discussion of the law with which any League of Nations must deal, because the formation of rules and laws has throughout the history of law preceded institutions which thoroughly enforce those rules.


H. Doc. 379, 63rd Cong.
The fact that international law has no sanction discourages no one; the fact that it has been flagrantly violated discourages no one. The fact that international law is, is the fact which concerns us, and we can treat of that law with the confident assurance that some day methods of enforcement will follow as surely as they did follow gradually on the development of civil and municipal law.69

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