The Register
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INTRNATIONAL LAW IN TIME OF WAR.

IV.—Contraband of War.

[By W. Jethro Brown, LL.D., Litt.D.]

The liability of enemy property to capture at sea, and the liability of neutral ships and cargo to capture when engaged in running a blockade, have been discussed in preceding articles. One ground of liability to capture at sea remains for consideration. I allude to the carriage of contraband. Neutral merchants are free to sell their wares to a belligerent. But if those wares are destined for use by the belligerent in the conduct of his hostilities, they are liable to capture, except in the territorial waters of a neutral State, from the moment the vessel carrying the contraband leaves the port for a belligerent destination, up to the moment when the contraband wares are deposited. The usual penalty is confiscation of the contraband goods. But the vessel also is liable to be condemned if the owner is privy to the carriage of contraband, or if cargo and ship belong to the same owner, or if false papers or other fraudulent devices are resorted to, or again if the ship resists capture or search. By article 40 of the Declaration of London, to which I shall refer directly, a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo. Innocent goods on board a vessel engaged in the carriage of contraband are confiscable if they belong to the same owner as the contraband.

—State Law and International Law.—

Although the rules relating to contraband are rules of International Law, they are enforced by State tribunals, and as such are also State law. Each State claims the right to determine for itself, in its own Courts without appeal, both what goods are contraband, and to what persons or places they may not be carried. State tribunals enforce international law as they understand it. The result has been a great deal of uncertainty very prejudicial to the interests of neutral shippers. In the Russo-Japanese war, Russia so enlarged the list of contraband as to involve about two-thirds of the Japanese import trade as liable to capture on the ground of being contraband. At one time during the war the insurance rates covering war risks for voyages from England to Japan rose as high as 40 per cent.; and for a brief period British shipowners refused to carry merchandise to Japan. Although Russia, under pressure from neutral Powers, very considerably modified her original declaration, the incident will give some idea of the extent to which a powerful belligerent may go in hampering neutral commerce with the enemy. At the Hague Conference in 1907 the British Government, mindful of British interests as a maritime Power when not engaged in hostilities, sought to secure the total abolition of the law of contraband. The effort, however, was unsuccessful. The subject of contraband was brought up again at the Naval Conference in 1909. The conference was attended by representatives of the various Powers. After prolonged debates, certain clauses were adopted defining contraband, and the conditions of its liability to capture. The clauses were included in the famous Declaration of London. Although the declaration has not been formally ratified by Great Britain, its clauses dealing with the present subject matter have a special claim to consideration.

—The Declaration of London.—

This document divides contraband into two classes—absolute and conditional. Absolute contraband includes all articles, such as guns, explosives, &c., which are used exclusively for war. While a comprehensive list of such articles is stated, a belligerent is authorized to add to this list other articles of a like character. The Declaration makes absolute contraband confiscable if it can be shown to be destined, whether directly or by some ulterior route through neutral ports, to enemy territory or the armed forces of the enemy. Conditional contraband consists of articles which may be of use for both military and peace purposes. A list of such articles is stated, e.g., foodstuffs, clothing, coal. A belligerent

is empowered to add to this list by giving notice to other Powers. Conditional contraband is confiscable—(1) If is bound directly for enemy territory, for territory occupied by the enemy, or for the enemy armed forces; and, (2) if it is destined for the use of the armed forces of the enemy or of a Government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. As regards both absolute and conditional contraband, the ship's papers are a conclusive proof as to the voyage on which she is engaged, unless the ship is found to be out of her course and unable to justify the deviation. The Declaration also includes a list of articles, including raw cotton, wool, and metallic ores, which cannot be treated as contraband at all.

—British Practice.—

As I have already remarked, Great Britain has not formally ratified the Declaration of London. What attitude she will adopt, therefore, with regard to the many debateable questions relating to contraband, which the Declaration is an attempt to solve, is doubtful. The point, however, is one upon which we may expect early enlightenment. It is to the interest of a belligerent that neutral merchants shall at any rate know what they are in for. The irritation caused by the exercise of belligerent rights in relation to contraband is greatly increased by uncertainty beforehand as to what is contraband, or as to the precise conditions under which it is confiscable. If Great Britain ignores the Declaration of London, she will presumably adhere to the traditional British view, which is more favourable to neutrals than the Articles of the Declaration. British Courts have hitherto divided contraband into absolute and occasional. Westlake defines the English doctrine of occasional contraband as involving the assertion of a class of contraband of circumstance, a class never including anything solely of peaceful use, but in which things of use both in peace and in war, on their way to a hostile destination, may be placed as occasion requires, being otherwise entirely free. "Goods usus ancipitis may be contraband of the conditional class either by virtue of an express declaration by the belligerent Government, based on the circumstances of the war, or by the judgment of its Prize Court, when that Court sees reason for believing or presuming that they are intended to be used for purposes of war."

—Summary of Capture at Sea.—

Enemy property at sea, neutral property seeking to evade a blockaded port, and neutral contraband of war, are the more important grounds of liability to capture at sea. If Great Britain maintains her naval supremacy, German merchantmen will in all probability rapidly disappear from the seas. The carrying trade between Germany and neutral ports, in so far as it continues, will be effected on neutral ships. Although we may not make many captures of enemy property at sea, we disorganize the German commerce, and, incidentally, German industries. This would be so apart from the law of blockade and contraband. But when we add these grounds of liability to capture, it is easy to see how important it is for Great Britain to retain her supremacy on the sea for the positive purpose of directly hurting the enemy as well as for the negative purpose of maintaining intact her own commerce. The duel between Germany and England, as I have suggested in an earlier article, is like a duel between two combatants, when one can hit the harder, but the other is less vulnerable to attack. Great Britain has in substance staked her all on the navy. Germany is, of course, aware of the fact. If she could divide the English Fleet, and attack and conquer it squadron by squadron, England's position would be a bad one indeed. But the if is a mighty big one.

—Postscript.—

Since the above was sent for typing, a cable has arrived to the effect that the allies will adopt the Declaration of London in reference to prizes of war, with slight additions and modifications. We have yet to learn what will be the nature of the "additions and modifications." I propose to give in Thursday's Register a brief review of the Declaration itself.

ARTICLES PREVIOUSLY PUBLISHED.

I. — International Law — Its Binding Force, August 17.

II. — Liability of Private Property to Capture, August 19.

III.—Blockade, August 22.

The Register August 26th 1914

Considerable interest is being aroused by Professor Jethro Brown's important articles which are appearing in The Register on the legal side of the great war. Coming from such an eminent authority at the present juncture, they throw a flood of illuminating information on a critical and delicate phase of this European crisis. This is the age when "the man in the street," as well as the man of public affairs, is a persistent seeker after knowledge. The question of the relation of nations to one another in times of peace and of war would seem to dwell in a purely academic realm; but the issues are vital to the individual. With the outbreak of hostilities on the Continent, and the development of what Professor Jethro Brown says promises to be the greatest clash of arms since Napoleonic times, thoughtful students have wondered what code regulates the attitude of the Powers in these tremendous circumstances. What is the law of blockade? What is the law of contraband? What are the rights and duties of belligerents? How far is private property liable to capture when the world is at war? These and other incidental questions Professor Brown is answering. His

PROFESSOR JETHRO BROWN,

who is contributing an important series of articles to The Register on the legal side of the war.

articles are invested with great authority. They engage the reader by their scholarly breadth, and at the same time their gift of lucid argument. The style is commanding, as becomes a distinguished author; but it has a popular appeal. Professor Brown realizes that the masses are interested, and he is writing for them. The ability of analysis and presentation is striking, and letters of generous appreciation of the value of the series have been received. Professor Brown (says Saturday's Journal) is one of the intellectual forces of the Adelaide University. He has been professor of law there since January, 1906, and prior to that appointment successively filled similar chairs in the University College of Wales, Aberystwith, the Universities of Tasmania, and Sydney. Professor Brown is a South Australian—a native of Mintaro, where he was born 46 years ago. His academic career was one of unusual splendour. He was educated at St. John's College, Cambridge, and took double first-class honours in the Law Tripos. In the same year he won several important distinctions, and then headed the list in the examination for the degree of Doctor of Laws at the University of Dublin. Professor Brown is the author of a number of celebrated works, including "The New Democracy" (for which the University of Dublin conferred upon him the high honour of D.Litt.), "The Study of the Law," "The Austinian Theory of New Democracy," and "The Underlying Principles of Modern Legislation." His degrees are M.A., LL.D. (Cantab.), and LL.D., D.Litt. (Dublin).

The Advertiser. August 25th/15

Sir Henry Norman MacLaurin, M.L.C., M.D., LL.D., died on Monday in Sydney as the result of an operation performed for a malady from which he had suffered for some time. Sir Henry was born in Kilconquhar, Scotland, in 1855, and was educated at the St. Andrews and Edinburgh Universities. He was assistant surgeon in the Royal navy in 1878, and served on H.M.S. Challenger on the Australian station. After settling in Sydney he was appointed president of the Board of Health, and served in that capacity for some time. He held the position of Chancellor of the University of Sydney since 1896, and in 1889 he was appointed to the Legislative Council and Vice-President of the Executive Council. He was representative of the Dibbs Government in the Upper House in 1893-4.