California Law Review

Volume 3 | Issue 4 Article 2

May 1915

# Freedom of Neutral Commerce

Edward Elliott

# The Freedom of Neutral Commerce

THE freedom of neutral commerce and the principles upon which it rests are of great importance at the present time to all neutral states, and especially to the United States, the neutral with the largest commerce affected unfavorably by the regulations which have been proclaimed by the belligerents in the present war.

The struggle of neutrals with belligerents to secure the freedom of their trade is as old as the modern European states themselves. Some of the earliest of the regulations touching the matter are to be found in the Consolato del Mare, a collection of sea laws published in Barcelona in the fourteenth century. The origin of these laws was most probably on the shores of the Mediterranean, where they had developed out of the commercial intercourse carried on among the cities.

The principle of the Consolato del Mare which related to the freedom of neutral commerce was that of spare your friend and harm your enemy. If a belligerent found the goods of his friend on an enemy's vessel, these goods would be free from confiscation though the vessel itself was liable to condemnation as good prize, while the goods of an enemy found on a neutral vessel were liable to capture and confiscation. In course of time this principle of the Consolato made its way to the maritime states outside of the Mediterranean, where it was accepted by England and became the English practice until the Declaration of Paris in 1856.

The French, who were the great rivals of the English upon the sea, did not accept the principle of the Consolato but at first adopted the doctrine of hostile infection or contagion. In accordance with this doctrine if the ship was hostile, the goods of a neutral on board were infected with a hostile character and were liable to seizure and confiscation, and if a neutral vessel was found carrying enemy's goods, the vessel became liable to capture and confiscation as well as the goods.

This doctrine, if carried out by belligerents, would restrict neutral trade in time of war to neutral ships carrying neutral goods. It was too severe and a modification of it, first put forward by the Dutch, was subsequently accepted by the French. This modification was expressed by the phrase "free ships, free goods; enemy ships, enemy goods", and was followed by France

until the Declaration of Paris referred to above. By this practice the character of the flag was made the determining factor as to whether or not the goods were liable to confiscation.

Many treaties modifying the doctrines held by England and by France and the states which followed respectively their leadership, were entered into in the course of the seventeenth and eighteenth centuries, but in the absence of treaty stipulations to the contrary, these were the principles enforced. Through the war with her North American colonies, England became involved in a war with France and Spain, in the course of which her treatment of neutral commerce led to the formulation, by Catherine of Russia, of certain principles for the guidance of Russian merchant vessels, and to the formation of a League of Armed Neutrality, to which practically all of the continental powers and the United States gave adhesion, to enforce the following principles which had been put forth by the Russian government:

1. That neutrals should have the right of trading freely from port to port and along the coasts of belligerents.
2. That free ships make free goods, except contraband.
3. That contraband is limited to articles of immediate use in war.
4. That a port is blockaded only when there is evident danger to an entering vessel from vessels of the attacking power stationed sufficiently near.

These rules were not accepted by Great Britain and following the peace made in 1783, they were soon deserted by other states, Russia among the first.

In 1800 a Second League of Armed Neutrality was formed which proclaimed the same principles and the additional one that a neutral vessel under convoy of a warship of its own country should be free from molestation. The Napoleonic era was one in which scant regard was paid to the rights of neutral commerce. Great Britain in her Orders in Council, and Napoleon through the Berlin and Milan decrees, utterly disregarded the freedom of neutral commerce. Paper blockade and confiscation for trading with the enemy were made the basis for an almost complete destruction of the commerce of the United States. Repeated protests on behalf of the United States went unheeded and non-importation and embargo acts produced no effect upon the conduct of the belligerents and resulted only in further injury to American commerce. When Napoleon was finally overthrown, and the congress of representatives of the European powers assembled

at Vienna to readjust the boundaries of Europe and to re-establish the state order which had been so sadly disarranged, no steps were taken for the protection of neutral commerce, and until the Crimean War England held to the doctrine of the Consolato del Mare and France to that of free ships, free goods, enemy ships, enemy goods. When these two states found themselves allied in that war it was necessary for them to arrive at some agreement in the treatment to be accorded to neutral commerce and accordingly a compromise was effected between the two opposing doctrines. France dropped the doctrine of enemy ships, enemy goods, and England accepted the principle of free ships, free goods. At the close of the war representatives of the powers met at Paris and agreed to certain rules for the regulation of maritime warfare known as the Declaration of Paris, and from that time on the following principles were accepted as a part of international law:

1. Free ships make free goods, except contraband.
2. Neutral goods, except contraband, on enemy ships are not liable to confiscation.

It was further agreed that a blockade to be binding must be effective; that is, that it must be maintained by a force sufficient to prevent access to the port or coast of the enemy. It was no longer required that the vessels should be stationed before the harbor as was proclaimed in the League of Armed Neutrality. This change was due to the introduction of steam power which enabled vessels cruising backward and forward to cover a far larger radius of territory and much more effectively than in the old days of sailing vessels. From 1856 until the present war no question has been raised with respect to the validity of these rules as a part of international law.

There has been a constant struggle between neutrals and belligerents, the former seeking to remain as unaffected by the war as possible and the latter seeking to put pressure upon the enemy through interrupting its trade. The neutral claim to be allowed to carry on trade as freely in time of war as in time of peace has been subject only to the restrictions which have been allowed the belligerents for the furtherance of their aims; these restrictions have been limited to contraband, blockade running and unneutral service, and the right of visit and search as necessary to enforce the rules applicable to them. International law has not placed upon neutral states the obligation to prevent their citizens from engaging in carrying contraband or running blockades, or from performing unneutral services, but in each of these cases it has

granted to the belligerent the right to prevent the acts in question through the exercise of the right of visit and search, followed by capture and condemnation by the prize court in the three cases indicated.

The sole object of the right of visit and search is to afford the belligerent the means of determining (1) the character of the vessel, for enemy vessels upon the high seas are liable to capture and confiscation, and the enemy character of a vessel cannot be established without the exercise of the right of visit and search; and (2) whether or not the vessel is carrying contraband, is attempting to run a blockade, or is engaged in unneutral service.

The right of visit and search, with the examination of the ship's papers and cargo, must be carried on with the least possible inconvenience and delay to neutral vessels. If the examination of the papers and cargo leads to the conclusion that the vessel is engaged in any one of the three forbidden classes of acts, it may be taken into a port of the captor and there brought before a prize court for condemnation. A mere suspicion, unsupported by irregularities in the ship's papers, or by the character of the goods, or the service in which the vessel is engaged, is not sufficient to warrant the detention of the vessel, and previous to the present war consignment of goods to a neutral port "to order" has never been considered a suspicious circumstance.

One of the difficulties of every system of law is the fact that it is not always in harmony with the actual conditions, due to the fact that conditions are constantly and rapidly changing, while laws change by a slow and tedious process. The rules developed in the days of sailing vessels are ill adapted for the guidance of vessels in the days of submarines, and the examination of the cargo of the largest sailing vessel was a matter of great ease in comparison with the examination of the cargo of the seafaring monsters of today. Because of the difficulty of examining the cargo at sea, the English have asserted the right in certain cases of taking vessels into port in order that a thorough examination of the cargo might be made. Against this course of conduct the United States government has raised its protest, and while the protest may have been well founded because of unnecessary delay imposed upon the vessels, it by no means follows that the fundamental right of visit and search for the purpose of determining the character of the vessel and its cargo, will not justify the taking of vessels into port when there is fair ground for suspecting that a right of capture exists.

Hugo Grotius in his famous work on the Laws of War and Peace, published in 1625, divided all goods into three classes: those primarily of use in war, those of use both in war and in peace, and those of no use in war. Goods of the first class when bound for a hostile destination were declared to be absolute contraband and liable to seizure by a belligerent anywhere upon its voyage after it had left neutral territorial waters. Goods of the second class were called conditional contraband and were held liable to seizure only when bound directly for the use of the army or navy of the belligerent. When bound for the use of the peaceful or civil population, they were not liable to confiscation. Goods of the third class were never contraband and so never liable to seizure and confiscation. The English and American practice has always accepted this classification, and it was embodied in the Convention adopted by the London Naval Conference.

At the time of the American Civil War, after the blockade of the Confederate ports had been proclaimed, a very active trade sprang up between British ports and ports of the West Indies, Cuba and Mexico. This trade consisted in articles of every sort, but a large part of it was in articles contraband of war. Neutral vessels sailing from a neutral British port for a neutral destination, would, under ordinary circumstances, be regarded as free from molestation, but it soon became apparent to the United States government that the goods thus carried were reshipped in the neutral ports into swift blockade runners, in the hope of landing the goods in Confederate ports and there securing rich profits.

The difficulty in capturing these vessels engaged in running the blockade was almost insuperable and so the United States government seized certain vessels bound from a British home port to another neutral port on the ground that these vessels were carrying goods contraband in character, the ultimate destination of which was a hostile port, or else they were carrying goods, the ultimate destination of which was a blockade port, and upon the ground that the voyage was a continuous one from the neutral British port to the Confederate hostile destination or port, the capture of the vessels and the confiscation of the cargo were upheld.

This doctrine of continuous voyage was strenuously objected to by the British press and public at the time, although the government itself refused to make any protest against the action of the United States government and at the time of the Boer War the executive department of the British government ordered the seizure of three German vessels, the General, the Herzog and the Bundes-

rath, on the ground that they were carrying contraband to the Boers. The vessels in question were bound to Delagoa Bay, a Portuguese possession in East Africa, where a railroad ran direct to the South African Republic. Subsequently the vessels were released because they were not carrying contraband, but the only justification of their seizure was on the ground that the ultimate destination of the goods was hostile.

The object of a blockade is to put pressure on the enemy and it may be of a particular port or place, or of a stretch of coast as in the Civil War when the entire Confederate sea coast was declared under blockade. A blockade to be binding must be effective and the effectiveness is a matter of fact. Furthermore a blockade must be proclaimed by proper authority and notice of its proclamation must be conveyed to neutral powers. This notice should contain the limits set to the area blockaded.

The first and second Hague Conferences did not attempt to formulate rules respecting trade in contraband and blockade running, but at the London Naval Convention in 1909 a set of rules was drawn up covering, among other things, trade in contraband, blockade running and unneutral services. The London Naval Convention was called as a result of an adoption by the second Hague Congress of a Convention Relative to the Establishment of an International Prize Court. In this convention it was stated that in the absence of treaty provisions governing a case, the court should give judgment in accordance with the general principles of justice and equity.

The London Naval Conference, composed of representatives of the ten most important maritime powers, was called by Great Britain to formulate rules to be applied by the international prize court, but the rules agreed upon at the conference were never ratified by the powers, and in the present war the United States has taken the position that we are remitted to the rules of international law as they stood before the war began irrespective of the action of the conference, while Germany has declared that she will abide by the rules formulated by the conference if her enemies will do likewise. England, however, has accepted the results of the conference only with modifications.

The conference accepted the doctrine of continuous voyage developed by the United States during the Civil War in so far as it applied to absolute contraband, which, accordingly, is liable to seizure anywhere upon the high seas if its ultimate destination is a hostile port. Great Britain, then, is clearly within her rights

in seizing all vessels carrying absolute contraband if the presumption of an ultimate hostile destination is clear. Each case must necessarily be judged on its own merits and one of the most important circumstances indicative of the real destination of such goods is whether or not they could be utilized in the ordinary course of trade in the port to which they are immediately bound. It is well to remember that at the time of the Civil War the United States was vehemently accused of seizing vessels upon the high seas merely upon the suspicion that the ultimate destination of the cargo was a hostile or blockaded port.

It has been the universally accepted view with respect to conditional contraband that it is liable to seizure only when bound directly for a hostile port and for the use of the army or navy, or a department of government, of the belligerent. Therefore the doctrine of continuous voyage is not applicable to it. Food stuffs are conditional contraband and are not liable to capture on the way from one neutral port to another neutral port, even though the ultimate destination be hostile, nor on the way to a belligerent port unless for the use of the army or navy or a department of government. On no principle involved in the conception of contraband could Great Britain legitimately interrupt trade in food stuffs between the United States and neutral ports. She was, therefore, finally forced to declare a blockade of all the German ports and coasts.

The essential elements of a blockade are notification and effectiveness. The notification that a blockade has been established must be conveyed to all neutral states, and this notification must contain a statement of the area to be blockaded. The English proclamation of blockade may be criticized from its failure to state with sufficient clearness the area within which it proposes to make the blockade effective.

The effectiveness of a blockade is a matter of fact to be determined by a prize court. The element which enters primarily into the question of effectiveness is that of the danger to which a vessel attempting to run the blockade is subjected by the vessels of the blockading power. Formerly it was regarded as necessary for the blockading vessel to be stationed before the blockaded port. This we have seen was in the Declaration of Paris no longer regarded as necessary, and the introduction of mines, submarines, and aeroplanes has changed materially the conditions surrounding the maintenance of a blockade and has led to a con-

sequent enlargement of the area of the operations of the blockading vessels.

A blockade of a neutral port is not permissible, for blockade is a war measure and the right of interference with neutral trade is strictly limited. To blockade a neutral port would be the equivalent of an act of war. The blockade which England has proclaimed cannot lawfully interfere with neutral commerce to neutral ports, unless it can be shown that the ultimate destination of the goods or vessels is a blockaded port, or that the goods are absolute contraband.

Unneutral service is rendered by a neutral vessel to a belligerent when it engages in some special service for the belligerent, as in transporting troops, in carrying despatches and other like acts. In all of them the service must be specially done, and generally it entails something out of the ordinary course of business of the neutral vessel, and frequently the putting of the neutral vessel under the control and at the disposition of the belligerent. For such services, the neutral vessel is liable to capture and condemnation at the hands of the other belligerent.

One of the most serious menaces to the freedom of neutral commerce which has arisen in the present war is the proclamation by Germany of a war-zone embracing the waters around Great Britain, including the whole English Channel and the warning to neutral vessels that within this area they are liable to destruction, since all enemy vessels are to be destroyed, and since it may not be possible to determine in advance the neutral character of the ship. The reasons assigned for this inability were the alleged misuse of neutral flags by British vessels, and the arming of merchant vessels. This last rendered visit and search by submarines impossible, and therefore all merchant vessels within the war zone were liable to immediate destruction.

The United States government very properly protested in vigorous and almost sharp terms against such a course, and gave notice that Germany would be held responsible for the loss of any American lives or property, through the carrying out of this unjustifiable course. To both sides the government has made it plain that acts of retaliation of the belligerents upon each other must not be at the expense of the neutral rights, and the freedom of neutral commerce.

*Edward Elliott.*

Berkeley, California.