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SOME PLAIN REASONS FOR
IMMUNITY FROM CAPTURE
OF PRIVATE PROPERTY
AT SEA.

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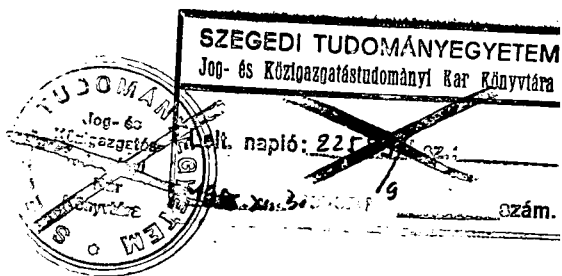
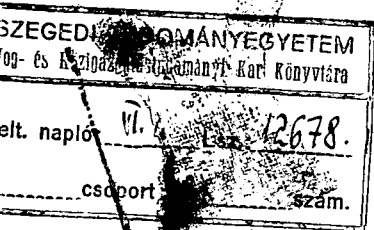
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FROM CAPTURE OF PRIVATE PROPERTY
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I DESIRE to state some plain reasons why, in the interests of peace and in those of England, Private Property at Sea should be exempt from capture by belligerents. I discuss the question, not as one who thinks war always and necessarily wrong. Under certain circumstances, rare now, and becoming, it was possible until lately to hope, rarer, it may be inevitable. Here are offered, in no dogmatic spirit, a few plain reasons for immunity. They do not include grounds which might be adduced for the same conclusion if the question were discussed in all its bearings. I am of purpose silent as to false ideals of national greatness often set up in this controversy, and as to the ethical side of the matter, in my view even more important than that which is here considered. Nor have I any arguments to offer likely to be convincing to those who say "The whole question is one for the Admiralty, to be settled only by naval experts."

The earnest wish of every one must be for disarmament; if possible, some reduction, so far as national safety will permit, of the expenditure yearly being piled up in building vessels of war; some term put to the competitive folly of nations in waste of their resources. Can we hope for any diminution of this, not the least of the white man's

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burdens, so long as ships and their cargoes are liable in time of war to capture? On the part of nations possessing mercantile marine an important reduction is out of the question. "So long as this liability exists," writes the *Allgemeine Zeitung*, with reference to the policy of England, "must other nations, from plain motives of interest, seek to protect their marine commerce." If England insists upon capturing such property, it is inevitable that they should increase their navies. Speaking the other day at Kiel, the President of the German Navy League, Admiral Von Koester said: "When once asked why the navy was so enormously popular (in the United States), the answer was: 'we have got to protect our trade.' It was the same feeling of absolute necessity for a strong navy that inspired them there at Kiel." I note that Lebedour, the German Socialist leader, at the recent Socialist Congress at Copenhagen, made a great point of the refusal of the English Government to give up the right of capture, and of the necessity of protecting commerce while this right was retained.* Much the same argument is often used by those in this country who are opposed to disarmament, and who advocate an increase in our fleet; they are apprehensive of grave national disasters if our mercantile marine is imperfectly protected, and if our oversea supplies are intercepted or reduced. What measure would best help to allay this anxiety and most weaken this argument for naval expenditure? I give the answer in the words of President Eliot: "Confining our thoughts in the first place to operations on the ocean, we easily see that the adoption by a decided majority of the great maritime powers of the principle of the immunity of private property at sea would in itself go

* "Die Abschaffung dieses Rechtes würde einen Hauptvorwände für den fortwährenden Bau von Kriegsschiffen beseitigen, da die Handelsschiffe eines Schutzes dann nicht mehr bedürfen," *Frankfurter Zeitung*, September 3, 1910.

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far to relieve from this great apprehension the nations that suffer most from it."

This argument especially applies to Germany. Her mercantile marine is increasing at a rapid rate. Already it stands third in point of tonnage. In vessels of the largest size it stands at the present time second. We must expect the German people, looking with just pride at the remarkable increase in their merchant shipping in recent years, to protect their vessels in the only effective way—to do what we should in like circumstances be certain to do. It is not undervaluing or doubting the sincerity of the professions of friendship made by our Government and by many Englishmen to say that the best, and indeed the only, means of persuading the German people that we are in earnest in our desire to reduce armaments is to take away that which must appear to them an unanswerable reason for increasing them. Of course, the only, or indeed the chief, motive actuating the propagandists of the idea of a large fleet in Germany is not a desire to safeguard her commerce. But the argument which I have stated is unfailingly used, and generally with effect, to convince or remove the doubts or objections of Germans who deprecate lavish naval expenditure. Liability for capture necessarily and justifiably means large armaments on the part of other countries with property in peril at sea.* What Germany has done other countries possessing considerable merchant shipping must be tempted to follow. In the past there have been many attempts, so far futile, to bring about on sea a Balance of Power similar to that which it was the policy of European nations to establish and maintain on land.† The

* See letter by Sir C. Furness, *Times*, April 4, 1910.

† I may here quote Dr. Wehberg's explanation ("Das Beuterecht im Land-und-Seekriege") of the retention of "booty" at sea and its abandonment on land. I venture to question the justice of his special condemnation of England. France was, in the end of the eighteenth century and the beginning of the nineteenth, when her privateers were active,

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liability of property at sea to capture, with the consequent stimulus all round to increase fleets, must ultimately put an end to the maritime supremacy of any one Power, or must make its retention more and more costly and difficult.

That is the first plain reason : the second is this :— All the leading nations of Europe are parties to the Declaration of Paris of 1856 by which privateering is abolished. The United States have always refused to assent to that Declaration. They have argued, and it seems to me logically, that privateering and immunity of Private Property from Capture at Sea stand and fall together : that if American ships are to be at the mercy of an enemy's cruisers, they, who possess no fleet comparable in size to ours, must be free to resort to the only expedient open to them ; they must be able to improvise a naval force for purposes of offence or defence, and be free to use vessels whose sole object is to prey upon commerce. It is not to be forgotten that in the wars in which the destruction of property

little disposed to abolish the right of capture ; not a few Continental writers have urged the maintenance of the right as an effective weapon against England. France, too, long persisted in confiscating neutrals' goods found in enemies' vessels : a course which England did not follow. " Der Grund dafür, dass im Seekriege trotz der entgegengesetzten Bestimmung des Landkrieges ein Beuterecht noch besteht, ist nicht zum wenigsten darin zu suchen, dass das Beuterecht im Landkriege eine viel längere Entwicklung hinter sich hat als das Beuterecht im Seekriege. Ein Völkerrecht kann sich bekanntlich nur dort bilden, wo die Völker sich als gleichberechtigt anerkennen. Während dies im Landkriege schon recht spät, vor allem durch den Westfälischen Frieden, erreicht worden ist, hat sich in Bezug auf das Seekriegsrecht ein allgemein anerkanntes Völkerrecht noch viel später entwickeln können, weil fortwährend ein Staat die Vorherrschaft zur See innegehabt. In 15 und 16. Jahrhundert haben sich die Spanier, im 17. Jahrhundert die Niederländer niemals auf eine Reform einlassen wollen, weil sie als herrschende Seemacht kein Interesse daran hatten. Seit dem Rückgange der holländische Macht hat vor allem England jeden Versuch, das Seebeuterecht zu beseitigen, zurückgewiesen. England betrachtet ja das Völkerrecht im wesentlichen nur als einen der Faktoren, der in hohem grade zur Aufrechterhaltung seiner Sicherheit dadurch beitragen kann, dass er zur Einschränkung der Operationen seiner Feinde dient" (p.p. 15-16); statements not easily reconcilable with the policy of England at the Hague and at the recent Conference of London.

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at sea was practised on a large scale, for example, in our wars with France and America, it was not so much the regular ships of war as the corsairs fitted out in Dunkirk, St. Malo, Philadelphia and Boston, which were most destructive to commerce.

The value of the Declaration of Paris has no doubt been impaired by the existence of volunteer fleets and by the failure of the chief States at the London Conference last year to come to an arrangement as to the conditions under which merchant vessels may be transformed into ships of war. Even, however, were these matters effectively dealt with, we cannot expect the United States to abandon the position as to privateering which they have consistently maintained since 1856. We are likely to see the Declaration of Paris repudiated or evaded by States which have not the means of creating a powerful navy. The danger to which I refer is stated by Lord Charles Beresford in his Second Open Letter to Mr. Asquith: "The privateering of the future will be conducted, as it was in the past, by merchantmen transformed into duly licensed privateers. . . . Privateering has been revived under conditions which enormously enlarge its powers to injure British trade." It is significant that, in the discussion of this question at the Second Hague Conference, the strongest opposition to immunity from capture came from representatives of States which saw in privateering a cheap and an effective weapon against powerful Governments. It seems to me that the question is not fully understood until it is realised that liability to capture involves an increase of armaments as a measure of protection by some States and a reversion to privateering, in substance if not in form, as a measure of attack by other States.

It is often said "Why grant immunity to private property at sea? There is no immunity for property on land." This is misleading; the statement slurs over impor-

PRIVATE PROPERTY ON LAND

tant differences in the treatment of property according as it happens to be on land or at sea. As understood by civilized nations the laws of warfare are chiefly contained in the Hague Conventions of 1899 and 1907. These carefully limit the purposes for which the property of private persons can be seized. Article 47 says "Pillage is prohibited ;" Article 46, "Private property cannot be confiscated." Article 49 adds that, if money or contributions, over and above the ordinary taxes, dues and tolls, are levied, they can only be for the needs of the army or administration of such territory. Article 52 states that neither requisitions in kind nor services can be demanded or requisitioned from the inhabitants except for the needs of the army of occupation. Requisitions must be in proportion to the resources of the country and of such a nature as not to imply any obligation upon the population to take part in operations of war against their country. "Care is to be taken that the demands upon the inhabitants shall be made in a regular manner and on the responsibility of the Commanding Officer." Of course these rules are not always faithfully carried out in actual warfare ; and under cover of them grievous wrongs or hardships are inflicted upon non-combatants. The contrast remains ; all private property at sea may be seized—pillage is permitted ; on land only such property as indirectly or directly subserves the needs of war is seized. There is a further notable difference : private property seized on land goes to the State (*Bello parta cedunt rei publicæ*) ; that acquired as booty at sea is appropriated by private individuals. The true likeness is between requisitions on land and seizure of contraband at sea—that is articles of use in war. Mr. McKenna, in defending the existing law, remarks, "A military force captured the roads and railways, and the Navy, regarding the sea as a road, declared that it should not be used except under the penalty

SHIPS AS TRANSPORTS

of the enemy losing their goods." He does not add that the roads and railways are "captured" only so far as is necessary for military operations, and that property going by road or rail, if it is not in any way subservient to warlike purposes, or the carriage of it does not obstruct military operations, is allowed to proceed.

And here I may advert to another reason sometimes given for the retention of the right of capture. Every ship, it is said, is a potential transport, every merchant sailor a potential effective combatant; all which, if true, would be so only in much the same limited sense as that in which every able-bodied subject of a belligerent is a potential soldier, and every part of his property potential aid to his Government. If the justification of the capture of ships is their possible application to hostile purposes, why not on land appropriate all private funds which may be lent to, or made use of by, belligerents? * Giving all possible weight to this argument, it might justify detention during hostilities, not confiscation, of private property. Besides—and it is a point which is apt to be overlooked by those who rely upon this reason for upholding the right of capture—this country, in common with others which are parties to the Convention of 1907 relative to restrictions upon the exercise of the right of capture, has in great degree abandoned the old rule according to which the officers and crews of vessels captured were made prisoners of war. The subjects of neutral States serving on board such vessels are released unconditionally; the subjects of the belligerent State, "provided they undertake, on the faith of a formal written promise, not to engage while hostilities last, in any service connected with the operations of the war" (Articles 5 and 6 of Convention XI,

* "Es liegt gar kein Grund vor, dass nicht mehrere patriotische Millionäre ihr ganzes Vermögen dem Staate leihen; und ist nicht das bare Geld der Privaten zu Lande viel nützlicher als die auf See schwimmende Ware, die erst noch in Geld umgesetzt werden muss" ? (WEHBERG, p. 15.)

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1907). In view of the large proportion of foreign seamen serving on board our merchant vessels, this concession would necessarily have great effect.

I may recall the fact that at the Second Hague Conference a proposal to assimilate the laws of war on sea to those on land was brought forward, and obtained a majority of one (13 States voting for it and 12 against it). One of the "Vœux" expressed in the Final Act was that all Powers should apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land. The statesmen and lawyers who took part in this discussion were not disputing about a shadow. They knew that the adoption of the proposal was fraught with serious consequences.*

Certain writers seek to make light of or nullify this point by declaring that a cargo of wheat which is on land private property somehow becomes when on sea public property. Property at sea, says one writer who draws this new-fangled distinction, "belongs in general to a special class—the mercantile community—and is intended to earn profit. . . . Property on land, on the other hand, may be an object of trade, but it is less easily distinguished as such than is the case with property at sea. It can only be seized as belonging to private individuals in general." This distinction, which is not very intelligible, appears to be unknown to economists or lawyers. I have failed to find it in books of authority—unless, indeed, it is a remnant of the antiquated doctrine that foreign trade is somehow more profitable than home trade. I may not have understood the point, which is generally expressed in metaphorical

* I am tempted to interpose here two questions—First, would the present practice have survived—would it not long ago have been extinct—if there had been no prize money? Secondly, have not great naval commanders from time to time complained that the desire to obtain or not to lose prize money has led to diversions from and interferences with the main objects of war?

PROPERTY OF NEUTRALS

or rhetorical language, not in precise economic or legal terms. How a sack of wheat has one set of legal and economic incidents and qualities when going by road and another when it is part of a sea-borne cargo ; how a consignment of ore coming by ocean steamer is property in a different sense from another consignment belonging to the same owner and coming by canal or rail, I am at a loss to understand. There is, I admit, a real distinction, and one of consequence, between property at sea and that on land. But it is a distinction which, as I shall point out, makes for the immunity of the former.

It is not only the private property of subjects of a belligerent state which may be lawfully seized. Certain kinds of property belonging to subjects of neutral Governments are also liable to capture. Prize Courts act upon hard and fast rules with regard to ownership which do not always harmonise with municipal law ; and the consequence may be, and often is, that property really belonging to the subjects of a neutral state may be confiscated by belligerents. I cannot here fully illustrate this point. I mention only one or two facts which may help to explain it. In determining who are enemies and what is enemies' property our Prize Courts have been guided chiefly by the *domicile* of the owner. But they have given to that term a wider signification than ordinary Courts have done, so as to include in certain circumstances persons trading or concerned in trading in a belligerent country ; in other words, to sweep into the captor's net as much booty as possible, the Prize Courts have treated as domicile that which the ordinary Courts of the country would not. Further, goods found on board an enemy's vessel are presumed to be enemy's goods. (Article 59 of the Declaration of London). Article 60, stating the generally accepted rule, says, "enemy's goods on board an enemy's vessel retain their enemy's character until they



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reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded." There may have been, and often is, a valid sale when the goods are afloat by transfer of Bill of Lading or otherwise. The ordinary Courts will recognize the validity of such a transaction; Prize Courts will not always do so. The consignor and consignee may honestly agree that the property in goods is not to vest in the latter until actual delivery; there may be a valid custom of trade to that effect; Prize Courts will disregard the contract and the custom. The Sale of Goods Act states that the property in specific or ascertained goods is "transferred to the buyer at such time as the parties to the contract intend it to be transferred" (s. 17). The Statute also provides that the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled (s. 19); and "the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled." According to certain systems of law, following the Roman law,—and among them the German law—the mere contract of sale does not pass the property; subject to certain exceptions, delivery is necessary. Speaking broadly, the tendency of modern jurisprudence in all countries is to give effect to the intention of the parties as to the transfer of property and the burthen of risk; a tendency which Prize Law is obliged to disregard. Further, municipal and private international law recognise the validity of mortgages or charges on ships or their cargo, if the requisites of municipal law are complied with; most Prize Courts do not. The reason given for this policy is "the ease with which enemy's goods might secure protection from the exercise of the right of capture." In other words, the present practice can be maintained only by permitting the captor to take from time to time what does not belong to the

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belligerent. I say nothing of the fact that nations are not agreed as to the *test* of "enemy's property," that while some apply the criterion of domicile, others apply that of nationality, and that at the Conference in London last year the representatives of the great Powers could not come to an agreement on this point. It is highly probable that a belligerent which enforces on a large scale in any future war the right of capture will have much trouble with neutral States. This is not a mere accidental circumstance; there is a necessary collision of interests: the whole system of capture would break down if ordinary municipal law prevailed.

The indiscriminate capture of private property might be justifiable if it were effectual—if history afforded many clear instances in which such operations had great or even appreciable influence upon the termination of a war. In the many wars in which they have been employed, the advocates of the present policy are unable to produce any unquestionable example of such results; they generally cover their failure by quoting instances of the results of commercial blockades, to which different considerations apply, and which affect alike neutrals and belligerents. "Never has any Government asked for peace in order that its merchant shipping should be spared." That saying by M. de Laveleye is irrefutable. The only plausible instance adduced of a distinct effect of maritime captures upon the duration of war is in the case of the Peace of Paris of 1763 between this country and France*; the close of the war, it is said, was hastened by the losses sustained by English shipowners at the hands of French privateers. But that case proves little; historians are agreed that many causes favourable to peace were at work in both countries.

* Perhaps I ought to add the war of 1812 with the United States. "The commerce destroying exploits of the American cruisers had a very distinct effect in furthering the readiness of the British to come to terms" (*Clowes*, vi. p. 157).

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Even according to Admiral Mahan, the chief advocate to-day of this policy, the captures effected on either side during the great wars between England and France did not amount to more than $2\frac{1}{2}$ per cent. of the value of property afloat. While thinking that this estimate is "somewhat misleading," Sir George Clarke, who speaks with authority, adds as his general conclusion, "that our losses were moderate appears to be beyond question." Whether the captures to-day would amount to as much as that proportion may be doubted in view of the fact that the mercantile marine of the world largely consists of steamers, not bound as were sailing vessels of old to any definite trade route, and able to escape from all but the swiftest cruisers. In any case, even on the most favourable estimates of the efficacy of this agency, it is scarcely conceivable that such captures could determine or seriously affect the result of a war between two great States. If, unfortunately, England and Germany were at war, and our fleet were successful, we might seize some German vessels; we might compel many more to remain either in port at home or in neutral harbours. It is ridiculous to suppose that such success, or "bottling-up" to any extent of the German mercantile marine, could appreciably influence the issue of the hostilities.

Dr. Voelcker, who has discussed with much care the effect of war upon German commerce and industry, and who is not disposed to minimise it (*"Die Deutsche Volkswirtschaft im Kriegsfall"*), points out the many means of communication which his country has with Holland, Belgium, France, Switzerland, Austria-Hungary and Western Russia. Not to speak of the "Hauptstrasse," the Rhine, twelve railway lines cross or connect the Belgian and Dutch frontiers, eight the French frontier, six the Swiss, thirty-six the Austrian, four the Russian. From her position Germany is most favourably

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situated to endure the effects of a temporary cessation on a large scale of her ocean navigation.

The words of Dr. White, the President of the American Commission at the Peace Conference at the Hague in 1899, with reference to the experience of his country in the Civil War, are here worth quoting. "Only three of the Confederate cruisers did any effective work; their prizes amounted to 169 vessels; the premiums of insurance between the United States and Great Britain increased from 30s. per ton to 120s.; American ships aggregating nearly a million of tons were driven under the British flag; and the final result was the almost total disappearance of the mercantile navy of the United States. If such a result was obtained by the operation of three little vessels, what would happen with the means which are to-day at the disposal of great nations? Yet all the world knows that this employment of privateers and all the enormous losses thereby occasioned had not the slightest effect upon the termination or towards the shortening of the Civil War. If it had been ten times as great they would still have contributed nothing towards ending the contest. All that was immediately effected was simply the destruction of a great mass of property belonging to the most industrious and meritorious portion of our population, resulting in the ruin of our sailors who had invested in their vessels all their hard-earned savings. The more remote general effect was to leave throughout our country a general resentment sure to be the cause of new wars between the United States and Great Britain had not a wise treaty of arbitration removed it."

The situation has entirely changed since the wars in which Rodney, Nelson and Collingwood took part. By the Declaration of Paris of 1856 England conceded the immunity of belligerents' goods carried on neutral vessels. Whether that was a politic step or not it is now useless to discuss; it

TRANSFER TO NEUTRALS

is much too late to think of withdrawing that concession. In a war with Germany one of the first results, upon the most favourable assumption as to our naval supremacy, would be to induce importers of goods to ship them by neutral vessels, that is to say, by French, Belgian, Norwegian or American vessels. The premium in favour of conveyance by neutral vessels might become large. If hostilities were protracted, there might be a transfer of vessels on a considerable scale from our mercantile marine to the mercantile marine of some neutral state. Whether the vessels so transferred would ever again revert to the English flag is, to say the least, very doubtful.

“Upon a review of all the evidence,” say the Commissioners on food supply in their report, “it appears that trade in time of war, and especially during the great uncertainty which would prevail in the first few weeks of the war, would have a tendency to seek neutral bottoms in the hope of avoiding the risk and expense to which belligerent vessels would be exposed, in addition to those that would fall upon neutrals. It must be admitted as probable that neutrals will take advantage of a time of stress to acquire a larger share of the world’s shipping. We do not think it likely that in any case the transfers will bear a large proportion to the total of the British Mercantile Marine; but in so far as they may be effected they constitute an injury to our trade, which it will be difficult, perhaps impossible, to recover after the restoration of peace” (p. 11). In virtue of the Declaration of Paris goods would be conveyed to Germany *via* Antwerp and other neutral ports. Those who discuss this question are apt to overlook the service likely to be rendered in the event of war with Germany by navigation on the Rhine. Neutral vessels drawing a considerable draught of water would sail freely up the Rhine to Emmerich or other frontier

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port; their cargoes would be trans-shipped or conveyed by rail to their destination in the interior of Germany. Intercourse will be facilitated by the provisions in the Declaration of London which, with a reservation not applicable to Germany, abolish the doctrine of continuous voyage as to conditional contraband (Article 35).

Let me cite the words of one of the most acute historians of maritime operations, Mr. Corbett. Writing of the failure of the destruction of British vessels in the war ending in 1763 to produce "any real warlike advantages," he remarks, "such an advantage, it would appear, is only to be obtained by a practical stoppage of trade communications and the capture of the oversea depôts. When the volume of commerce is so vast and its theatre so wide-spread as ours was even in those days, pelagic operations against it can never amount to more than nibbling. They may produce inconvenience, but cannot paralyse finance. To injure credit to such an extent as to amount to a real consideration of war (*sic*) operations against trade must be systematically carried on by land and sea till its main sources and the possibility of transit are practically destroyed. Then, and then only, can it become a material factor in securing the ultimate object—a favourable peace." I do not stop to inquire what would be the injury to neutrals if a belligerent were successful to the extent indicated in this passage. It is enough to say that if in 1759-1763 mere "inconvenience" and "nibbling" could be caused owing to the magnitude of the trade, the effect in determining the result of a war to-day is not likely to be greater.

In the discussion of this question a quarter of a century ago the common assumption, avowed or tacit, was that our enemy at sea might be the United States. Later the prevalent assumption was that we might be at war with France. In these days it is generally taken for granted that

INJURY TO BRITISH TRADE

our only possible adversary is Germany, though England has never been at war with that country, though for centuries she saw in France her "natural enemy," though she has twice been at war with the United States, and has been more than once in perilous imminence of conflict with them. If the dire calamity of hostilities between England and the United States were to befall humanity, what would the position be of our mercantile commerce? We could not inflict injury, at all events of much consequence, upon the mercantile marine of America.* We could not seriously injure in any way a country which has limitless resources within its boundaries, whereas serious injury might be inflicted upon our mercantile marine by swarms of privateers. For us, the history of the *Alabama* might be repeated, of course with such modifications as the conditions of modern commerce involve. If our fleet is the most powerful in the world, our commerce is the most vulnerable. I take it for granted that experts are right in their opinion that only in the early stages of war would our mercantile marine grievously suffer. The most sanguine expert does not deny that the loss might be at least as great as that sustained by our adversary, and that for a time neutral countries might have a distinct preference as carriers by sea. Upon this point I may quote the words of the present Lord Chancellor:—"The United Kingdom stands in quite a peculiar position. Half our food is imported; if the sea is closed we are half

*Admiral Stockton, one of the representatives of the United States at the Hague, is of opinion that his country would suffer little from captures in time of war. "With our insignificant mercantile marine and a comparatively strong navy, it is probable that no injury except an occasional panic with regard to our coastwise commerce will result." The effect of the exercise of this war right upon countries such as England, dependent for food upon seaborne supplies would, he thinks, be great. "The imminence of the danger, its gravity and surety, will be sufficient to make the government of the day enter into negotiations preliminary to peace."—*American Journal of International Law*, I., p. 942.

WAR WITH LIMITED LIABILITY

starved. We are mainly a manufacturing people, and an enormous proportion of our raw material is imported. If the sea is closed, we are largely reduced to idleness. We are immeasurably the greatest carrying nation of the world, and thence derive vast profits, estimated by the Board of Trade at ninety millions sterling a year. If the sea is closed we can no longer carry." England's losses, though heavy, might not induce her to come to terms; Dr. White tells us that an injury done to American trade would be equally ineffective.

It is said that war with limited liability is wrong. It is not right or well, it is urged, that the mass of the people or any one class should be free to pursue their peaceful avocations, while armies composed of their countrymen are fighting. The existence of war must be felt by all. So argued men in savage times when every barbarity was practised upon non-combatants. War was to be brought home to them; and so their homes were burnt, their cattle or goods taken, and all inhabitants, whether in the fighting line or not, were treated alike. It was the policy of Tilly and of Turenne in the Palatinate. It was a plausible policy. But it did not succeed. It bred lasting bitterness and hatred. It was not a deterrent of war. It remained a bitter memory, and proved an enduring incitement to revenge. "War with limited liability" exists on land. Why should it not exist at sea? "To bring the pressure of war to bear upon the whole population, and not merely upon the armies in the field," says Admiral Mahan (*Times*, November 4, 1910), "is the very spirit of modern warfare." Why is not this principle applied by every invader? Why does he in these days usually announce to the people of the invaded country that he comes not to make war on them, but on their Government? A merchant ship is only a moving warehouse or store. Why should stationary ware-

CAPTURE AS A CHECK UPON WAR

houses or stores be exempt from capture? If the seizure of miscellaneous cargoes is justifiable because it impairs the means of resistance, equally justifiable would be the seizure of cash and private deposits in banks, the suspension of the payment of debts, with the consequent disorganisation of credit and business, and the destruction of standing crops, and the appropriation of all stores of provisions. What Clausewitz calls "absolute war," violence without limit, between every member of hostile tribes or nations, neither property nor life spared, does not answer. History seems to prove—certainly that of the Thirty Years War and Louis XIV's campaigns seem to show—that the more cruelly as to persons or property a war is conducted, the longer it lasts.

It is said by persons whose opinion is to be respected, that the liability to capture is a check upon warlike passions—some security for peace. Has it in fact been such? It would be difficult to find proof of this in the history of times in which capture of enemy's goods wherever found was practised. The seventeenth and eighteenth centuries were the ages in which this form of hostilities was most freely employed, and never were wars more frequent. Nor can one be sure that the liability to capture would in these days operate as a deterrent. Upon whom would losses arising from capture fall? The answer is far from clear. The effect might vary according to the duration of the war, and according as time was given to shift the ultimate incidence of losses. The modern system of underwriting and re-insurance complicates the question. It is clear, however, that the loss would not necessarily fall in all cases upon those individuals whose ships or cargoes happened to be seized. Of course, underwriters would charge premiums proportionate to the risk, and these premiums would be paid by the whole trade at risk; they might be paid in part by

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persons insured in neutral countries ; in the end the burdens might be distributed over the whole body of consumers of commodities conveyed by sea in proportions so minute as to be inappreciable by each.

Those who speak of liability to capture as a deterrent of war forget that it might be, in view of the size, value and vulnerability of our mercantile marine, an incitement and temptation to other countries to engage in hostilities against England. Admiral Aube, the advocate of the destruction of commerce, has still his school of disciples. There exists a whole incendiary literature, the strain of which is, " England is defenceless ; her vast seaborne commerce makes her an easy prey ; she can at any moment be reduced to extremities by any Power which attacks her commerce."

It is taken for granted that neutrals ought to have no voice in this matter. That view may not always be theirs ; if I am right, it is already not their view ; and this fact may be decisive of the controversy. They are interested as sellers and as purchasers, as producers and consumers ; as sellers and buyers of food and other necessaries, as purchasers of raw materials. The United States sell to us their wheat and cotton. Is it of no consequence that, if we are at war, they should be deprived of their best customer, or that, if they happen to be at war, we should be obstructed in obtaining from them supplies of the prime necessities of life ? Further, while a neutral may ship his goods in a belligerent vessel, he must be a sufferer in the event of its capture ; he will sustain loss from detention and seizure for which he will receive no redress ; if the vessel is not brought into port for adjudication, but is destroyed at sea—which will generally be the case if the captor has no port of his own in the vicinity—the neutral's goods will be destroyed also, without compensation. Such are the closely woven and interlaced ties between

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nations that there is no separating the interests of neutrals and belligerents, no injuring those of the latter while sparing those of the former. I submit that this aspect of the question cannot fail to receive more and more attention. The capture of private property on land rarely affects others than the belligerents. To capture it at sea might seem no concern of neutrals, while it was believed that the foreign trade of a country was a gain only to itself. As soon as it is recognised that such trade is a mutual advantage, a gain both to the exporter and importer, the capture of property at sea is seen in a new light; the injury inflicted upon the subjects of the belligerent is an injury also to the neutral State. It may be that some neutral government one day will say to a belligerent, "You may do as you please with the home trade of your opponent; it is not our concern; you may intercept contraband; you must not injure us by interrupting a trade profitable, nay essential, to our subjects." This weapon wounds friend as well as foe. With the growing commercial solidarity of the world, there is no saying always which it may strike hardest. To injure effectively, and on a large scale, the foreign trade of one country without injuring seriously that of others, has become impossible. There is the dilemma: destroy a few ships or cargoes; impede or interrupt unimportant branches of trade; the neutral is not much injured; neither is the belligerent. Impede or interrupt important branches of trade so as to injure the "vital resources" of the belligerent, and both neutral and enemy are injured seriously. "It may be taken," says Mr. Corbett, who speaks with authority, "as a law of maritime warfare, which cannot be omitted from strategical calculation with impunity, that every step towards gaining command of the sea tends to turn neutral sea powers into enemies. The prolonged exercise of belligerent rights, even of the most undoubted kind, produces an interference

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with trade that becomes more and more oppressive.”* If this were true in 1759, is it not applicable to the present state of things with maritime trade on a scale then unknown? The increasing community of interests among nations, the reciprocity of services rendered by international commerce, becomes every year a greater obstacle to the free use of the right of capture. There is a real distinction between property at sea and property on land ; it arises out of the interests, it may be vital, of neutrals in the former.

In the days when capture of private property was carried out vigorously by England, France, and the United States, ocean-borne trade was comparatively small ; it consisted chiefly of luxuries, at all events not of the prime necessities of life or of the raw materials of manufacture to any great extent. Now all is changed. The exports and imports not only of England but of several other States are on a gigantic scale ; they consist largely of articles of food and of raw materials indispensable to the chief industries of the countries importing them, and giving employment to much capital and labour in the countries producing them. This close interdependence of communities is novel. Capture on a large scale necessarily means disorganisation of international trade and consequent injury to domestic industries, unemployment and disturbance of credit, in neutral as well as belligerent countries. In an appendix is printed a statement showing the value of the six chief commodities imported into Germany for home consumption from the six principal countries from which Germany imports, together with the value of the six chief commodities of domestic production exported to the six principal countries to which she exports.† The values are very large and the commodities are of great

* “ *England in the Seven Years' War* ” (II. p. 5).

† Supplied by the kindness of the Commercial Intelligence Branch of the Board of Trade.

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importance. Many of them, we may be sure, would find their way into or out of Germany, circuitously or in neutral vessels, no matter how active and vigilant were our cruisers. But if it were possible to stop or seriously reduce this vast trade, neutrals must seriously suffer.

I may point out another consideration of moment. There have been several attempts to form armed alliances of neutrals against belligerents pressing their rights; by the Scandinavian Powers in 1693*, and on a larger scale and by other States in 1780 and 1800. These attempts failed for various reasons, the chief being that the neutral Powers had not, individually or in the aggregate, a naval force at all comparable to that of the belligerents. That inequality is fast disappearing. Every capture at sea means in these days a possible quarrel with formidable adversaries.

I have said so far nothing as to contraband or blockade. It is of course essential to neutrals that the former should be defined strictly; otherwise immunity of private property might mean little. Unfortunately the recent Declaration of London has by no means done all that was required; it has obscured and complicated some parts of the subject; it has recognised and extended the dangerous doctrine of continuous voyage; and it has left much to the discretion of belligerents. In a paper read at the recent Conference of the International Law Association, I pointed out several serious defects in the Declaration. For example, as to absolute contraband, owing to the extension given to the doctrine of continuous voyage,

"Goods may, in fact, be destined to a neutral port, and yet because the vessel carrying them touches at a hostile port, they are seizable: the reason being, it may be assumed, the strong temptation to dispose of them to the belligerent. Rarely has such a contention been in recent times put forward by a belligerent. We have got beyond the doctrine of continuous voyage; we are in presence of the doctrine of probable destination of goods. We are not far off that of possible destination."

*Bergbohm, "Die Bewaffnete Neutralität" (p. 47).

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I further pointed out grave defects in the articles relating to conditional contraband: For example, under the Declaration,

"The doctrine of continuous voyage does not apply to conditional contraband; it is excluded by Art. 35. Consequently, broadly speaking, there can be no capture of any such contraband going to continental countries, Switzerland excepted: it will be enough for them to direct consignment to a neighbouring neutral port—in the case of Germany to Antwerp, Amsterdam, Rotterdam, or (if the goods be of small bulk) to Trieste—and forward the goods to their final destination by rail, river, or canal, which can under modern conditions of transport always be done. On the other hand, of course every consignment of similar goods to England will be direct, and, as such, subject to capture. This is not in theory the abolition of the capture of conditional contraband, so far as all continental States are concerned, and its maintenance against England. In practice it might be so. Further, there is substituted for a clear objective test—the destination of the vessel to be ascertained by her papers, unless they are false or she is out of her course—a subjective and complex test: an inquiry into motives, with necessarily uncertain results."

But the Declaration has good points. Thus it places certain articles upon a free list. They are not to be removed therefrom without previous notice; and a right of appeal to an international Tribunal is given. Besides, with or without the abolition of the right of capture of private property, certain Powers, as experience shews, will be tempted to enlarge the range of contraband.

An extension of the area subject to an "effective blockade" is, as I also pointed out in the above-mentioned paper, probable. Carried out under modern conditions, with vessels stationed on, or moving along, an arc distant from a blockaded port, in order to avoid attack from submarines and torpedoes, a blockade may prove seriously inconvenient. Large portions of the open sea may be treated by powerful belligerents as effectively blockaded. But every blockade affects neutrals, who will be interested in resisting unreasonable pretensions; it extends to maritime warfare principles not unlike those which would be applied to attempts to relieve or provision a town or fortress invested by land;

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and the generally recognised rules as to effectiveness, re-affirmed by the Declaration of London, are some check against abuses. It seems to me that Articles 17, 18 and 19 impose or affirm salutary restrictions upon blockades. Besides, whether the right of capture is retained or abandoned, we may count, in certain circumstances, upon an extension of blockaded areas.

I cannot help feeling that in regard to this controversy, motives rarely avowed, perhaps unconsciously, influence all who take part in it. Some of those who would retain the present practice have a secret jealousy of all that would trammel a nation at war; a belief that everything should bend to it; an impatience of rules of any kind; a conviction that war in itself is good, the school of the highest virtues, and that without it, as Von Moltke said, the world would stagnate.* Some enthusiasts write as if all time spent in peace were misspent, each dispute amicably settled a neglected opportunity of beneficent strife. Perhaps the advocates of immunity are no less impatient as to belligerents' rights, eager to restrict them, jealous of the interruption of human progress by what they believe to be lapses to barbarism. It is not easy to be impartial, but it seems to me that the future belongs to the policy of immunity; the trend of events appears to show it. More than one country has expressed its readiness to accept the principle of immunity. The Italian Maritime Code of 1865 declares that to be law in all cases where reciprocity is observed. In more than one recent war belligerents have agreed not to enforce the right of capture. At the Hague Conference of 1907, twenty-one States of the world (including Germany, with certain reservations) voted for absolute immunity, while only eleven voted against it. To quote the

* See as to this Mr. Norman Angell's remarks in "The Great Illusion" (p. 164).

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distinguished German jurist, Dr. Ludwig von Bar, "Immunity of Private Property at Sea lies in the line of the development of civilization." "I do not say this boastfully," to quote Dr. White, "but I say it that you may know what I mean, when I say that the people of the United States are not only a practical people but idealists as regards the question of immunity of private property on the high seas. It is not a question of merely material interests for us: it is a question of right, of justice, of progress towards a better future for the entire world." In 1626, the year after the publication of Grotius's work, "De Jure Belli ac Pacis," representatives of England are said to have declared that by the law and usage of Europe neutrals must stop all intercourse with the belligerents while war was going on. Some years later Great Britain and Holland, when at war with France, entered into a convention in effect forbidding neutrals trading with France. That seemed justifiable in the 17th century. For many years afterwards nations thought it right, some to capture belligerents' property on neutral ships, others to capture neutral property on belligerent ships. The second of these practices probably died out in the 18th or beginning of the 19th century. Not until 1856 was the immunity of belligerents' goods on neutral vessels recognised by England. It would be only one step further in a long process of evolution to declare the inviolability of private property at sea.



APPENDIX.

STATEMENT, extracted from the "Statistisches Jahrbuch für das Deutsche Reich," showing the values of the six leading commodities imported into Germany for home consumption from the six principal countries from which Germany imports, and also the values of the six leading commodities of domestic production exported from Germany to the six principal countries to which she exports.

A. STATEMENT showing the total value, and values of six leading commodities imported for home consumption into Germany in 1908, from the six principal countries from which she imports.

1. UNITED STATES.

					1908. 1,000 marks.
Total imports of merchandise	...	...	...	...	1,282,600
Cotton, Raw	...	...	...	...	376,500
Copper, Raw	...	...	...	...	181,800
Wheat	...	...	...	...	123,200
Lard	...	...	...	...	95,300
Kerosene	...	...	...	...	62,100
Fur Skins, undressed	...	...	...	...	34,500

2. RUSSIA.

Total imports of merchandise	...	...	...	...	944,800
Barley	...	...	...	...	196,700
Wood, pine	...	...	...	...	72,300
Eggs	...	...	...	...	55,200
Bran	...	...	...	...	46,000
Wheat	...	...	...	...	44,400
Rye	...	...	...	...	39,100

3. AUSTRIA - HUNGARY.

Total imports of merchandise	...	...	...	...	751,400
Lignite	...	...	...	...	85,800
Eggs	...	...	...	...	60,000
Wood, pine	...	...	...	...	53,300
Barley	...	...	...	...	36,900
Oxen	...	...	...	...	30,900
Calf Skins	...	...	...	...	19,300

4. UNITED KINGDOM.

	1908.
	1,000 marks.
Total imports of merchandise	696,900
Coal	145,800
Wool, yarn	80,300
Cotton, yarn	78,500
Wool tissues (clothing stuffs, etc.)	17,500
Herrings, salted	15,000
Pig Iron	12,200

5. ARGENTINA.

Total imports of merchandise	446,000
Wheat	145,600
Linseed	84,500
Wool in the Grease	81,600
Hides of Cattle	36,700
Maize	27,700
Bran	20,800

6. FRANCE.

Total imports of merchandise	420,000
Wool, combed	33,000
Wine, ordinary, in casks	22,600
Calf Skins, green and salted	14,300
Wool, raw,	12,000
Silk, raw,	9,200
Clover Seed	9,100

B. STATEMENT showing the total value and values of six leading commodities (domestic produce) exported from Germany in 1908 to the six principal countries to which she exports.

1. UNITED KINGDOM.

	1908.
	1,000 marks
Total exports of merchandise	997,500
Sugar	143,700
Wool tissues (clothing stuffs, &c.)	31,000
Cotton Gloves, Hair Nets	26,800
Close woven half-silk tissues, excluding ribbons	26,500
Iron and Steel ; blooms, ingots, &c.	22,700
Oats	20,300

	1908.
	1,000 marks.
2. AUSTRIA - HUNGARY.	
Total exports of merchandise	736.800
Coal	117.000
Books	22.200
Wool, combed	21,500
Coke	20,600
Cotton, raw	20,200
Machines for working metals	14.000
3. UNITED STATES.	
Total exports	507.500
Cotton stockings and socks, shaped in manufacture ...	30.500
Aniline and other tar dyes	21.000
Toys	20,300
Sugar	17.300
Cotton Gloves, Hair Nets	15,100
Calf-skins	14.900
4. NETHERLANDS.	
Total exports	453.700
Coal	55.300
Wool tissues (clothing stuffs, &c.)	15.000
Rye	14.300
Woollen Clothing, &c., for women and girls ...	14.100
Iron and steel ; plates and sheets, coarse ...	10.600
Oilcake and oilcake meal	8.800
5. RUSSIA.	
Total exports	450.200
Cotton, raw	20.200
Rye	18.900
Hides of Cattle	14.600
Coal	11.000
Merino Wool washed after shearing	9.600
Fur Skins, wholly or partly dressed	8.500
6. FRANCE.	
Total exports	437.900
Fur Skins, wholly or partly dressed	37.200
Coke	35.900
Coal	21.400
Locomotive tenders over 10 metric tons, locomotives without tenders	19,100
Cycles, parts of	9.800
Wool tissues (clothing stuffs, &c.)	9.700

Metric Ton = 2204.6 lbs. Mark = 11.8d.

NOTE—The above figures relate to imports and exports of merchandise only, i.e. excluding bullion and specie.

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