THE CONFERENCE

OF

THE INTERNATIONAL LAW ASSOCIATION

At BUDA-PESTH, 1908.

SOME POINTS

IN

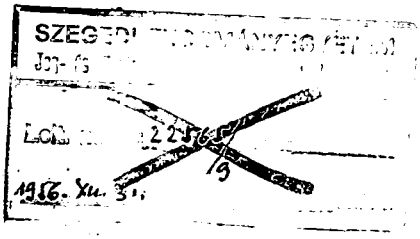
THE LAW OF BLOCKADE.

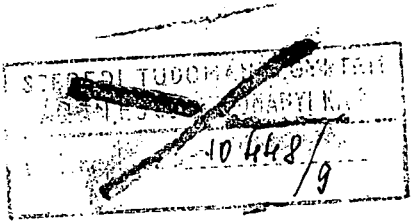
BY

SIR WILLIAM R. KENNEDY,

A Lord Justice of the Court of Appeal in England.

PRINTED BY
—WATERLOW AND SONS LIMITED, LONDON WALL, LONDON.—
1908.





THE CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION AT BUDA-PESTH, 1908.

SOME POINTS IN THE LAW OF BLOCKADE.

By SIR WILLIAM R. KENNEDY,
A Lord Justice of the Court of Appeal in England.

Originally, no doubt, 'blockade,' in military parlance, denoted an operation of a besieging force. In order to procure or to hasten the surrender of a defended place, whether maritime or inland, the assailant forbade communication between that place and the outer world, and did his best to enforce the ban by capturing and confiscating all property, neutral and enemy, contraband and not contraband, alike, found in course of transit inwards or outwards, and sometimes also by inflicting personal punishment, of which the great jurist Bynkershoek explicitly approves, upon those who tried to maintain intercourse with the beleaguered garrison. "Si quis nondum advexit, sed, dum advehere voluit, deprehendatur, sola rerum interceptarum retentione erimus contenti, idque donec caveatur, nihil tale in posterum commissum iri? Ego ea sententia non utor, *usu edoctus, ad minimum res interceptas publicari, soepe et poenam exigi, si non capitalem, aliam certe corporalem.*"* Such a blockade is,

* Bynkershoek, Q. J. P., Bk. I., c. xi., commenting on Grotius, De Jure B. and P., Bk. III., c. i. [The italics are, of course, mine.]

in the language of the same jurist, "jus obsidionis," and it has ever been treated as an inevitable concession to the exigency of war. "Ex ratione et gentium usu urbibus obsessis nihil quicquam licet advehere vel ex his evehere."*

In course of time, however, blockade has come, as a term of international law, particularly to denote a distinct operation in maritime warfare, of which the proceeding of the United Provinces in the year 1630, when they sought by a placaat, or ordinance,† to seal the ports of Flanders, then held by Spain, has been sometimes cited as the earliest historical example. Blockade, in this modern use, does not necessarily involve, as a condition on the part of the belligerent who employs it, the siege, or investment, of any defended port or position of his enemy on the coast of sea or river which the blockade affects. On the contrary, those who write of it often qualify such a blockade by the adjective 'commercial.' It is a belligerent's interdict upon all intercourse or commerce by sea with a particular port or with a particular region of his enemy's coast, whether the port or the region is defended or defenceless. The blockade may be established, on his own initiative, by the commander who has been entrusted by the belligerent government with the direction of naval warfare in that part of the world. Such a blockade is distinguished by publicists as a *de facto* blockade. More frequently, however, the blockade is established by the commander on the instructions of his government, which publishes at home, and formally notifies to neutral States, the blockade

* Bynkershoek, *ubi sup.* See also Vattel, Bk. III., c. vii., s. 117.

† Extracts from its text appear in Bynkershoek, *ubi sup.*

which it directs, as, for instance, President Lincoln did when it was determined by the Government of the United States in 1861 to blockade the Atlantic sea-board of the Southern Confederacy. When this happens, or when the belligerent government publishes at home and notifies to neutral States its adoption of the act of its authorised commander, a 'public' or 'governmental' blockade, as distinguished from a *de facto* blockade, is established, and is binding upon neutral powers, provided always that the belligerent is able to prove the reality in fact of the blockade which he has thus proclaimed.* So long as the blockade, however established, continues, the blockading belligerent, in regard to any vessels which, without his special licence or the excuse of some unforeseen and overwhelming necessity (and, in regard to neutral vessels which were in some port of the blockaded region at the time of the commencement of the blockade, after the expiration of a discretionary term of grace), attempts to pass into or out of the blockaded region, is entitled by international law to capture and confiscate such vessel and her cargo, provided that three conditions are fulfilled. These conditions are, of course, well known to students of international law, but I think that I ought not to pass over them. For, whilst it is no part of the scheme of this paper to present to the Conference a summary of the whole Law of Blockade, there may be here those to whom the subject is not familiar, and as to the correct method of the fulfilment of these conditions statesmen and jurists have still left open to controversy some noteworthy points of principle and

* Westlake, *International Law*, Pt. II., p. 232 ; and cf. Phillimore, *International Law*, III., 476.

detail. Further, by this addition to the brief preliminary statement I have given as to the meaning of maritime blockade and the process of its establishment, my hearers, whether experts in international law or laymen, will be enabled, I hope, to appreciate with more ease and interest the later observations which I shall submit for their consideration.

The three conditions which I have mentioned are these :—

I.—In the first place, the blockade must be real, or, as it is described in the text of the Declaration of Paris, 1856, "effectif," *i.e.*, the access from the sea to the maritime region to which the belligerent applies the hostile blockade must, with an allowance, at the most, of a temporary and involuntary dislocation of the force through stress of weather,* so far remain throughout under the actual domination of his warships stationed or cruising in the vicinity (with or without the aid of shore batteries) for this special purpose, that traffic by sea to or from that region without his leave is not practically possible, and any vessel attempting to "run the blockade" must, in all probability, be captured by the blockading squadron.

In a reported English case in our Court of Queen's Bench,† Chief Justice Cockburn neatly expressed the condition in these words: "In the eye of the law blockade is effective if the enemy's ships are in such numbers and position as to make the running of the blockade a matter of danger, although some vessels

* This is not universally admitted, but has a great preponderance of authority ; see Westlake, p. 236, and Phillimore, Vol. III., 484.

† *Geipel* v. *Smith*, L. R., 7 Q.B., 404, at p. 410; cf. also the judgment of Sir Wm. Grant, *The Nancy*, 1 Acton's Rep. Dr. 7, at p. 58, and of Dr. Lushington in *The Franciska*, Spinks, 287.

may succeed in getting through." The language of the Declaration of Paris, in regard to blockades binding upon neutrals, that they must be "maintenus par une force suffisante pour interdire réelment l'accès du territoire ennemi" cannot reasonably be interpreted in any stricter sense. Otherwise we should be forced to the absurd conclusion that a single success in blockade-running will suffice to destroy the validity of a blockade. Not, perhaps, absurd, but still, I submit, most unreasonable, at the present time, would be the contention, which has been put forward, and then with some show of reason, by writers in the past,* that, in order that the blockade should be binding upon neutrals, it must be maintained by a squadron which is stationary. Obviously, in these days of swift cruisers and wireless telegraphy, the reality and effectiveness of a blockade (and this the essential matter) could be at least as well maintained by a smaller force of the latter class; and, as has been pointed out,† the danger to a stationary squadron from torpedoes and submarine boats might be so great at night that such a squadron could not keep its station except by day. "Il faut bien se garder d'édicter des règles dont la stricte observation pourrait être rendue impossible par la force des choses." ‡

One further remark only on this part of my subject. I have used the expression "warships stationed or

* Referred to by Dr. Oppenheim, *International Law*, Vol. II., p. 407.

† Westlake, *International Law* (1907), Pt. II., p. 231. Pillet, *Les lois actuelles de la guerre*, 1898, pp. 135, 136, also gives authority to the view stated in the text, and Dr. Oppenheim, *ubi sup.*, Vol. II., 408, adds that of Perels and Bluntschli.

‡ His Excellency Baron Marschall de Bieberstein, at the recent Hague Conference, 9th October, 1907.

cruising *in the vicinity* for this special purpose." The proximity of the blockading squadron to the port or region blockaded is not determined by any rule or usage, but necessarily depends upon circumstances, of which the nature and number of the squadron and the nature of the locality are the most decisive. During the Crimean war the port of Riga was blockaded by a single warship, stationed at a distance of 120 miles from the town of Riga, in the Lyser Ort, a channel three miles wide, which formed the only approach to the gulf. During the American Civil War four hundred Federal cruisers sufficed to blockade the coast of the Confederate States, extending some 2,500 miles.*

II.—In the second place, the legality of the condemnation of a vessel for running or attempting to run the blockade depends upon the fact that those who are responsible for the direction of her course have had, before her capture, notice of the existence of the blockade. Notice to the master of the vessel binds the owner of the vessel, and if he is also the owner of the cargo on board, the cargo as well as the vessel is liable to confiscation; but, in general, as Lord Stowell stated in the case of *The Mercurius* (1 C. Rob. 80), he is not the agent of the owners of cargo unless expressly so constituted by them; and, therefore, notice to the master of the vessel cannot rightly be held *per se* necessarily or presumptively to constitute notice to the owner of the vessel's cargo, if he be distinct from the owner of the ship, so as to justify the captors in confiscating the cargo.

Thus far, I think, all nations are in practical agreement. But in applying the term 'notice'

* Dr. Oppenheim, *International Law*, Vol. II., p. 408.

there is a considerable divergence both in theory and in practice. According to the prevalent continental view, whilst, so far as regards egress from the blockaded port, Phillimore's statement that "after the blockade has existed for any length of time it is impossible for those within to be ignorant of the forcible suspension of their commerce, and the notoriety of thing supersedes the necessity of particular notice to each ship" * would not, I think, be controverted, an actual notice given to each incoming ship is held to be essential to the validity of the seizure and confiscation of that ship for breach of blockade. "La pratique maritime commune exige, pour la validité de la saisie, qu'elle ait été précédée d'une notification spéciale au navire qui en est l'objet."† The practice of France and of Italy has been in conformity with this rule. The British view is different in the case of a blockade which is not merely a *de facto* blockade—of that vessels going in are generally entitled to actual notice before they can justly be liable to the consequences of breaking a blockade—but which has been proclaimed and notified to neutral governments so long that it may fairly be deemed to have become a matter of notoriety at the time of the sailing of the vessel which is seized by the belligerent as a blockade-runner. In the case of a vessel so sailing notice of the blockade is inferred from the fact of its general notoriety as against both the owner of the ship and against the owners of her cargo. In regard to the ship, I may quote a passage from one of the "masterly

* *International Law*, Bk. III., p. 494.

† Pillet, *ubi sup.*, p. 138.

judgments," as Wheaton has justly styled them,* of Lord Stowell in the High Court of Admiralty—the often cited judgment in *The Neptunus*† :—

"The effect of a notification to any foreign Government would clearly be to include all the individuals of the nation; it would be nugatory if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be subject of representation to his own Government and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise; but this is a case of a blockade by notification." The same principle has been applied by our Prize Courts in dealing with the liability of the owners of cargo. "It is established that when the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to exhibit by evidence . . . The necessity of acting upon these rules is noted by Lord Stowell on the notoriety by the fact that in almost all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo; but if they were at liberty to allege their innocence of the act of the master, it

* *Elements of International Law*, 4th English edition, p. 684.

† 2 C. Rob. 112.

would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving."*

This doctrine of 'constructive notice' in the case of a notified and notorious blockade has been consistently maintained by my country. But, with sincere respect to that learned author, I must say that I was surprised to read the statement in Pillet's valuable text work, *Les lois actuelles de la guerre*, that this principle has been accepted by England alone.† It is recognised, I believe, by at least two great maritime Powers, America and Japan. In a note on p. 139, Pillet refers to the declaration by President McKinley of the blockade of Cuba in April, 1898, as admitting the necessity of the "notification spéciale," A reference to the text of that document, which was published in *The Times* of the 23rd April, 1898, shews that Pillet's inference is mistaken. The words of the document were: "Any neutral vessel approaching any of the said ports, or attempting to leave the same without notice or knowledge of the establishment of such blockade, will be duly warned by the commander of the blockading forces, who will endorse on her register the fact and the date of such warning." It is quite plain that the President's proclamation limited the right to a "special notification" to the case of a vessel which is navigating *without notice or knowledge* of the blockade. Its language does not suggest that notice or knowledge would not be inferred by an American Prize Court if a vessel was found approaching or hovering in the neighbourhood of a blockaded Cuban

* Lord Kingsdown, delivering the judgment of the Privy Council in *The Panaghia Rhomba*, 12 Moore, P.C. 168.

† P. 138.

port after the Governmental publication of the blockade had become notorious. On the contrary, so far as regards America, the text of the document which I have quoted goes to disprove the contention of the learned jurist that it is Great Britain alone which does not accept what he calls "la pratique maritime commune" of the necessity of a special notification in every case and in all circumstances.

The difference in national practice and juristic opinion upon which I have just touched is eminently one for settlement by international conference. I content myself with saying that, in my humble judgment, the view which I may describe as the Anglo-American view appears to be both consistent with equity, and (so far as one who is not a naval expert can judge) sanctions a practice which is necessary for the effective use by a maritime belligerent of the undoubted right of blockade. If the vessel sailing for a blockaded port, after the belligerent's published notification to the Government under whose flag she sails, is to be treated as immune until she has been particularly warned by a 'special notification,' the intending blockade runner may safely approach the blockaded port or hover in its vicinity in the hope of choosing her opportunity and slipping in without obstruction; for if, contrary to her hope, she is stopped and visited by a warship of the blockading squadron, she will be able successfully to plead the absence of special notification and go scot-free; only to try, in all probability, a second venture. It appears to me that the reasoning, upon the practical aspect in such matters, of the American Courts in *The Admiral*, *The Cornelius* and *The Cheshire* (reported in the third volume of Wallace's

(American) Reports) approving the judgments of Lord Stowell in *The Charlotte Christine* and *The Neutralitet* (reported in the sixth volume of Robinson's (English) Reports) is sound. In the course of his judgment in *The Cheshire* (p. 235), Field, J., observed: "If approach for enquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade." I will only add that, if a 'special notification' is to be an indispensable condition precedent to a right of capture for blockade running, it is difficult to assign any practical value at all to the belligerent's Governmental notification of the blockade to other Powers; and there appears to me to be good sense in the language of Lord Stowell in his judgment in *The Columbia* (1 C. Rob. at p. 156), in reference to the effect of a treaty with America which provided that "there must be a previous warning" before capture. "Certainly," said Lord Stowell, "where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with knowledge of the fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required."

III.—I now come to third condition of a valid and binding blockade. It needs only two or three sentences, because, happily, it is a matter as to which no difference of opinion or of usage exists. The blockade must be impartially exercised. The interdict of commerce with the blockaded port must be enforced with equal rigidity both as between the subjects of the belligerent state and neutrals, and between one neutral and another. The belligerent is not debarred by this condition from granting special licenses of ingress or

egress to individuals; what he must not do is to differentiate between one nationality and another.

I now approach the two questions connected with the law of blockade, to which, on account of their importance, I particularly wish to invite the attention of this Conference.

The first of these questions is as to the alleged applicability to blockade of the so-called principle or doctrine of 'continuous voyage;' the second is as to the possibility of international agreement as to when the 'attempt' to run the blockade should be treated as beginning, so far as it affects the liability to capture.

(*A.*) "*The Continuous Voyage.*"—The origin of the phrase itself is interesting and rather curious. The history is fully set forth by Westlake in his standard work on International Law, and by other writers on that subject. For my purpose to-day a short statement will, I hope, suffice.

In the war between France and Great Britain in 1756, the French found that their Colonial Trade was crippled by the superiority of their enemy at sea. So, for the time, they ceased to insist upon their monopoly of that trade and opened it to the Dutch, granting licences to Dutch vessels to carry goods between the colonies and the mother-country. Thereupon, Great Britain treated Dutch ships using these licences as identified with the enemy, and, when captured, they were condemned by the Prize Court as lawful prize.

In 1793 France opened her coasting and Colonial trade to all neutrals, and Great Britain, with whom she was at war, thereupon extended the practice of 1756 and penalised neutral vessels not only when carrying cargoes between France and her Colonies,

but also when trafficking between their own ports and a belligerent colony, or between any ports belonging to the belligerent country. The Declaration of Paris of 1856 prevents any future application of this extension of the practice of 1756, which has been condemned generally abroad, and both Westlake and Hall endorse that condemnation. Neutrals, so assailed, naturally sought to evade liability, and, to borrow Westlake's description, they did so in the following manner:—

"Neutrals carrying on the trade between an enemy colony and its mother country would unship the cargo at a neutral port, reload it—perhaps with some addition, or after payment of the Customs duties, in order to give further colour to the pretence of importation there—and then complete its transport to the enemy mother country on the same or another ship."*

The question thereupon arose, when the vessel on which the goods were being carried from the intermediate port to the enemy port happened to be captured by the British on the voyage to that enemy port, whether it was lawful prize or not. In more than one case the English tribunals of Prize adjudged that it was, holding that the latter part of the voyage was a continuation of the former part, so as, in Westlake's words, "to constitute one transport between the places between which the trade was prohibited to neutrals by Great Britain." In *The Maria*,† Lord Stowell thus stated the law:—

"It is an inherent and settled principle, in all cases in which the same question can have come under discussion, that the mere touching at any port, without importing the cargo into the common stock of the

* Westlake, *ubi sup*, p. 255. † 5 *C. Rob.* at p. 368.

country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port."

And, three years later, in his judgment in *The Thomyris*,* the same great authority affirmed that it was a clear and settled principle that the mere transhipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country† where the transhipment takes place.

To designate the doctrine asserted in these decisions as the doctrine of the continuous voyage, is intelligible enough. Goods are being carried by sea on a prohibited adventure from A. to B., the latter being a hostile port. In the one case—the case of *The Maria*—the vessel which starts home with the goods on board is captured by the belligerent on her way to B. Plea; for ship and goods, that the voyage from A. to B. had been previously to the capture interrupted at C., an intermediate port, at which the goods were unloaded and reloaded, and where, it is contended for the ship, a new voyage began. Answer of the captor, that the voyage was none the less, on account of the temporary stoppage, one prohibited voyage, it being clear that the voyage of the ship and the carriage of the goods were from the first intended to be from A. to B. and that the stoppage was merely to give a colour

* Edwards, Adm. Rep., 17.

† This language was adopted by the Supreme Court of the United States in the judgment in *The Bermuda*, 3 Wall., 551.

of innocence to the prohibited transaction. Or take the case of the *Thomyris*, where the goods were captured in course of transit from A. to B. on board a ship into which they had been transhipped for that hostile port for the purpose only of appearances, there never, in fact, having been any intention in regard to their destination, except that they should be carried by sea from A. to B.

It seems to me that to hold, as it was held, that at the time of the capture the carriage of the goods by sea was a continuation of the prohibited voyage, begun at the original port of sailing in regard to both ship and goods in the first case, and as regards the goods in the second case, was reasonable and just.

Now, this doctrine so stated and so applied by the English Prize Courts has in the course of the last sixty years been invoked by eminent authorities to justify by analogy the conduct of a belligerent towards a neutral in two kinds of case, which appear to me to differ in material circumstances, both from the cases which I have just referred to, and from each other. The first kind of case is that in which a belligerent captures on the high seas a neutral vessel, proceeding to a neutral port as her one and final destination, but carrying a cargo which consists wholly or in part of contraband of war, destined by the shipper for the use of the belligerent's enemy, and intended to be forwarded to that enemy from the port of the vessel's discharge, either by sea or land or by inland water transit. The second kind of case is that in which a belligerent captures on the high seas a neutral vessel, carrying to a neutral port, as her one and final destination, a cargo not of a contraband nature,

but consigned by its shipper to agents at the vessel's port of destination, who, as the shipper intends and has arranged, shall, at the port of the vessel's discharge, load the goods on board another vessel, which will then attempt to effect their carriage into a port which is blockaded at the time by the belligerent.

Now, in regard to each of these two cases, I feel very great difficulty in tracing such an analogy of material circumstances as would justify the belligerent captor in basing a claim to confiscate the neutral property upon the authority of the doctrine of 'continuous voyage,' as enunciated and applied by the British Prize Court. It seems to me that an essential distinction lies in the fact that the capture in each of these cases is of neutral property in transit by sea, not to a hostile but to a neutral port, which, so far as the carrying ship is concerned, is at the time both the immediate and the final destination of the voyage. But, whilst, in my humble judgment, the reasoning, and the practice based upon that reasoning, in the English decisions from which the phrase 'continuous voyage' draws its origin, cannot properly be treated as warranting a decision in favour of the belligerent in either of the two sets of circumstances which we are considering, it does not, of course, follow that in the one case or in the other the question of the legality of the belligerent's claim to capture and to confiscate is therefore necessarily concluded against him.

On the contrary, so far as concerns the carriage of contraband which is on board a vessel bound to a neutral port as her port of discharge, but as to which it can be proved by the belligerent who seizes it on the high seas that it is being carried on board that vessel

not for the purpose of importation into the common stock of the country where they will be unloaded, but for the purpose of their being forwarded from the port of discharge by land or water, it matters not which, to the enemy or for the enemy's use, and under arrangements for effectuating that purpose, I prefer the view that the international law ought to look beyond the destination of the vessel to the destination of the goods, and to sanction the belligerent's interference with the adventure by the detention of the carrying vessel and the confiscation, through the Prize Court, of the contraband goods. It appears to me that there is great force in the observation of Sir Godfrey Lushington, that, if the contrary view were established, then, under certain circumstances, a belligerent might as well give up all attempt to stop contraband.*

Certainly the belligerent's claim, in this case of contraband, has, in its favour, a great body both of expert opinion and of national practice, during the last half century. The judgments of the French Prize Court in the case of *The Frau Howina*, a Hanoverian ship captured in the course of the Crimean war; of the Supreme Court of the United States in several cases during the American Civil War; of the Italian Prize Court in the case of the *Doelwijk*, a Dutch vessel, captured in the course of the war between Italy and Abyssinia in 1896; the Prussian Regulations of 1864 regarding Naval Prize; and, last in date, the action of the British Government during the late Boer war in regard to *The Bundesrath*, *The Herzog* and *The*

* Cited in an article contributed by Mr. Dundas White to the *Law Quarterly Review*, for January, 1901 (Vol. XVII., p. 22).

General; all these are in accord with the weighty opinions* of Bluntschli, Calvo, Gessner, Perels, Westlake and Holland, and with the rule adopted by the Institute of International Law at its Venice Meeting in 1896 "La destination pour l'ennemi est présumée lorsque le transport va a l'un de ves ports on bien à un port neutre qui, d'après des preuves évidentes et de fuit incontestable, n'est qu'une étape pour l'ennemi comme but final de la même operation commerciale."†

But the conclusion, I submit, ought to be different when we come to consider the second of the two cases which I have put, and with which this paper is specially concerned, because it is the case of a seizure of a neutral vessel bound to a neutral port, which the belligerent who seizes her seeks to justify not on the ground of the cargo being contraband, but on the ground that the cargo on board has been shipped and is being carried to the neutral port, with the purpose, for the execution of which the shipper or his agents have made or will make arrangements, of those goods being carried in some other vessel to a port which the belligerent is blockading. The theory of such a justification has been maintained, so far as I know, only in the Courts of the United States during the Civil War of 1861. It appears in the judgments of the Supreme Court in *The Bermuda*‡ and elsewhere; but I shall limit myself to quoting, as it is there stated within the compass of a single sentence, from the judgment of Chief Justice Chase in *The Springbok*§ :—

* Quotations from the works of the continental jurists are collected by Mr. de Hart in his article in the L. Q. R., Vol. XVII., pp. 198, 199.

† Annuaire de l'Institut de Droit Internationel, Vol. XV., p. 231.

‡ 3 Wallace (Amer.), 514.

§ 5 Wallace (Amer.), 1, at p. 23.

"But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, 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.*"†

The theory thus judicially asserted has, I believe, been universally, or almost universally, disapproved both in Great Britain and on the Continent; and, with most sincere deference to the great tribunal and to the very learned Chief Justice who delivered its judgment in this and in other prize cases of that period, I must say that I cannot see how the action of the captor in such a case can be justified by an application to blockade of the doctrine of 'continuous voyage,' or of any logical extension of that doctrine.

It would, I think, be almost presumptuous on my part if I thought I could better, by language of my own, the following clear and concise comment contained in the following passage:—

"In the United States, during the Civil War, the carriage of contraband was generally presented to the Courts in connection with blockade-running, to which the doctrine of continuous voyage does not apply. The offence of blockade-running, consisting in the attempt to communicate with a prohibited port, and not in the introduction of a prohibited class of goods, is essentially one of the ship, and not an offence of the goods, except as derived from that of the ship. If a

* The neutral port, for which the vessel was bound, as her port of discharge, at the time of her capture.

† The italics are my own.

ship is bound for a neutral port, not as a port of call, no blockade-running has been attempted by her, and her cargo, still innocent, cannot connect her with any such attempt which the ship into which it may be removed may afterwards commit." *

B. *The time at which the 'attempt' to run the blockade ought to be held to begin, so far as it affects the liability to capture.*—There is no doubt that, according to both the British and American view of international law in relation to maritime warfare, a ship 'attempts' to run the blockade, and is, therefore, liable to capture from the moment of her sailing, if those who are responsible for her direction had at the time, or must be presumed to have had, knowledge of the blockade, and intended, nevertheless, that she should prosecute a voyage to the blockaded port. The law was so laid down by Lord Stowell,† and in the American decisions, in cases arising out of the blockade of the Confederate seaboard by the United States, "they enforced in all its strictness the rule that the act of sailing from a neutral to a blockaded port with intent to enter and with knowledge of the blockade, subjects both ship and cargo to condemnation." According to French practice, which, I believe, the prevalent view of continental jurists approves, the liability to capture is first created only by the attempt to cross the very line of blockade or by proceeding, in order to do so, after receiving a notification from a belligerent warship. Without admitting the justice of Pillet's condemnation of the Anglo-American rule—which he

* Westlake, *International Law*, Pt. II., pp. 256, 257. That very learned jurist has more fully stated his argument in an article in the *Law Quarterly Review* (1899), Vol. XV., p. 26.

† See his judgment in *The Columbia*, 1 C. Rob., 154.

denounces as resulting in "une extension démesurée donnée à la notion de violation du blocus et pour les neutres, une insécurité générale"—I should venture to suggest that those who may have, and, we may I hope, at no distant date, to consider whether an international agreement as to the rules of blockade cannot be concluded, might well consider whether the conditions of modern commerce and intercourse by sea, and the interests of civilisation which are increasingly dependent upon their security, do not justify some limitation of the right of capture to a narrower area than the rule allows. "It may further be observed," says Mountague Bernard, "that any extension of the belligerent's power to capture on the high seas has a tendency to diminish more or less the necessity of keeping an adequate force at the place or places blockaded, and thus to open the door to paper blockades."

It appears to me that in this matter it is not a question of choice between the very wide Anglo-American area of capture and the very narrow area given by the French view of international rights, which, for reasons which I have already had occasion to indicate in dealing with the requirement of a special notification, may reasonably be objected to, from the belligerent's standpoint, as offering too great an opportunity to the blockade-runner. Mine is merely a tentative suggestion, but it occurs to me that a solution of the difficulty of agreement between the advocates of the two systems might be found in the compromise which would result from the adoption by international compact of a rule which should require that the belligerent's

* *The Neutrality of Great Britain during the Civil War* (1870), p. 308.

notification of blockade should specify, by latitude and longitude, or in some other way, a zone (not necessarily a narrow zone) within which the blockading force would operate in its maintenance of the blockade, and entry into which would subject all vessels to capture and condemnation unless it could be clearly proved that they were not attempting to enter the blockading port. The 'attempt' would, under such an arrangement, not be treated as commencing, so far as to fix a liability upon the ship until she entered or was trying to enter the notified zone. It is, of course, possible that my want of acquaintance with naval matters has prevented me from foreseeing some reasonable objection on the part of belligerents to the acceptance of such a compromise as I have ventured to indicate. It is, however, I think, not undeserving of mention that, if my memory of the reported cases serves me aright, in every instance of condemnation in the English Prize Courts, from the commencement of Lord Stowell's time, for blockade-running, the vessel was captured when actually approaching or when hovering about the neighbourhood of the blockaded locality.