MARITIME NEUTRALITY TO 1780

A History of the Main Principles Governing Neutrality and Belligerency to 1780

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PREFACE

THE present work had its inception in the author's doctoral dissertation, *Great Britain and the Baltic States, 1772–1780,* which aimed to show that it was the domestic contingencies and the interdependence of the various Northern Governments, rather than maritime rivalry, which conditioned their diplomatic relations with England. However, the maritime controversy could not be evaded. The present study is therefore a history to 1780 of the main principles involved in maritime controversy between neutrals and belligerents, and of the agencies evolved to give effect to these principles.

The history of these principles and agencies contravenes some of the commonly accepted interpretations, even among historians, of the conflict between neutrals and belligerents. It indicates that the Armed Neutrality of 1780 was not the first, but rather the fourth, or even the fifth, concerted action by neutrals to secure their freedom of navigation upon the high seas; that the principle embodied in the so-called Rule of War of 1756 was not an innovative principle in the middle of the eighteenth century, but that it was as old as the national states; that the institution of privateering, and the principles underlying blockade and the definition of contraband of war served the civilizing forces of Europe fully as much as did the development of prize law and prize courts, and helped to liberalize restrictions upon neutral commerce; and that

in the great maritime wars of the eighteenth century some states, now for the first time habitually neutral, having lagged in the development of trade and colonies, sought through militant neutrality to profit from the embarrassment of the belligerents.

The work was pursued with the aid of the Bureau of International Research of Harvard University and Radcliffe College, and published through the generous support of the Carnegie Endowment for International Peace. To each of these organizations the author here expresses his grateful appreciation. In the search for facts use has been made of treaties, the various maritime codes and compendiums, instructions to naval forces, diplomatic correspondence, Acts of Parliament and decrees of Kings and Councils, prize court decisions, and the writings of early commentators. The most helpful of these are indicated in the footnotes. For the free use of this material the author is under great obligation to the authorities of the Harvard University Library.

The study was suggested by Professor Wilbur C. Abbott, to whom the writer owes a long debt of gratitude for his encouragement and criticism. He is greatly indebted to Mr. George A. Finch, who read the manuscript and acted for the Carnegie Endowment, and to Professor George Grafton Wilson who gave him many timely suggestions. Most of all does he owe to Professor Sidney B. Fay who gave invaluable advice throughout the progress of the work, and kindly criticized the manuscript in regard to form and subject matter.

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INTRODUCTION

THE treaties of peace concluded at Utrecht, Frederiksborg, and Nystad, terminating the War of the Spanish Succession and the Great Northern War, mark the end of an epoch and the beginning of a new era in the diplomatic history of Europe. The Peace of Utrecht set a bound to the restless ambition of the Bourbon dynasty to establish its hegemony in Western Europe. It eliminated French interference in the political life of England and established the Protestant succession in the House of Hanover. It introduced to war-torn Western Europe three decades of peace, when there was to be diplomatic coöperation between France and England.

When the wars between these Powers commenced again in the middle of the century, the emphasis was shifted to the colonies, to India and America. Since these new wars became mainly maritime and colonial, they tended to affect in varying degree the commercial activities not only of the subjects of the belligerents, but, in a larger measure than in any previous war, the commercial activities of nations not directly participants in the conflict. Thus the far-flung naval campaigns of the eighteenth century affected the welfare of a larger number of people than did the more localized dynastic wars of the seventeenth. The disputes which now arose between belligerents and neutrals became more clearly drawn. They were intensified by the fact that the dynastic wars had brought about a new alignment of

the European Powers, so that states which theretofore had been involved in nearly all the great wars were content, in the time of wars of the eighteenth century, to remain interested spectators and to reap the fruit of their condition of neutrality.

Of such states Holland was a notable example. Having borne for over a generation the brunt of the attacks of Louis XIV, she was temporarily exhausted. Her population of only two millions — a tenth of that of France — and her limited resources compelled her statesmen to abandon all thought that she might continue to play the part of a first class Power on the Continent. The preeminence which she had enjoyed as a colonial and commercial nation was passing from her hands to those of England. Therefore, during all the succeeding wars between the Great Powers she preferred to remain at peace. In the days of her struggle against Louis XIV, in 1689 in particular, her statesmen had joined with England in imposing unreasonably severe restrictions upon neutral commerce; in 1780 they gladly coöperated with the neutral Courts of the North to impose equally severe restrictions upon the belligerents. At the former date she was one of the chief belligerents; at the latter, temporarily involved in the war, she was hoping to protect her trade by means of help from the other neutral Powers. Her transition is significant of the contradictory interests of neutral and belligerent.

A shift in the balance of power had also taken place in the Baltic region. The evolution of Russia, the decline of Sweden, the foreign and commercial policies of Denmark, and the new relationship between the Scandinavian states, all exerted a determining influence upon the controversies which in the course of the century arose between states

which remained neutral and those which, in consequence of their expansion and colonization, became involved in the great maritime wars.

In the realignment of the Baltic states at the end of the Great Northern War the balance inclined heavily in favor of Russia, which at that time rose to the rank of a first class Power. The process of unifying the diverse elements of which the Muscovite territories were composed had been advanced by Peter the Great, and the center of the Slavic world was as a consequence being shifted from Warsaw to St. Petersburg, or to Moscow. On the ruins of the Swedish Baltic empire arose the unwieldy structure of Russian Tsardom, as the Romanoffs succeeded the Vasas as the most formidable rulers of Northern Europe. But a century was to elapse before Sweden would become reconciled to the loss of her provinces on the eastern shore of the Baltic and abandon her hope of revenge. Therein lies one of the keys to Russian foreign policy. In the event of war between Russia and one of the other Great Powers, Sweden might become a dangerous neighbor. Russian diplomacy therefore aimed to tie the hands of Sweden's rulers by finding occupation for them among the maritime states of the West. That was its aim in the time of the War for American Independence and of the Armed Neutrality of 1780.

There were other elements of Russian foreign policy relative to the formation of that league of neutrals. These came from the Russian acquisition of the Baltic provinces, and, consequently, from Russian supervision over the foreign merchants who had established their commission houses in the trading centers of these provinces. English and Dutch traders had begun commercial intercourse with

Archangel in the sixteenth century. Dutch, English, Germans, and Scandinavians began to settle in Eastern trading centers, such as Riga, Memel, and, later, St. Petersburg. As factors and commission merchants they controlled the trade of the interior region, which was mainly Russian. When the Baltic provinces containing these cities were conquered, the foreign merchants continued their trade, but came more directly under the observation of the Russian government.

In connection with this situation there were two definite tendencies. When the Russian government came under the influence of Western mercantilism, and forthwith began to subsidize industry, to import foreign artisans, and to regulate trade on a nationalistic basis, there arose resentment and criticism relative to the favorable position occupied by the foreign merchants. At the same time it happened that foreign countries — France, Denmark, and Sweden, in particular — became aware of the preëminent position which the English had obtained in some of the Eastern towns. These countries proceeded by means of diplomacy and other methods to undermine the English so as to secure for themselves a greater share of the Russian foreign trade. This policy was intensified after the Peace of Paris in 1763. It helped to prepare the way for closer coöperation among these Powers during the War for American Independence.

For Sweden the results of the Great Northern War were fully as significant as for Russia. The death of Charles XII and the subsequent Peace of Nystad in 1721 closed the chapter of Swedish dominion in the Baltic. A war with Poland of a hundred and fifty years' duration was ended. A century of futile thrusts at the Russian colossus was to

ensue before Sweden would become reconciled to her new position and definitely accept the limitations set by her natural boundaries. But the year 1721 found her exhausted, her people impoverished, her trade completely disrupted, her imperial power irrevocably lost. Peace with other Powers, thrift and hard work at home, and a market abroad for the products of her fields, mines, forests, and industries were prerequisites for the restoration of prosperity and security in Sweden.

Some important changes were effected in the position of Sweden. For a period of a century and a half before the Peace of Nystad the waging of war had been her chief interest, and the country had been organized primarily for that occupation. In the eighteenth century the periods in which Sweden was at war became as exceptional as the years of peace had been in the seventeenth. The transformation of the country from the status of belligerency to that of neutrality was a decisive factor in bringing to issue old commercial disputes between nations that were at war and those that remained at peace.

The new conditions in Sweden gave encouragement to peaceful pursuits. The government took an active part in promoting the economic life of the country. Industry was encouraged by a policy of militant mercantilism; commerce and shipping by a nationalistic navigation system. Old markets for Swedish products were to be extended and new markets developed in various parts of the world. But certain obvious results necessarily followed such a policy of trade expansion. Its course began to run athwart the fields of operation of the belligerents in the maritime wars which began in the middle of the eighteenth century. In these wars the Swedish commercial policy discovered a

powerful stimulus for, and likewise a restraining force upon, the far-reaching calculations of its promoters.

For Denmark also there dawned a new age after the end of the Great Northern War. From one point of view the settlement of 1720-1721 had less significance for Denmark than for Sweden. While the latter had lost an empire, the former had increased her territory through the acquisition of the possessions of the Duke of Gottorp in Schleswig and the union of these with the Duchy of Holstein. In other respects the results of the settlement were similar. With the rise of Prussia and Russia to preëminent positions in the North, Denmark, like Sweden, became permanently a lesser Power. In consequence of her comparatively meager resources and lack of opportunity for expansion, it was necessary for her welfare that she should remain at peace. For a period of over two generations after the Peace of Frederiksborg in 1720 she took no part in any war.

The economic policy of Denmark differed but little from that of Sweden. The chief ministers of the Crown, including the two Bernstorffs and Schimmelmann, believed that the prosperity of the country was contingent upon the successful development of commerce and industry. An intensive mercantilistic policy was evolved, requiring the protection and promotion of the shipping industry, the creation of monopolies here to extend existing Danish trade, there to introduce it in foreign ports — and the establishment of colonies. There followed the creation of a system of credit to enable native merchants to deflect into Danish channels the trade theretofore under the control of foreign subjects. In these enterprises the government became an active participant.

Then came the great maritime wars between France and England. These furnished a unique opportunity for achieving the goal set by the statesmen of Denmark. It was determined that trade should profit by the temporary embarrassment of the great commercial nations, but in the endeavor to carry out a program of this nature the Danish policy of trade expansion, like that of Sweden, came into open conflict with the interest of the belligerents.

Yet another important change was effective by the Great Northern War. By destroying the predominance of Sweden it served to establish the balance of power between the two Scandinavian states. In turn there came an important result. Since neither Sweden nor Denmark was thenceforth of any great weight in European politics, save as the ally of some Great Power, they ceased to be essentially warlike nations in their relationship with the other states. They likewise discontinued the long and bitter wars which had characterized their policy toward each other in previous centuries. During the eighteenth century their diplomatic relations were indeed disturbed by an atmosphere of friction and suspicion, by the fear of war, and by the creation of alliances for defense or aggrandizement, but until the last years of the reign of Gustavus III there was no breaking off. Meanwhile there were sincere, sometimes even successful, attempts made for coöperation between Copenhagen and Stockholm. One of the most notable of these occurred in 1780.

These general characteristics of European developments in the eighteenth century indicate that the political and economic situations, particularly in the North, were propitious for the creation of armed leagues, such as that of 1780. A militant mercantilism was evolved in all the

Baltic states. In the time of the maritime wars it was inevitable that this aggressive commercial policy, having for its incentive the urge toward economic betterment and self-sufficiency, should encounter the equally persistent drive toward trade expansion on the part of the belligerent Powers, notably of England. It was this commercial policy which impelled the rulers of the neutral states to combine in a league in order to provide a wider field for the activities of their merchants.

The creation of the league of 1780 was also facilitated by certain specific and local factors. These were engendered by the *coup d'état* of Gustavus III in 1772, by the close relationship subsisting between France and Sweden, by the fall of Struensee and Queen Caroline Matilda in 1772, and by the close diplomatic coöperation throughout the century between the Courts of Copenhagen and St. Petersburg.

The league of 1780, unlike the leagues of 1691, 1693, and 1756, formally enunciated a comprehensive program of specific principles which it proposed to make effective throughout the world, irrespective of the opposition of other nations. It adopted a creed, as it were, drew up a formula, and armed to compel the world to acquiesce in what its members regarded as the true interpretation of old maritime usages, treaty stipulations, and prize court adjudications. The creed was based on the conception of the law of nature and the law of reason then in vogue among political philosophers. The Danish professor of jurisprudence, Martin Hübner, was its prophet; the Danish secretary of foreign affairs, A. P. Bernstorff, its propounder.

The men who formulated the ostensible program of that league borrowed freely from contemporary thought, with results easily discernible. Unbounded faith in the force of logic and in the mathematical correctness of logical conclusions, faith in the potency of the law of nature and the law of reason, and a firm belief in the supremacy of an idea and the possibility of its realization characterized the program of the Armed Neutrality of 1780, as it characterized the programs of reform advocated by many French thinkers of the eighteenth century. Such programs disregarded the complex nature of law, of custom, of international agreements, and of the organization of the national state. The lessons taught by history were unheeded. The aim was to effect immediate transformation of social and international institutions without regard for the element of time, for events, such as the great wars, which required the undivided attention of several of the greater states, or for the nature and condition of man.

The policy of that association of neutral states served to give impetus to the serious discussion of a fascinating subject. For a difficult problem it propounded a comparatively easy solution. Its program appealed alike to the political acumen of Frederick the Great and to the opportunism of Vergennes. More important still from the point of view of historiography, this program appealed to the sentiment of contemporary publicists and of succeeding historians. The force of such appeal was heightened by the accident that when the league was formed the American colonies were involved in a dramatic conflict to establish their independence and a government based upon the sanction of a whole people. The efforts of the Northern

Powers to secure the so-called freedom of the sea to the neutral nations came to be regarded as a part of the general struggle for liberty both in America and in Europe.

In consequence of these conjunctures the efficacy of the Armed Neutrality of 1780 has been regarded too highly. To it has been attributed reforms which actually were effected under different conditions and in time of peace, in the following century. The commercial and political contingencies which actuated its founders have been often disregarded, the origin and the history of the principles it enunciated often neglected. These facts have prompted the present survey of the evolution of the specific principles embodied in the formula drawn up by A. P. Bernstorff and accepted as the platform of the league, and likewise the review of the earlier armed neutralities which served as precedents for that of 1780.

CHAPTER I

EARLY PRIZE LAW AND PRIZE ADJUDICATION

THE Armed Neutrality of 1780 declared that captured neutral vessels should be adjudged without delay; that the proceedings should always be uniform, prompt, and legal; and "that in every instance, besides the reparation afforded in cases in which there has been loss, but not offence, complete satisfaction shall be given for the insult offered to the flag of their Majesties." The declaration was not consonant in many respects with the system of maritime usages that had grown up with the national states. It was based on the assumption that a complicated code, evolved through generations of struggle and compromise, could be simplified at the bidding of three states, one of which had not yet emerged as a trading nation. It ignored numerous treaty provisions, which, if heeded, would preclude uniformity in Admiralty Court adjudications, and it claimed as an established right the privilege on the part of the Declaratory Powers to enjoy immunities never theretofore gratuitously extended to neutrals. It disregarded many illegal practices among the neutral traders, which called, in the trial of a captured ship, for protracted hearing and weighing of evidence from bills of lading, passports, and naturalization papers, much of which had to be collected in far distant commercial cen-

ters of neutral countries; and it implied that the delay, cost, and injustice attendant on prize court adjudications were caused chiefly by irregularities on the part of belligerent judges and privateers. In short, the declaration assumed that a militant political statement could define properly, in all their ramifications, the maritime practices and regulations that had accumulated since the Middle Ages.

Basic Codes of Maritime Law

Medieval Europe has been characterized as being primitive, unorganized, and lawless. That characterization is only partially true. Although politically dismembered, Europe, before the advent of the national states, had evolved into a society with some degree of unity in her financial and commercial relations. Trade and commerce were indeed matters of local concern, inasmuch as they were under the control of the municipalities. But these were organized into great leagues, or united into great commercial empires. These leagues had their own fleets, their own diplomatic service and imperial policies. Moreover, they developed codes or compendiums of maritime law and practice which became the foundation of international prize law.

Of these compendiums the most important for the development of prize law was the *Consolato del Mare*,[1] a

[1] *Libro di Consolato Novamento et Ricor*, etc. (1539). Of the original text there are several copies in the Harvard University Library. The work is exhaustively treated in Pardessus, J. M., *Us et coutumes de la mer ou collection des usages maritimes des peuples de l'Antiquité et du Moyen Age* (Paris, 1847), II, pp. 1–368. In Robinson, Christopher, *Collectanea Maritima, being a Collection of Public Instruments, etc., tending to illustrate the History and Practice of Prize Law* (London, 1801) there is contained a translation of chapters 273 and 287 of *The Consolato del Mare Relating to Prize Law.*

collection of the maritime usages of Southern and Southwestern Europe from the beginning of the revival of commerce at the time of the Crusades to the development of oceanic navigation that resulted in the discovery of America. The prize law incorporated in this compendium was inherited by the maritime states of Modern Europe. It thus became the basis of all specific stipulations regarding matters of prize in the commercial treaties among the modern states until the latter part of the seventeenth century, at which time many attempts were made to change some of its regulations. Nevertheless, the majority of commercial agreements and prize court decisions of the eighteenth century coincided with the principles of the *Consolato del Mare.*

Two other codes or systems of maritime law were developed by Medieval Europe: those of Oléron [2] and of Wisby.[3] The laws of Oléron probably derived many of their precepts from the *Consolato del Mare.* They were introduced early into England from Flanders, and with more or less local modification they also became the basis of the maritime laws of Amsterdam. The laws of Wisby in their turn borrowed from the Code of Oléron. Likewise, they drew upon the laws of Lübeck and of Amster-

[2] Pardessus, *Us et coutumes de la mer,* I, ch. VIII, contains (a) a discussion of the *Coutumes de la mer connues sous le nom de Rooles ou Jugemens d'Oléron,* pp. 282–322, (b) the Code, or *Droit Maritime vulgairement connu sous le nom de Rooles ou Jugemens d'Oléron,* pp. 322–354. The Code of Oléron is also given in *The Black Book of the Admiralty,* Travers Twiss, editor (London, 1871), II, pp. 211–397.

[3] On the laws of Wisby Pardessus, *op. cit.,* I, ch. XI contains (a) *Consideration de la compilation vulgairement connu sous le nom de Droit de Wisby,* pp. 425–462, (b) the text of *Droit maritime connu sous le nom de lois de Wisby,* pp. 463–524. See also *The Black Book of the Admiralty,* IV, pp. 265–299.

dam, and made their own contribution to the laws of the Hansa Towns.[4] They were recognized not only in the Baltic region but also throughout a great part of the rest of Europe. While these two codes were of importance in the development of maritime law, they were of less significance in the history of prize law than was the *Consolato del Mare*. They formed the basis of subsequent laws dealing with salvage, average, and the like.

The existence of these three compendiums or codes indicates that when the national states emerged they fell heir to a highly developed system of maritime law, particularly of prize law. Representing the principles that had survived many years of relentless competitive practices of the chief maritime cities of Europe, this prize law, as recorded in the *Consolato del Mare,* was based less on theory than on the actual experience of practical navigators and traders. Gradually amplified to meet the accretions of a changing society, it was able to weather more successfully the storms of the naval wars than were the newer schemes of law proposed by theorists. It was for all practical purposes universally recognized. It was in a certain sense fundamental law, or common law, as it were, to which the courts would refer when adjudging cases concerning which they found no treaties or immediate precedents to guide them. It was incorporated into the legal systems of the several political units, but in the earlier centuries of the Modern Era it retained its characteristic as the prize law of all Europe.

Yet the fact remains that this prize law had been developed to meet the needs of a comparatively simple society. At the beginning of the Modern Era the social out-

[4] Pardessus, *op. cit.*, II, pp. 432–557.

look was rapidly changing, the horizon rapidly expanding. Upon the evolution of the modern states and the great commercial empires, with the attendant growth in commerce and the introduction of new commodities, social conditions became increasingly complex, commercial activities multifarious indeed. The ensuing wars were more highly organized than those of previous centuries, and fought on different principles and on a far vaster scale. To overcome the enemy new weapons were introduced, more varied and extensive naval stores were required, and a different economic policy was called into being, especially after the enactment of modern navigation laws.

To meet the requirements of the new conditions it was necessary that the prize law should be changed and amplified. Perhaps the modifications were effected too slowly; perhaps the law lagged too far behind the needs of the times. At any rate, severe criticism arose, though usually only during the period of a great war. Unfortunately, the criticism was directed not so much against the inadequacy of the legal code and the failure to amend it as against those who were entrusted with the task of interpreting the law and of adjudging prize cases in the light of such interpretation. Upon the judges and other officials of the various European Admiralties was cast severe reproach for their failure to administer legal provisions that had not yet come into existence.

Development of the Prize Courts

The fact that a systematic prize law was developed during the later Middle Ages clearly implies that captures were made at sea. Documentary evidence as early

as the end of the thirteenth century reveals that vessels suspected of carrying warlike stores to an enemy were seized.[5] Neutrals were sometimes requested not to carry contraband or other supplies to a belligerent,[6] and when they engaged in such traffic their ships might be apprehended. But the most common form of seizure was that made in individual retaliation. Letters of reprisal were issued to private individuals, licensing them to capture vessels belonging to the party or the state which had wronged them and from which they had been unable to obtain justice. The seizure of merchantmen, then, was a recognized method of warfare both public and private at the beginning of the Modern Era.

Seizures at sea were necessarily followed by legal proceedings before some competent body to determine whether or not the captured vessels were good prize. Jurisdiction in such trials was gradually defined and specialized. Before the prize law had become differentiated from the law of the land in the several countries, the officials who had jurisdiction over litigations arising under the local law presided over prize cases also. In the course of time, this means of law enforcement proving unsatisfactory, prize cases were transferred to an admiral, or his lieutenants, who, to begin with at least, probably exercised summary jurisdiction in the districts under his command.

Such transfer of jurisdiction to a more specialized tribunal had occurred in some countries before the beginning of the fifteenth century. Available documents show

[5] Marsden, R. G., (ed.), *Documents Relating to the Law and Custom of the Sea* (London, 1915–1924), I, p. 21. This work hereinafter cited: Marsden.

[6] *Ibid.*, I, p. 64.

that as early as the middle of the fourteenth century captured vessels and cargoes when brought into an English port were tried before the Admiral. By the end of that century, if not earlier, a similar change had taken place in France.[7]

The necessity of mitigating or abolishing irregularities in the matter of captures and trials gave rise to further specialization in the method of adjudication. A French ordinance of 1400 conferred upon certain officials of the Admiralty the power to judge prize cases, and provided that some of the most important cases should be referred to an admiral. Other changes followed. By virtue of subsequent ordinances, and of numerous regulations and edicts,[8] it was established that whenever captures were made at sea by a French subject the adjudication should be rendered by the officials of the Admiralty of the port into which the prizes were taken. Appeals from their decision were to be taken to the *table de marbre*, or to the *parlement* of the province in which the port was situated.[9] During the period between 1627 and 1669 the office of admiral was suspended[10] and was replaced by that of grand master of navigation, which took cognizance of prize cases. That office was successively held by Richelieu, Anne of Austria, and the Duc de Vendome—all much occupied with other matters and not especially

[7] Lebeau, *Nouveau code des prises, ou recueil des édits, déclarations, lettres patentes, arrêts, ordonnances, règlemens et décisions sur la course et l'administration des prises, depuis 1400 jusqu'au mois de mai 1789; suivi de toutes les lois arrêtés, messages, et autres actes qui ont paru depuis cette dernière époque jusqu'à présent* (Paris, 1799–1801), I, p. 1, art. 4, Ordinance of 1400.

[8] Lebeau, I, pp. 10, 21, 45, 49, 53, 85, 91.

[9] *Ibid.*, pp. 1, 5, 21, and the ordinance of Feb., 1650, arts. 6 and 9, p. 33, and that of 1681, art. 29, note, p. 113.

[10] *Ibid.*, p. 30.

qualified for this function. The result of this situation was that the *conseil des prises* was established by the *Lettres Patentes* of December, 1659, and was set up anew at the commencement of every subsequent war. Appeals from its decisions were to be taken to the Royal Council.[11]

With some changes this system remained intact until the time of the Revolution. Briefly, the French law of the eighteenth century vested the power to adjudicate prize cases in a body of ten councillors of state and six masters of requests, with an admiral as president. Subordinate officials resided at the various ports. Appeals from the decisions of this court were made to the King in Council, where all such cases were determined in accordance with reasons of state.[12] That is, political exigencies of the moment rather than legal principles conditioned the pronouncements. The neutral trader often profited by this system.

The evolution of machinery more or less specialized for the adjudication of prizes was not peculiar to France. Treaties and other evidence prove that similar developments took place in other Continental countries.[13] In the sixteenth century, even while the several provinces of the Netherlands were jealously watching over their local power and interests, Holland delegated to the Admiralty all jurisdiction in the matter of captured ships brought into one of her ports by commissioned privateers and men-of-war. The third clause of the ordinance which the States-General of the United Provinces issued in August, 1597, provided that the Admiralty Court should

[11] Lebeau, I, p. 49.
[12] *Ibid.*, I, pp. 85, 229, 294, 377, 452, 517; II, pp. 95, 330, 338.
[13] Pardessus, *op. cit.*, I, pp. 394 f.

have jurisdiction over all booty and all prizes that might be taken and brought in by vessels of war or privateers operating under the order of the Admiral.[14] This function was thenceforth permanently vested in the Admiralty, the Estates of Holland declaring in 1673 that it was a well-known rule that the Admiralty was competent to adjudicate prizes taken upon the seas and rivers. Appeal from its ruling would be made to the States-General.[15]

At an early period Denmark likewise conferred jurisdiction in maritime affairs upon the Admiralty.[16] In the seventeenth century and in the eighteenth all captures made at sea by Danish privateers and men-of-war were adjudicated by the Courts of Admiralty of the several administrative districts, upon evidence taken by local officials and by them transmitted to the Courts.[17] In cases of complaint by the claimant or his sovereign, the decisions of the Admiralty Court were to be reviewed by the King's Council.[18]

The Spanish practice differed from that of the other Continental states. According to the Italian jurist, Azuni, the second article of the Spanish ordinance relative to privateering provided that the legality of captures at sea was to be determined by the intendants, or their sub-

[14] Bynkershoek, Cornelius van, *Quaestionum Juris Publici Libri Duo.* Translation by Frank Tenney (London, 1930), Bk. I, ch. 17, p. 100.
[15] *Ibid.*, p. 108.
[16] Dumont, J., Baron de Carlscroon, *Corps universel diplomatique du droit des gens, contenant un recueil des traitez d'alliance, de paix, de trêve, etc., faits en Europe depuis Charlemagne jusqu'au présent [A. D. 800–1731]* (Amsterdam, 1726–1731), VII, pt. 1, p. 132, arts. 23, 24, the Anglo-Danish treaty of 1670.
[17] See Larsen, Kay, *Danmarks Kapervaesen* (Copenhagen, 1915), Instructions of 1807, arts. 15 and 16.
[18] *Cf.* the Franco-Danish treaty of 1742 in De Clercq, Alexandre (compiler), *Recueil des traités de la France, publié sous les auspices de M. C. de Freycinet, président de conseil, ministre des affaires étrangères* (Paris, 1880), I, p. 46, art. 38.

delegates, residing in the various ports. In the event there was no such official in the port to which a prize was taken, the case was to be decided by the intendant of the province. When in 1675 a controversy arose between the Supreme Council of War for the Kingdom of Spain and that of the Province of Aragon, the Queen-Regent, mother of Charles II, with the advice of the States-General, decided that the Council of War had the exclusive cognizance of all disputes relating to war, "as the sending of dispatches and questions relative to salutes and to prizes, which must be determined according to military laws." [19]

Of all the European tribunals the High Court of Admiralty of England came to be most significant for the development of international prize law. Its evolution affords the most convenient illustration of the manner in which prize court jurisdiction was slowly being differentiated from the narrower province of national law, and likewise of the way in which the High Court itself differed from corresponding institutions on the Continent. In the eighteenth century this Court was composed of the ordinary Court of Admiralty, so called, and the prize court. At that time appeals from its decisions were heard by the Lords Commissioners of Appeals, that body consisting chiefly of the King's Council. There were also several Vice Admiralty courts established in the colonies. When these functioned as prize courts appeals were taken to the same Lords Commissioners of Appeals.

[19] Azuni, Dominico Alberto, *The Maritime Law of Europe*. Translated from the French by William Johnson (New York, 1806), II, p. 264. For the Anglo-Spanish treaty of peace, commerce, and alliance, concluded at Madrid in 1667, see Dumont, VII, pt. 1, p. 27, art. 23; for the Treaty of Vienna of 1725 between Emperor Charles VI and Philip V., *Ibid.*, VIII, pt. 2, p. 114, art. 30.

The English prize tribunal, like the French, was built on foundations laid during the later Middle Ages. At a time when the Common Law courts were the only recognized legal tribunals in England such disputes over prizes as required legal adjustment were referred to them when not tried before the King in Council, for there was little or no distinction made between the different kinds of law administered, or between the methods of procedure. As time passed, trials in the Council occurred less frequently, and adjudications in the courts of the Common Law proved unsatisfactory. Gradually men began to differentiate between prize law, which in the main was of international significance, and the Common Law, which was English and chiefly local. As this differentiation progressed the procedure in prize cases was modified and tended to become more specialized.

The first major change in procedure came in the fourteenth century, when jurisdiction in prize cases was conferred upon the admirals.[20] An event illustrating this transference of jurisdiction occurred in 1357, when some Portuguese traders demanded the restitution of a cargo brought to an English port in a captured ship and condemned as good prize by an English admiral.[21] The Portuguese recognized the legality of the admiral's jurisdiction, but based their claim upon the allegation that he had paid no regard to the compact of friendship between England and Portugal, and that he had not properly observed the prize law. The case was brought to the attention of Edward III, whose letter to the King of Portugal

[20] Marsden, R. G., "Early Prize Jurisdiction and Prize Law in England" in *English Historical Review*, 24 (1909), pp. 675–697, and 25 (1910), pp. 243–263; Marsden, *Law and Custom of the Sea*, I and II, introduction.
[21] Marsden, *Law and Custom of the Sea*, I, pp. 81 f.

contains the chief facts of the trial.[22] It is held that this instance affords the first record in the Admiralty files of a prize adjudication before an English admiral with appeal to the King in Council.

Thus were questions concerning the legality of captures referred to special tribunals. But before there could be a centralized court in England another transformation was necessary. The tribunals referred to in 1357 were the admirals' courts of the North, South, and West, each apparently under the immediate supervision of the several admirals controlling these districts. These constituted an important link in the evolution of the High Court of Admiralty of a later age, but their jurisdiction was ill-defined, their procedure irregular and expensive. That they should give way to a more highly organized and more efficient tribunal was inevitable. But in the meantime various other individuals or corporate bodies were invested with prize jurisdiction. A proclamation of 1426 [23] provided that captures made at sea and brought to a port for trial should be kept intact until the King's Council, the Chancellor of England, or the Admiral of England, or his deputy had determined whether the goods belonged to a friend or an enemy.

The office of the admiral deputy referred to in that proclamation originated in the fourteenth century. By 1450 it had become a judgeship with power to hear all principal cases appertaining to the sea. This function it performed intermittently for several generations longer, and while so doing concentrated in the hands of its judges the duties that had formerly devolved upon the local

[22] Marsden, *Law and Custom of the Sea*, I.
[23] *Ibid.*, p. 117.

Admiralty courts of the North, South, and West. When the functions were thus centralized, the office of the admiral deputy began to exert its influence. During the latter part of the seventeenth century it emerged as the High Court of the Admiralty.

Thus while man was learning the art of navigation, while he was building new avenues of trade and improving the efficiency of the weapons used in his frequent conflicts at sea, he was evolving a system of legal codes for the regulation of belligerency, often more or less piratical, and was developing in the form of national prize courts machinery for giving effect to those codes. Differing from each other in details of organization and operation, these courts nevertheless represented an institution common to the maritime states of Europe. At first sanctioned by custom, they were later defined and in a measure regulated by treaties.

Treaty Provisions Governing Prize Courts

Through such regulatory treaties there evolved a universally recognized principle of prize law. It became an established rule that a captor should come into the ownership of his prize only after a regular judicial proceeding had given each party an opportunity to present its case, and after the condemnation of the captured vessel or cargo had been pronounced in a Court of Admiralty or in an equally competent tribunal, the decision being based upon the customary law of nations and upon stipulations of treaties. Equally significant were the treaty regulations which prescribed that the only court which might properly decree a sentence of confiscation upon a captured

neutral vessel and cargo was a court of the belligerent state to which the captor belonged.[24]

A large number of commercial treaties concluded after the beginning of the seventeenth century took cognizance of captures of neutral vessels at sea and the consequent trials in the Admiralty courts. As early as 1632 [25] France and England agreed that whenever a privateer should capture a merchant vessel he should be obliged within twenty-four days after his arrival in the home port to lay before the judge of the Admiralty or his clerk all the books of accounts, papers, licenses, commissions, and bills of lading which he found in the prize, so that the interested parties might take copies thereof for their use. In places where there was no Admiralty judge the captured papers should be put into the hands of the King's officials, to be sent closed and sealed to the Judge Admiral. Likewise, the captor was required to bring with him the persons whom he found in the neutral vessel, or at least the captain and the master, or two or three of the principal officers, and present them within twenty-four hours before the Judge Admiral, or the mayor of the town or the King's officials. The captor might not detain such officers beyond the specified time, on pain of being punished and losing the prize; "and after said prisoners shall have been heard and examined, the said judges shall be obliged to set them at liberty, to follow their affairs as

[24] *Cf.* the Anglo-Danish treaty of 1661–1670, the Anglo-Dutch treaties of 1654 and 1667, the Franco-Dutch treaty of 1678, and the French treaty of 1716 with the Hansa Towns.

[25] Prior to this time similar regulations had been aimed at by an act of Parliament of 1414 and an Anglo-French treaty of 1497. See Cauchy, *Droit Maritime International,* I, p. 349, and G. F. Martens, *Versuch über Caper,* p. 332.

they shall think fit." After the ships had been captured and brought into a port, the mariners and seamen might not be banished, or any of the goods put ashore, without a previous order from the court, or before an inventory had been made in the presence of the principal persons concerned, "whereof a copy shall be delivered to them from the said judge." [26]

Such was the nature of the stipulations of early treaties upon matters of prize adjudication. In the course of the next one hundred and fifty years a large number of similar treaties were concluded, or treaties which stipulated that the validity of prizes should be determined according to the law and practices of the captor's country.[27] France, Spain, England, and Portugal agreed as late as 1763, in their treaty of peace in that year, that ships captured at sea should be tried and adjudged "according to the law of nations and according to treaties, in the court of justice of the nation who shall have made the capture." [28] Specific stipulations were included in other treaties that whenever a ship was captured the aggrieved party could make no demands upon the government of the captor's country, through diplomatic channels or

[26] Anglo-French treaty of 1632, Dumont, VI, pt. 1, p. 33, arts. 5, 6, 7.

[27] Treaties between England and Holland of 1668, arts. 9, 14; of Dec., 1674, and April, 1689, arts. 12, 13; between England and France of Nov., 1655, arts. 17, 18; of 1677, art. 7; (treaty of commerce) of 1713, arts. 26, 30; between England and Spain of 1677, art. 23; the Treaty of Ryswick between France and Holland of 1697, arts. 26, 31; between England and Denmark of 1670, arts. 23, 24.

[28] Martens, Georg Friedrich von, *Recueil de principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, etc., et plusieurs autres actes servant à la connaissance des relations étrangerès des puissances et états de l'Europe tant dans leur rapport mutuel que envers les puissances et états dans d'autres parties du monde depuis 1761 jusqu'à présent* (Göttingen, 1816), I, p. 104, art. 16.

otherwise, "where relief had not been sought for in the ordinary course, or where justice had not been denied or unjustly delayed." [29]

Not only adjudications in the first instance, but also reviews by superior tribunals were provided for in various conventions. In the treaty made between France and England at St. Germain in 1677 it was agreed that if the ambassadors or ministers of the King of England should complain of the sentences given in the French prize courts, the Most Christian King should cause the said sentences to be reviewed and examined in his Council in order to have them confirmed or annulled. The controversy that might arise should be decided within four months from the day when the complaint was made. The same procedure should be followed in respect to French vessels brought into England for adjudication.[30] Similar stipulations were inserted in a number of other treaties.[31] Article twelve of the marine treaty concluded at London in 1674 between England and Holland provided that reviews of admiralty cases should be made, in England by the Council, in Holland by the States-General.[32]

The rules governing the decisions of the superior court were identical with those of the court of the first instance. Both tribunals were guided by the law of nations and by the specific provisions of treaties subsisting between the states whose subjects were directly interested in the trial. In the eighteenth century it was held as a general rule that when no appeal was made both parties to the suit

[29] Marsden, II, pp. 148 f.
[30] Dumont, VII, pt. 1, p. 327, art. 22.
[31] Treaty between England and Holland of Feb., 1715, art. 2; between Holland and France of 1697, art. 12; of 1713, art. 33; between France and England of 1713, arts. 31, 32.
[32] Dumont, VII, pt. 1, p. 282, art. 12.

acknowledged the justice of the sentence pronounced by the lower court.

The functions of prize courts were therefore regulated by principles which were recognized as binding among the chief naval Powers. There were, of course, numerous variations. Treaty stipulations were in many cases dissimilar. By means of that fact the Dutch, for instance, succeeded on several occasions in obtaining for their merchants more favorable treatment than was accorded to those of other nations; and Denmark was at times able to secure advantages denied to Sweden.

Political considerations, moreover, not infrequently induced a government to ease the rigidity of its regulations, or even to suspend them to the advantage of a given country. France did so on numerous occasions, sometimes favoring Denmark, sometimes Sweden, or the Venetians. Still more noteworthy were the exceptions which she granted to the Dutch. But her most effective modifications were those which aimed to win the support of the Northern Powers in the days of the armed neutralities.[33] Through various treaties, England, Holland, and other states were likewise granting exceptions, sometimes to win an ally, sometimes to prevent a Power from joining the enemy.[34] Uniformity in the adjudication of prizes captured from the subjects of the several countries, as advocated in 1780, was not only unattainable, but, from the standpoint of the law and usages of several generations, undesirable. The law of nations was indeed uncertain, and the determinations thereon were various. So

[33] For the French edicts, letters, regulations, and ordinances for each war see Lebeau, I and II.
[34] Marsden, I and II.

long as treaty stipulations varied, so long would the pronouncements of the prize courts vary also.

National Regulations Governing Prize Courts

In addition to treaty stipulations and common usages of old standing there was another source from which the course of prize proceedings was derived: the regulations of the several states upon the seizure of ships at sea and the subsequent trial before a court. Such regulations, based on the prize law of the particular states, took the form of orders in Council, ordinances, acts of Parliament, and, as in France, letters of the King to the Admiral. While treaty stipulations tended to establish uniformity in organization and procedure, national regulations were conducive to diversity in both. In the French and English systems may be found the most profitable illustrations of the latter tendency.

The modern French regulations date from the ordinance of 1400.[35] Broad in their scope and minute in detail, they constituted the *Nouveau code des prises,* a collection of the ordinances, decrees, and instructions of the ancient régime, dealing with every possible phase of the maritime law and practices of France to the eve of the Revolution. These regulations emanated from the executive, and were drawn up to harmonize, as far as that was possible, with the foreign policy of the monarch during those centuries.

The nature of the French tribunals is clearly described by Azuni.[36] The *conseil des prises* did not, according to

[35] Lebeau, I, p. 1.

[36] *Op. cit.,* II, p. 268. This is a description of the Council of Prizes established by the law of March 18, 1800. But the author explains that this law had brought things back to the original state, such as prevailed before the enactment of the laws of February 14 and October 1, 1793.

his observations, belong to the ordinary judicature of France. It was a political institution established by a special commission from the government to decide in an executive capacity on the validity of maritime captures. It was a court of equity, a distinct body formed to decide cases between the inhabitants of France and those of foreign lands. Its decisions were based on the law of nations and the diplomatic relations existing with foreign states, and were not made according to the strict forms of the common prize law. "Its powers, therefore, are not limited or restrained by points of practice, or legal formalities, though it may decide upon them. Causes are not brought to a hearing, as they are before the ordinary tribunals. Simple memoirs, communicated by the respective parties, or their advocates, by means of the secretary of the Council, . . . which must contain the proofs of their respective rights and powers, are considered sufficient: no publicity, no detailed opinions, but simple decisions." [37]

Whenever ordinances, acts of the legislature in countries like England, or letters of the King were at variance with treaty stipulations, old practices, or the laws of the state issuing such regulations, it was inevitable that difficulties would arise, not only in the French prize adjudications, but in those of the European system in general. In theory treaties constituted the superior law, and in practice they often prevailed.[38] The British judges were frequently directed to comply with the Dutch treaty of 1674. In 1741 they were informed that treaty provisions

[37] *Ibid. Cf.* the English practices in this regard as they appear in the Admiralty cases reported by Pratt and Robinson.

[38] Marsden, II, pp. 414–418, 420, 428–429.

were to be observed, notwithstanding the tenor of the general instructions.[39] Such directions to the judges conformed to the general practices of France and other countries. But much would depend upon the position of the judges. When their tenure of office, or their function, was of a nature to make them subject to the immediate control of the executive, as was the case in some countries, the will of the King had the force of law.

In many respects this was true in France. After 1614 there was no Estates-General to circumscribe the ambition of the King and to guide, restrict, and protect his officials. The King, or his great officers of state, interpreted treaties and regulated the prize courts. From political and diplomatic points of view this arrangement had many advantages. It tended to make prize jurisdiction less rigid: favors were extended and withdrawn, interpretation of treaties became flexible, and the remonstrances of neutral ambassadors were met with graciousness, sometimes with sincerity. Unhindered by the rigidity of parliamentary legislation and by the power of a great commercial interest that through an Estates-General would impose its will, the French system was often able to placate the neutral trader and promote the diplomatic interest of France. It was probably less salutary for the steady development of international prize law.

The history of the English regulations is somewhat different from that of the French, especially after the Puritan Revolution. The execution of Charles I and the abolition of the office of Lord High Admiral left Parliament as the only authority capable of legalizing captures

[39] Marsden, II, p. 290.

by privateers and men-of-war. After the Restoration regulations for the Admiralty Court and for privateers were again issued by the King in Council; but from the time of the Revolution of 1688 Parliament became permanently the chief authority, although the Council continued to issue its instructions to the privateers.

In the early stages of prize court proceedings, however, there probably was little difference between the English and the French methods and institutions. But in the course of time they became differentiated, particularly as the English Admiralty Court progressively won recognition as an independent tribunal. Gradually this Court gained the exclusive right to deal with prize cases. This right was not seriously questioned after the Restoration. By the middle of the eighteenth century the Court was able to maintain that it had an inherent jurisdiction and that the commission to deal with prize cases was "no more than notification to the judge that he should proceed to exercise the jurisdiction he antecedently had of condemning prizes, but (that it) gives him no new power or authority."[40] Half a century later it was openly declared that the Court was not primarily British but international in character and scope, and that foreigners had the right to demand of it the direct application of the law of nations, divested of all principles borrowed from English jurisprudence.[41]

Thus the English prize court declared its independence. Not all its judges, however, had been able to follow an

[40] *Ibid.*, II, p. 330.

[41] Robinson, Christopher, *Reports of Cases Argued and Determined in the High Court of Admiralty; Commencing with the Judgments of the Right Hon. Sir William Scott, Michaelmas Term, 1798* (London, 1806), I, case of the *Maria*, VI, case of the *Recovery*.

independent course. Some had deferred to the opinion of the Crown, or had asked for particular instructions before pronouncing a judgment. The judges of Vice Admiralty Courts in the colonies were probably more given to this practice than those of the High Court. But the latter were not always willing to assume the burden of responsibility, particularly when subjected to great pressure arising from political or diplomatic considerations, such as those involving the creation of alliances at the approach of war. Sir Leoline Jenkins wrote, in 1689, that treaties with foreign nations were not to be the object of speculation or debate in the Court of Admiralty. They were to be interpreted by the King with the advice of his Council.[42] On the other hand, the same year witnessed the refusal of the same Court to comply with the wish of the government to restore a ship after it had pronounced a sentence of condemnation, for it was held that the Court could not reverse its own decision.[43] Thus even at that early date in its history the Court was not entirely subservient to political considerations.

At times the Court functioned as an independent tribunal, seeking to hold the balance even between neutral and belligerent. That came to be more nearly true in the days of the great maritime wars of the eighteenth century. The principle upon which the judges then acted, especially Sir William Scott, was that they were appointed

[42] Wynne, William, *The Life of Sir Leoline Jenkins . . . and a Complete Series of Letters* (London, 1724), II, p. 732; Marsden, II, p. 34 n.

[43] Hedges to Nottingham, given in Marsden, *op. cit.*, II, p. 131. *Cf. Ibid.*, II, p. 318, the letter of Penrice to the Lords asking them to determine whether pitch and tar in Swedish ships were contraband. Letters such as this do not indicate that the judges were subservient to the wishes of the government.

to administer with indifference the law of nations to the subjects of independent states, of whom some happened to be neutral, some belligerent. They were sitting under the authority of the British government, but that government had no authority to prescribe to them rules which contravened international law.

With the application of that principle, difficulties of a diplomatic nature would inevitably arise. For it is obvious that if the government could not intervene in its own behalf in the function of procedure of the Court, it could not do so at the instance of a foreign Power. England would then be less able than formerly to comply with the wishes or remonstrances made by a diplomat to ease the position of a neutral trader who had become a claimant [44] in the Court. That potential disability was realized and was aggravated by the fact that the first prize act of 1692 gave the captor a statutory right to his prizes. That is to say, he was legally entitled as a plaintiff to present his case in the Court and to demand trial and adjudication without hindrance of a political nature. In this matter the opinion of the law officers was definite. They held that the government could not at the instance of a foreign Power interpose to discharge court proceedings. The captor and the claimant alike were to enjoy a fair hearing. It was said in 1710 that there was no law or treaty running contrary to this principle,[45] and in a prize trial in 1750 the judge, Sir Henry Penrice, observed that when the prizes belonged to the Crown, the Court might show favor to the claimers, "which cannot be shown now the

[44] The person who laid claim as owner for the restitution of property seized and subjected to the adjudication of an Admiralty Court.

[45] Hedges to the Lords, Aug. 28, 1710. See Marsden, II, p. 213.

prize is given to the captor, and that distinction has been well enforced by Dr. Lee." [46]

The results of this development were to distinguish the English prize court. From a diplomatic point of view the procedure therein became less flexible and more formal. For their guidance the judges were wont to consult treaties and to revert to precedents, English and Continental. Unless the function of the court should be interfered with by violent methods, changes would henceforth come only gradually. Possibly adjudications became slower at the time when the privateer became more active and the neutral trader more ubiquitous. The fact is that in the days of the naval wars with France the British government was not gaging prize court adjudications to the wishes of neutrals. Accommodations with them were found only through the slow method of reinterpreting or even rewriting old treaty provisions. A wholesome element had thus been introduced to influence the growth of international prize law.

In Northern capitals and trading centers there was bitter condemnation of the English prize court, as its method of administering justice became more rigid. The charges varied in nature. Some were those which were later inserted in the Declaration of 1780, that the procedure was costly and that it resulted in unnecessary delay. Others were that justice could not be obtained in England, and that "all British adjudications were to the advantage of the privateer. Either the lading was condemned as

[46] Pratt, Frederick T., *Law of Contraband of War: with a Selection of Cases from the Papers of the Right Hon. Sir George Lee, L.L.D., formerly Dean of the Archives, etc., and an Appendix containing Extracts from Treaties, Miscellaneous Papers, and Forms of Proceedings, with the Cases to the Present Time* (London, 1856), the case of the *Med Guds Hielpe*.

French property, or, when that was not the case, as *munitions navales* and accordingly seized for British accounts in return for payments which were awarded according to the whims of the Court." [47]

The Origin and Practice of Privateering

The privateer had long been the object of fear and bitter accusation on the part of the neutral trader. In the eighteenth century, as the auxiliary of the regular naval forces of a belligerent nation, he served to check, sometimes to deflect, the illegitimate transactions of the neutral merchants; he also frequently interfered with regular channels of trade. His origin was humble, the reason for his existence in the beginning very different from what it came to be in the days of the great naval wars.

In the early days of maritime enterprise it frequently happened that individuals of one community would inflict material injury upon those of another. Retaliation would follow, and the ensuing private war would disturb peaceful traffic on the sea. As civilization advanced and the ambitious rulers of the rising national states became able to assert their authority over unruly subjects, this warring was frowned upon, but it did not cease. However, it came under regulation. Numerous treaties [48] stipulated that letters of reprisal, or letters of marque, might be granted to the injured party only after he had ineffectually demanded justice in the proper courts. Other trea-

[47] Odhner, C. T., *Sveriges Politiska Historia under Konung Gustaf IIIs Regerung* (Stockholm, 1885–1896), II, p. 67.

[48] England and Castile, 1467; England and Spain, 1515; England and France, 1510, 1632, 1677, 1713; France and Spain, 1559; England and Holland, 1668, 1674; France and Holland (Treaty of Ryswick), 1697.

ties, as that between England and France of 1632, specified that letters of reprisal should not be executed in ports and havens except against the actual wrongdoer.[49] In many treaties of the seventeenth century the signatories agreed that reprisals should be allowed if justice had not been obtained within some definite time, ranging from three to six months.[50] Other regulation was administered through laws and ordinances. The matter of reprisals was discussed by commentators on the law of nations from the time of Grotius to that of Vattel.[51]

Hence, individual reprisals were authorized to remedy specific grievances. They were occasional and limited, and did not affect the relationships between governments. As soon as justice was obtained the reason for the license ceased to exist and the legitimate measures for retaliation came to an end. The practice of issuing letters of marque in time of peace was virtually discontinued toward the end of the seventeenth century. By that time justice for private injury could be obtained through diplomatic channels.

As the occasion for authorizing private retaliation disappeared, it was gradually becoming the practice in time of war to issue letters of marque to individuals for the purpose of general retaliation. Thus arose the institution

[49] Dumont, VI, pt. 1, p. 33, art. 2.

[50] *Ibid.*, VI, pt. 1, p. 33, art. 2; *ibid.*, pt. 2, p. 74, art. 24. The French ordinances date from 1543. *Cf.* the opinions of English judges, Marsden, *Law and Custom of the Sea*, II, p. 13.

[51] Grotius, Hugo, *De Jure Belli ac Pacis Libri Tres*, translation by Francis W. Kelsey (London, 1925), Bk. III, ch. 2; Bynkershoek, *op. cit.*, Bk. I, ch. 25; Vattel, Emerich, *The Law of Nations; or the Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* (Dublin, 1787), Bk. III, ch. 8, sect. 142. *Cf.* Martens, Georg Friedrich von, *Essai concernant les armateurs, les prises, et sur tout les reprises, d'après les loix, les traités, et les usages des puissances maritimes de l'Europe* (Göttingen, 1795).

of privateering, an instrument for general reprisals on the part of the several governments. It constituted a weapon of belligerency and was employed in every maritime war in the days of the sailing vessel.

The evolution of privateering coincided with that of the prize court. The main purpose of both institutions was to eradicate abuses arising from unbridled retaliation at sea, a purpose in accordance with the chief aims of the national kings to eliminate predatory warfare on land and sea alike. To attain this end numerous acts, ordinances, and regulations were promulgated during the fifteenth and sixteenth centuries.[52] One of these was the French ordinance of 1553. It provided that no ship whatsoever, whether merchantman or privateer, should leave any port of the kingdom without first obtaining clearance papers and providing bonds. These papers were to be registered with the officers of the Admiralty at the port of departure. Any one disregarding this regulation would be treated as a pirate and punished accordingly. Ordinances and regulations identical with that of 1553 were issued in 1584 and 1650, and at various times thereafter. During the same period the English also were annoyed by pirates and other unregulated ships at sea, and were taking steps to eliminate them. English privateers had been licensed during the early part of the sixteenth century, but the regulations of 1577, in particular, authorized them to combat the pirates that infested the territorial waters and the surrounding seas.[53]

These were the original regulations; they were accom-

[52] Lebeau, I, p. 1, ordinance of 1400; p. 10, that of 1553; p. 21, that of 1584.

[53] Marsden, I, p. 216.

panied by others. To circumscribe the field of action of native privateers departing from a home port, as was done by France in 1543 and by England in 1577, would not of itself accomplish the aim in view; it was also necessary to prevent enterprising subjects from taking commission as privateers under a foreign prince. French measures to achieve this object began with the ordinance of 1517,[54] which was renewed periodically during the two following centuries. An *arrêt du conseil* of 1650 went further, inasmuch as it forbade officers of the Admiralty to take cognizance of prizes brought in by privateers operating under foreign licenses.[55] Another regulation limited to twenty-four hours the time that such a privateer might remain in a French harbor under stress of weather. Commercial treaties confirmed the regulation of 1650. The treaty between France and Holland in 1678, like the articles of peace and alliance of 1667 between Holland and England, provided that the subjects of either Power should refrain from taking commission as privateers under a foreign government at enmity with the other.[56] Further, each contracting party agreed not to grant retreat or haven to privateers that had taken prizes from the subjects of the other. "If any such shall be driven in there by stress of weather or dangers of sea, they shall be sent out again with all possible haste."

In the matter of acknowledging such privateers as might be operating under foreign appointments, and of adjudicating prizes in a neutral port, the early English custom seems to have differed from the French. At any

[54] Lebeau, I, p. 5.
[55] *Ibid.*, I, p. 45.
[56] Dumont, VII, pt. 1, p. 44, art. 21.

rate it was less uniform. In 1659 and again in 1660 the English judges took cognizance of prizes brought into English ports by privateers under foreign licenses.[57] They were thus recognizing a practice which the French were prohibiting. But in 1641 they decreed the restitution of a French ship captured by some Dunkirkers and brought into Weymouth where it was sold.[58] The reason given for this decision was that the prize had been taken into a neutral port before it was tried in a belligerent tribunal. That is, they held that a ship captured by a privateer could not be adjudged good prize by a neutral court, and that recognition could not be accorded to neutral privateers under neutral commission. This court decision, the French regulations, the articles of peace and alliance signed by England and Holland in 1667 — of which article twenty-one specified that it would be unlawful for any foreign private men-of-war to equip their ships in the harbors of either contracting party, or to sell and ransom their prizes there — and commercial treaties, such as that of 1678 between France and Holland, refute the observation of Marsden that the right of a belligerent to bring his prize to a neutral friend's harbor, and even to sell her there, appears to have been unquestioned before the eighteenth century.[59] During the first nine decades of the eighteenth century probably no captures were tried before a neutral tribunal.

For the objection to the practice of taking prizes to a neutral port various reasons may be assigned. One of the most important was based on economic considerations.

[57] Marsden, II, pp. 38, 39.
[58] *Ibid.*, I, p. 514.
[59] *Ibid.*, II, p. xiii.

The Kings and the Admirals alike were interested in obtaining their share of the proceeds from the sale of prizes. Unless the captured ships were brought to a home port, a source of profit would be lost to them. The economic motive also helped to produce the early sixteenth-century regulations that the captor should not come to an agreement or reach an accommodation with the master of the captured ship while at sea, or buy, exchange, or receive in gift, under any pretext whatsoever, any of the merchandise or property of the prize, or to run his prize aground, or in any way conceal his captures.[60] In other words, until the prize had been brought to the home port for trial, no part of the ship or its cargo might be touched by the privateer. After condemnation of the prize, the Admiral's share and the court expenses were to be deducted before the privateer might take possession of his booty.

But the economic was probably not the most important motive underlying these regulations. After all, the King and the men who were chiefly responsible for drawing up the rules to govern privateering were not to any great extent enriched by that institution. Moreover, the purpose of the prize court was not to confiscate the captured prizes, but to try the legality of all captures at sea. Its function was to free ships and cargoes unjustly seized, to condemn others as good prize, and to hold the privateer responsible for unlawful captures. There might conceivably be little profit even to the Admiral in that procedure. It is probable that the purpose of this and other regulations was primarily to assert the authority of the sovereign.

[60] Lebeau, The regulations of 1543, 1584, 1650, 1666, 1674, 1681, etc.

One of the chief aims of every powerful ruler at the opening of the Modern Era was to vest the Crown with the exclusive right to make war by land and sea. Once secured, this right was jealously guarded. Thus it happened that any one who wished to engage in privateering had to obtain the permission of his sovereign. This was given in the form of a commission or license. Having established the right to determine who might become privateers, the ruler next moved to define the manner in which the privateer should operate. In the course of the seventeenth century the principle was established that prizes must be brought to a home port for adjudication — in France, to the port whence the privateer had departed. Further, adjudication in the captor's country was to precede the transfer of any part of the prize to the captor. The evident purpose was to prevent predatory warfare by forcing the privateer to give an account of his actions. With this aim in view attempts were made, particularly in France, to prevent him from concealing his capture, destroying the ship's papers, or making a reciprocal agreement with the merchantman to release ship and cargo.

An effective method was devised to enforce these regulations. Treaties, acts of Parliament, and instructions of the sixteenth and seventeenth centuries provided that security of bonds for good behavior should be exacted from the masters or owners of vessels engaged as privateers. Some commercial treaties, such as that between England and France of 1677, specified the exact amount of the security thus to be provided. In article ten of that treaty it was agreed that privateers should for the future be obliged, before their commission was made out, to give "sufficient security of such persons as have no share in fitting

them out." This was to be done before proper judges, "to a sum of fifteen hundred pounds Sterling, or thirty-three thousand livres." Such security should be "effectually bound, together with the privateer, to make good the injury and damage they shall do during their cruising, either by themselves or their officers and others under their command, contrary to the tenor of this treaty, and of all others made between the said Most Christian King and (the) King of Britain: Besides which, the said privateers shall lose their commissions, wherein their names, and their giving security shall always be inserted; to which it is added, that the ship shall be particularly liable to the payment of all damages and interest upon the same." [61]

Since the right of the privateer to seize neutral and enemy vessels depended upon the war power delegated to him by his sovereign, violation of his commission subjected him to severe penalty. This might extend to the loss of his license or his security or both. He was also answerable to the same extent for whatever spoliation or embezzlement or other damages might occur on the captured vessel before it was delivered into the custody of the Admiralty. If the bonds required were of great value and if the regulations were rigidly enforced, it is possible that the authority of the sovereign was maintained even over the most enterprising privateer. But sometimes it was impossible even by this drastic method to satisfy the innocent neutral trader for the loss of time and the inconvenience resulting from captures.[62]

[61] Dumont, VII, pt. 1, p. 327, art. 10.
[62] Lebeau, I, Regulations of 1398, 1498, 1584, 1650, 1674, 1681; Marsden, I, pp. 161, 162; II, pp. 168, 341, 428, 490.

Whenever a ruler was able effectively to assert the principle that the right to make war was a royal prerogative, he could also maintain that all captures made in war belonged to the state. Thus when prizes were taken they became the property of the King, who might dispose of them at his pleasure. At first, part of the proceeds were used to reward the Admiral, later to encourage privateering. The successful privateer was allotted a definite share of the amount realized from his captures.

Such was the practice in France. From the beginning of the fifteenth century, if not earlier, one-tenth of all prizes was given to the Admiral. As time passed, the share to be enjoyed by the privateer was also determined. By 1672 a regular schedule had been drawn up.[63] In that year it was declared that after the Admiral's share was taken care of, court expenses and outlays incurred in caring for the ship should be discharged. The remainder of the profit should then be apportioned, one-third to the owner, one-third to the master, and the rest to the crew that made the capture. If the captor was a man-of-war, the net proceeds, after expenses and the Admiral's share were deducted, belonged to the King. In 1692 this ruling was modified to the extent of dividing one-tenth of the proceeds among the officers and men of the ship.[64]

As the wars of Louis XIV became more protracted and more bitter, particularly when the naval phase became more important, special inducement was offered to all subjects who engaged in privateering. At first it consisted in lending to privateers ships from certain classes of the royal navy. The inducement was twice modified in 1688,

[63] Lebeau, I, p. 53 (1672). *Cf.* Marsden, I, pp. 169, 386.
[64] *Ibid.*, p. 187 (1692).

in respect to the division of profits and to the use of the men-of-war.[65] The result was that ships from the navy were delivered to privateers in a state of complete preparation for service, including both munitions and necessary stores. The privateer was not to be held responsible for the loss of or damage to the ship. At first he received one-third of the proceeds of his captures, later the whole. This privilege was modified in 1691, so that he did not thereafter enjoy the whole profit unless he returned the King's vessel in the same condition as he received it.[66] In 1694 the King reserved one-fifth for himself and the customary tenth for the Admiral, but in the War of the Spanish Succession he remitted his own share to the privateer.[67] An ordinance of 1692 offered a reward of two thousand livres for every capture of packet boats that sailed from either Spain or Holland to England.[68] It is evident that by the end of the seventeenth century the privateer had become an important factor in the great naval wars.

The development in other countries of this phase of privateering was similar to that in France, but there was elsewhere no such extraordinary encouragement given to the privateer. Nothing in the English practice before 1780 is comparable to the French measure which provided for lending him ships from the royal navy and allowing him the whole profit. But in England, as in other countries, the right of the privateer to enjoy the proceeds of his captures depended in early times upon the pleasure of the

[65] Lebeau, I, p. 131.
[66] *Ibid.*, p. 167.
[67] *Ibid.*, p. 225.
[68] *Ibid.*, p. 190.

Crown. Various adjudications of the seventeenth century delivered to the captor the prizes he had lawfully taken, but it was not until 1692 that an act of Parliament gave him a statutory right to them. Thenceforth his position was placed on a more secure basis.[69]

A proclamation of 1702 illustrates the English rule relative to the custody of captured ships before adjudication, and to the apportionment of the proceeds after the ships were declared good prize. Complying with the treaties entered into by the Allies, it may be regarded as an illustration of usages sanctioned by the majority of the European Powers. The proclamation declared that all prizes taken at sea should continue in the possession of the captor until after the trial had taken place, "having only Custom House officers on board, as is usual in merchants' ships, to receive her Majesty's dutys." When such ships, or their cargoes, were condemned "and duly inventoried and appraised by such persons as shall be lawfully authorized in that behalf, the same shall be delivered to the captor, or (to) such persons as are interested, to be disposed of by him or them as he or they shall think fit, they first satisfying, paying, or securing to her Majesty such customs and dutys as are payable upon the importation of such goods according to law . . . and also paying one-tenth part of the value thereof, according to the aforesaid appraisement, to such person or persons as shall be appointed by the Lord High Admirall of England to receive them." The proclamation also specified the manner in which the proceeds from the sale of prizes taken by ships in the royal service should be distributed among the of-

[69] Marsden, I, pp. 216, 241, 447, 449, 473, 503.

ficers and men of the captor "after payment of custom duties and other charges had been deducted." [70]

The labor and duties of the privateer did not cease with the capture of the prize; his obligations had only begun. If he would enjoy the fruits of his capture he was bound to follow a course mapped out in his instructions. The French regulations were particularly specific; the English likewise. Many of these regulations were fortified by specific treaty stipulations. Thus they constituted a commonly recognized method of controlling the actions of the privateers. They outlined the procedure to be followed in such matters as sending the prize into a port for adjudication, treatment of the crew of a captured vessel, care of the cargo, coöperation with the officers of the Admiralty in their investigation and compilation of data for the guidance of the court. Failure to comply with the requirements on these points might easily deprive the captor of his share in the prize.[71]

Such were the origins and early development of the most important features of the regulations governing the privateer. There were, of course, deviations from the general practices described above. Many court decisions and many specific regulations ran counter to the main current. In cases where treaty provisions served as the guide for governmental directions and court pronouncements, the application of the rules differed in matters of detail and intent, even as the treaties among the several Powers differed, some providing for various indulgences or relaxations, some for complete immunity from a given practice.

[70] Marsden, II, pp. 186–190.

[71] See Lebeau, I, for the French regulations of 1400, 1543, 1584, 1650, 1672, 1673, 1676, 1681, 1693; for the English regulations see Marsden, I, pp. 216, 325, 473; II, pp. 150, 215, 356, 377.

The date at which a given principle was introduced was not the same for all states. The degree of intensity of the naval wars in which the Great Powers became involved, and the significance and danger which the various governments saw in them determined the rigidity with which the rules were enforced. The degree of dependence upon warlike stores originating in neutral territory, and upon the services of neutral merchantmen determined the grants of relaxation and immunity. These needs likewise tended to condition the measures which one of the belligerents might take to negative the effectiveness of such immunities. Even the necessity of placating a troublesome neutral might lead to an agreement that would serve to modify the activities of the privateer.

As a result of these contingencies it is possible to cite provisions which differ in detail and purpose from those outlined here. But they, though disturbing the surface, did not deflect the main current of regulation upon privateering from the channel in which it was flowing. And this current was European in character and growth; its source lay in no single country, its origin in no specific period of time. It gained its force from springs in France, England, Holland, and other maritime countries. During the period under consideration the practice of privateering was recognized by every state, and utilized in varying degree by every government.

Briefly, then, the privateer was a product of the civilizing forces of Europe. The evolution of the national state from the dismembered geographic and social units of the Middle Ages, the vesting of the sovereign with sole authority to make war, and the attendant bitter con-

flict among the various princes and kings combined to eliminate piracy and to establish the institution of privateering. Not the caprice of any one ruler, but rather the exigencies of European political development are responsible for the evolution of this weapon of warfare.

The resort to privateering as an auxiliary military force was thus at an early date classed among the rights of the belligerents. By the eighteenth century the privateer had long been able, upon the deposit of sufficient security against illegal practices, to obtain from his government special authority for warlike operations at sea. He equipped one or several vessels and sent them out to fight against the enemy, or to intercept supplies illegally consigned to the enemy. He was enjoined to conform to the rules and ordinances established by the government in accordance with specific treaty stipulations, or, in cases where such were lacking, with the customary practices of the law of nations. These determined the conditions requisite to make the captures legal, and to secure to the captor the reward for his exertions.

Irregularities of Privateers and Traders

Amid the confusion of war, irregularities were committed by merchantman and privateer alike. The inability of the privateer to follow instructions, or his willfulness in disregarding them, the urge of the merchant to reap the fruit of lucrative trade, the greed and unbridled ambition of both were features accompanying every naval war. They were forces incapable of being entirely controlled, even by the most vigilant and strict enforcement of recognized practices.

Earnest endeavors were indeed made to regulate and circumscribe the privateer, but these were not always successful. The ever recurrent French regulations point to the irregularities of which he was accused. They refer to deliberate sinking or grounding of prizes, to setting the crew ashore on remote islands, or putting the men to ransom, all at the inclination of the captor. They reveal that occasionally the cargo was broken open before the time of adjudication, that the ship's papers were partly destroyed or thrown overboard in order to create plausible grounds for the seizure. English records depict similar conditions. One case reveals robbery of the crew, another maltreatment, and still another debarkation on an island while the ship was sent to New York for adjudication. But such cases were exceptional both in England and in France, and probably were prevalent in the early days of the Modern Era. Whenever the malefactor was brought before a court in either country, he was sentenced to forfeiture of his bonds or the loss of his license or both, depending upon the gravity of the offence. Unfortunately, in some cases it was necessary for the claimant, in order to obtain justice, to appeal from the Vice Admiralty Courts of the colonies to the King's Council, thus involving him in great expense and his ship and crew in inconvenient delay in a foreign land.[72]

The expense of prize court proceedings and the delays involved, condemned by the resolution of the Neutral Powers in 1780, had early become the object of alleviating regulations. A French decree of 1676, repeated in the ordinance of 1681, enjoined Admiralty officials to proceed

[72] Lebeau, I, Regulations of 1400, 1517, 1543, 1584, 1650, 1675, 1681, 1692, 1704; Marsden, I, pp. 341, 490; II, pp. 185, 186, 215, 377.

promptly with all adjudications so that captured vessels might not be detained unreasonably long. English regulations were to the same effect. But the chief merit of the courts did not consist in the celerity with which they dispatched prize cases; it lay rather in their readiness to admit and weigh all pertinent proof [73] of either party. It sometimes happened that the claimant, because he had sailed under a faulty passport, or carried colorable papers,[74] or even had no bills of lading for some part of the cargo, might be requested to submit further proof of his ownership. Such proof might have to come from the port of his departure, and sometimes from a city where he had been naturalized for the duration of the war. The captor likewise enjoyed the privilege of submitting further proof to support his contention of lawful seizure. In those days of slow facilities of communication delay was unavoidable, and valuable time was consumed while the merchant chafed at the loss of opportunities for lucrative trade that might come to him only in time of war.

But the majority of protracted hearings in the prize courts were occasioned by the equivocal and contradictory nature of the depositions — written declarations under oath — which the claimant submitted to the court as evidence of his ownership of the contested property, ship and cargo, and of his faithful adherence to the obligations imposed by law upon the neutral trader. The testimony of subordinate officers was frequently conflicting and at variance with that of the master. Sometimes the

[73] The *evidence* of the ordinary court. But in a legal sense *proof* was a broader term, and included everything that had a bearing upon the fact that was to be established.

[74] Papers drawn up in a deceptive or designedly ambiguous form. (*New English Dictionary.*)

same officer would change his statements from day to day. It is recorded of Eckhoff, master of the *Wilhelmina Catherina*, that there was "material difference between his first and second depositions." On the first day he declared that his ship had nothing but lawful goods on board, although he could not be certain since he was not present when the cargo was taken on board. "On the second to the eighth interrogatory, he says he knows there were small shots on board, and the mate has lately told him there were cannon balls and large iron spikes on board. At one time he confessed that the goods were carried for French accounts; at other times he said he did not know." [75] The question whether a ship was carrying contraband goods might lead to conflicting testimony and confusion in the trial. Cannon, muskets, and ammunition might be concealed, as was discovered in the cases of the Danish ships *Providentia* [76] and *Wilhelmina Catherina*,[77] in the hold under the lading, or among laces and other innocent-looking parts of the cargo. In his deposition the master of the *Providentia* swore that "these guns were for the ship's use, and were not to be sold." It was a delicate matter to decide how much armament was necessary for the defence of the vessel, because whatever was superfluous for this purpose would be condemned as contraband, and according to some treaties the carrying of contraband affected the status of the ship. On one occasion the court declared that "a single barrel of shot would not be contraband, but four tons upward is." But whatever the pronouncement of the court might

[75] Pratt, *Law of Contraband of War*, pp. 181 f.
[76] *Ibid.*, pp. 94, 144.
[77] *Ibid.*, p. 180.

be, the trial consumed valuable time and entailed considerable expense.

Various situations attending naval warfare and the institution of privateering were conducive to irregularities. It is obvious that in a war between France and England a cargo which consisted of *bona fide* articles of trade between a Northern European port and Lisbon might immediately assume the nature of contraband when the vessel deviated from its course and steered for a French port. If a vessel thus deflected from its course should attempt to enter a French harbor, and thereupon be captured by an English man-of-war or a privateer, the neutral captain could on the strength of his papers, which called for Lisbon as his destination, positively assert that he was sailing for that port, but that strong winds had driven him from his original course. In the event he carried a double set of papers, as many traders did, and one of these enjoined him to take his cargo to a French port if possible, the situation would of course be much simplified for the court. On the other hand, on the assumption that the cargo was consigned to a French firm, a privateer or an over-eager warship commander would be tempted to apprehend any vessel sailing for Lisbon but forced by actual stress of weather to approach the French coast. Cases such as these were of frequent occurrence. A situation better calculated to arouse enmity between neutrals and belligerents and to confound the best intentions of the Admiralty judges is difficult to imagine.

The High Court of Admiralty often dealt leniently with the neutral transgressors. In the case of the *Ebenezer* the judge declared that the object of the British government was to prevent neutrals from aiding the

enemy, and not to injure the trade of friendly Powers. Though the papers, seemingly colorable, revealed that the ship might sail for either France or England, the court declared that the facts did not especially prove that the ship was bound for a French port, or that it was assisting the enemy. Therefore the ship was not declared good prize.[78] In the adjudication of the *Fredericus Secundus* the court pronounced that "if the owners of the ship are not in *male fide*, it is hard they should suffer." The owners were accordingly directed to submit further proof that they were not "privy to the charter party," and thus guilty of an unneutral act.[79]

Controversies sprang from various other points in the cases that came up for court decision. Excepting those in which the ship was engaged in unfair or illegal trade, freight charges were generally allowed on that part of the cargo which was declared good prize. Differences arose not only upon the definition of what practices constituted unfair trade, but also, in a more direct way, upon the decision as to whether a given merchantman had been engaged in such transactions. The matter of contraband trade was a disturbing element. Despite the fact that nearly every commercial treaty concluded during the seventeenth and eighteenth centuries enumerated all commodities held to be contraband, and some of the articles that were not to be so regarded, disputes arose over the matter of definition, as is attested by the Anglo-Danish explanatory treaty of 1780. On this question the pronouncement of the court that tried the *Kleine David* is significant: "The law of nations is uncertain and the

[78] Pratt, *Law of Contraband of War*, p. 136.
[79] *Ibid.*, p. 109.

determination upon it very various. Treaties have determined what shall and what shall not be contraband." [80]

Ships engaged in contraband trade were variously treated: some were restored, some declared good prize, depending upon the treaties under which they were operating. An illustration is afforded by the case of the Dutch ship *De Maria,* which was seized while engaged in such traffic. The court held that the ship must be restored "by virtue of the treaty of 1674, for by that treaty a Dutch ship is not forfeited for carrying contraband." [81] But not all neutrals were protected by treaty provisions similar to those which gave immunity to Dutch ships.

The captor's position in the prize court was not always comfortable, nor did he often escape with impunity the consequences of illegal captures or of the violation of his instructions. In England in 1702 a warning was issued that if a captor should plunder, embezzle, purloin, conceal, or convey away "any goods, wares, or merchandizes, ship's papers, or any part of the tackle, furniture, or apparel of any prize taken," he should be punished "as a court martial shall think fit, either by loss of employment or otherwise . . . and in such case the captain and officers of a privateer shall not only lose their share of the prize, but be rendered uncapable of having a letter of marque for the time to come." [82] Sometimes the captor was sentenced to compensate the injured party to the full extent of the losses he had inflicted. On the other hand, if he had taken a ship which the court later restored, together with the cargo, he was not responsible for the

[80] Pratt, *Law of Contraband of War,* p. 170.
[81] *Ibid.,* p. 133.
[82] Marsden, II, p. 190.

losses entailed by detention and court proceedings if he could show reason for his suspicion at the time of capture that the merchantman was engaged in illicit commerce. But he must as plaintiff prove his case.

As plaintiff in a court at law he was called upon to furnish in various ways proof of his contentions and security for his actions that might tend to retard the progress of the case. In the trial of the *Princessa de Brazils* the captor was ordered to prove from the ship's papers that the cargo was enemy property.[83] His failure to satisfy the court on this point resulted in the restoration of the ship and the cargo. Whenever the captor deemed it advisable to go beyond the evidence of the ship's papers, which might be specious, and to demand the right to examine the cargo, he was required to furnish adequate security to compensate the owner for whatever damages might result from shifting or removing the freight. In the adjudication of *De Wilhelmina Catherina* it was recorded that Eckhoff swore he knew there were shots on board, "and the mate told him there were cannon balls and iron spikes. . . . Upon this evidence the court did, with difficulty, grant an inspection, but not before an additional security of 2,000 (pounds) was given by the captors." [84]

Nor was the captor always awarded the expenses incurred in the capture and trial of neutral ships. Although the court held that just cause of capture existed, the plaintiff in the case against *De Vlught naa Aegypten* failed to obtain the cost of his labor.[85] In the trial of *De*

[83] Pratt, *op. cit.*
[84] *Ibid.,* p. 186.
[85] *Ibid.,* p. 125.

Providentia the court awarded expenses to the captor, but when the Lords reviewed the case they reversed the decision of the lower court and decreed that each party should defray its own expenses.

There was, then, a highly developed prize law in Europe. Under certain conditions it sanctioned the capture upon the high seas of merchant vessels by men-of-war and by individuals operating under commission as privateers. Thus was created an auxiliary weapon of belligerency that was utilized by every naval Power. Through the authority vested in the prize courts the law sought to control the use of this weapon. The specific function of the prize courts was to determine, by means of the principles and detailed provisions of the law, whether a captured vessel was good prize, and to hold the captor responsible for transgressing the bounds set by his commission.

Prize law, privateering, and the prize court were component parts of an international institution. Originating in the usages of the seafaring peoples of Medieval Europe, this institution was modified and standardized by ordinances and regulations of the modern states that fell heir to it. Reciprocal stipulations in the various commercial treaties of the Modern Era sanctioned it and made it universal. Varying to fit local conditions, in its main features it was European.

Built on a foundation of survivals from previous ages and of material selected to meet the needs of a particular place and time, this institution contained many good parts, many defective. It may have failed to change and expand to meet the requirements of a rapidly advancing

society. Perhaps it continued too long to employ methods about to fall into disuse. Doubtless it afforded just ground for criticism. It was an old well-established institution, however, and there was no other to take its place.

Certainly it did not merit the condemnation expressed in the declaration of the Armed Neutrality of 1780. The neutrals demanded promptness, but delay is inevitable in any system of administering justice. Delay was by the very nature of things inevitable in the action of the prize court. The neutrals demanded uniformity, but that could not be achieved if the court was to heed treaty provisions. Nor is it apparent that uniformity was desirable. Justice could be more readily and more equitably administered if every case was decided on its own merit and in accordance with the circumstances of the capture.

The motive behind the demands of the Armed Neutrality of 1780 is plain. Two of the Powers forming the league were feverishly pushing to completion an ambitious mercantile policy, of which the aim was to utilize the resources and initiative of the state to capture a larger share of the world's commerce and to acquire new territory. The war between France and England afforded them an extraordinary opportunity for lucrative trade, the like of which had come only once before to the Scandinavian peoples, and was to return only once again in the course of the following century. While the neutrals were finding new avenues of commerce, French trade and shipping were being gradually eliminated from the seas, and the flow of French supplies steadily interrupted. French and neutral interests became complementary, France requiring the services of the neutral trader, the latter seizing the opportunity offered by France. Inspired

by French diplomacy and by three earlier attempts to enforce their will by united action, the neutrals established a league through which they would impose their principles, set this time on a loftier plane, upon the other states of Europe. On the other hand, England, desirous of increasing her own trade and of preventing the neutrals from giving aid to her enemy, could not recognize these principles. Two powerful interests clashed; they were irreconcilable.

CHAPTER II

THE RULE OF WAR OF 1756

THE enunciation in 1780 of the principle that neutral ships might trade freely from port to port and upon the coast of nations at war was a direct challenge to the Rule of War of 1756, that trade not open to neutrals in time of peace could not be open to them in time of war, and to the ancient law and practices of which that rule was a convenient summary. It disregarded the origin and the force of a commercial policy which had become a vital part in the organization of the maritime states, a policy motivated alike by the demand on the part of neutrals to trade freely with nations at war and by the determination on the part of belligerents to prevent supplies from reaching the enemy, so that through victory they might protect, or, whenever possible, even extend, the fields in which their traders were operating. It likewise ignored old treaty provisions which, based on ancient practices, bound the various states, among them the Northern Powers, in their commercial relationship with England, to observe the principle that a neutral vessel might not carry enemy merchandise anywhere on the high seas, and therefore not from one enemy port to another. Certainly it took no cognizance of the ancient practices of the chief maritime nations — Holland, France, and England — which had interdicted such traffic. It aimed,

through the combined efforts of three states, to set aside an intricate code of maritime usages sanctioned by treaty provisions and prize court decisions, and to substitute a system based upon the deductions of statesmen who had set themselves the task of augmenting the trade of neutral merchants by eliminating interference with such trade on the part of belligerents.

The declaration of 1780 represented something more than a mere challenge to an old principle of international law. It was a manifestation of the spirit of revolt which permeated the intellectual life of Europe, and which denounced all outworn institutions and theories in the sphere of political, legal, and commercial activities. It was inspired by selfish economic motives. The eighteenth-century neutrals, having lagged in the procession of states that marched to the conquest of colonies and to the establishment of commercial empires, now set about the task of gaining for themselves a proportionately larger share of the world's commerce by the process of destroying the monopolies of belligerent Powers and establishing similar monopolies in their own states. Thus their challenge was directed against the continued existence in other countries of a commercial policy whose origin coincided with that of the national states themselves. Coming in a time of war, this challenge also involved equally old principles of international law.

Effect of National Unity on Commercial Policy

In the struggle for national unity lies the key to the commercial policy and the navigation laws of Modern Europe. A map depicting the various political, economic,

and social units of the "geographic expressions" that slowly emerged as unitary national states would reveal the strongholds of baronies defying the central power, towns jealously guarding their old immunities, interior custom lines dislocating domestic trade, and territories where guilds successfully resisted attempts to reorganize trade and industry. The work of eliminating these disruptive forces and of unifying the states fell to the King. It called for the steady assertion of his power over feudal elements and semi-independent municipalities. It resulted in the growth of a policy which led the ruler to extend his control to all departments of activity within his dominions, and to compel the association of economic with political unity. As the work of unification progressed, the kings and ministers endeavored to adopt for the nation the self-centered, exclusive, and protective economic system that formerly was in force in the towns and the great leagues of city-states.

Certain definite consequences, then, attended the growth of the kingly power. The self-contained feudal baronies disappeared, but the noble families remained — here as first servants of the state, there as courtiers to grace the royal palace, in either place a burden on the royal treasury. While the advancing unification of the territorial states tended, after the termination of the civil wars, to eliminate internal feuds, it intensified old jealousies and old quarrels among the royal houses, it increased competition among the various peoples, and it was the cause of frequent wars. The passing years saw the nature and duration of these wars changing, as the Powers waging them changed. The hasty expeditions of former days, the pitched battle which decided an issue

by the valor of the individual soldier, gave place to the long campaigns and protracted sieges of the Modern Era. Success in war came gradually to depend on the ability to bear the expense of feeding, clothing, and paying an army. Presently it was recognized that he who could command the last piece of gold would retain possession of the last field of battle.

There was yet another result to come from the process of centralization. The success of the King was contingent upon the coöperation of the middle class. Upon the revenues flowing from the occupations of the merchant, the banker, and the tradesman would depend the stability and growth of the state, the power and honor of the King. At the very beginning there was developed a national policy to encourage such occupations as would most readily furnish the sinews of war, and best serve to defray the expenses of the royal palace. In the course of time vested interests sprang up among these favored occupations. When the welfare of the nation came to require a change in its commercial policy, these interests fought to maintain their monopoly. When at last the spirit of criticism arose and began to scrutinize all institutions which tended to shackle individual freedom and enterprise, the great trading monopolies became a special object for the attack alike of the disinterested theorist and of the interested merchant.

The development of an infallible source of steadily flowing revenue from the labors of the middle class became one of the chief concerns of kings and statesmen. In the days before the introduction of a system of credit enabled the sovereign to shift the burden of his wars upon the shoulders of future generations, revenue meant in-

come in currency. There were various ways of supplying the treasury. Spain found it most convenient to utilize the precious metals collected from the mines in America. Among the methods open to other nations, that of obtaining money through a favorable balance of trade received most attention. That is, the value of exports should exceed the value of imports, the difference to be accounted for by money or bullion.[1]

Hence the importance attached to foreign trade, and likewise the zeal with which it was cultivated. Hence also the belief that there was much more to be gained by manufactures than by husbandry, and by merchandise than by manufactures. In England in the middle of the seventeenth century it was said that the true worth of foreign trade was "the great revenue of the king, the honor of the kingdom, the noble profession of the merchant, the school of our arts, the supply of our wants, the employment of our poor, the improvement of our lands, the nursery of our marine, the walls of our kingdoms, the means of our treasure, the sinews of our wars, the terror of our enemies." [2] Therefore most states were pursuing a policy, not only to increase this trade, but to protect it from foreign interference.

Thus came foreign trade under the immediate control of the government, to be manipulated for the enhancement of the prestige of the state. Indeed, it was regarded as the property of the state. In time of war it was an instrument of the belligerent state, providing the suste-

[1] The fact that the emphasis shifted from the argument of the surplus metal to the argument of self-sufficiency in manufactures and agriculture is irrelevant.

[2] Mun, Thomas, *England's Treasure by Forraign Trade* (Reprint, 1928), p. 88.

nance of its forces. As property it was subject to attack by the enemy: it might be interrupted; it might be captured. Foreign trade of the neutral state was likewise property. When placed at the service of one of the parties to the conflict, it too might be attacked, captured, and confiscated, for used thus it too became an instrument of belligerency.

Out of the immediate needs of the rising national states grew a commercial policy whose main features were common to the maritime states of Europe. The agencies developed in the several states for putting this policy into operation were almost identical. Patents were everywhere granted to individuals or to chartered companies, conferring on them the sole right to trade in designated foreign parts. Imports and exports were largely controlled by a few great monopolies. These jealously guarded their territory or special field of operation against the intrusion of other merchants, domestic and foreign. This jealous tendency was aggravated when, under statesmen like Colbert, companies were chartered with the primary design to oust a rival nation from its field of operation. Colbert, like other statesmen of the seventeenth century, inherited the belief that foreign trade could be increased only at the expense of other nations.[3] When the various governments based their commercial practices and foreign policy upon that belief, bitter international struggles were inevitable. In time of war such a principle tended to embroil neutral traders with belligerent naval forces, which in some cases were under the control of great monopolies.

[3] *Cf. Lettres, instructions, et mémoires de Colbert, publiés d'après les ordres de l'Empereur, sur la proposition de Son Excellence, M. Magne, ministre, secrétaire d'état des finances, par Pierre Clement* (Paris, 1861–1870), VI, pp. 264 f.

Bacon wrote in 1600: " . . . forasmuch as the increase of any estate must be upon the foreigner (for whatsoever is somewhere gotten is somewhere lost), there be but three things which one nation selleth upon another: the commodity . . . ; the manufacture; and the vecture, or carriage; . . . and it cometh many times to pass that *materiam superabit opus*, that the work and carriage is more worth than the material, and enricheth a state more; as is notably seen in the Low Countrymen, who have the best mines above ground in the world."—"Of Seditions and Troubles," *Essays*.

When colonies were established, the trade which sprang up between them and the mother country became a new instrument to enhance the power of the sovereign through a favorable balance of trade. The colonies, subordinated to the motherland, were to provide her with the means of a steadily increasing commerce. They were to serve as a source of her raw material, a market for her finished wares, a recipient of goods flowing from her traffic with other countries. Foreigners were strictly debarred from participation in this lucrative commerce. Every colonial power kept the trade of its plantations in the hands of its own subjects, often in the hands of a favored few. So highly was this trade regarded, so potent the use of the profit therefrom that it was considered the chief source of England's success in the Seven Years' War. He who could manage to undermine this trade would succeed in undermining the foundations of England's greatness and the bonds of her colonial empire. What this vast colonial trade had done for England it might, if captured, do for France, and, in a lesser degree, for Sweden and Denmark. In the minds of statesmen like Choiseul and the Danish Minister, Bernstorff, permanent good might come to their nations from the humiliation of a trade rival such as England.

Of all the forces called into being to effect the main objectives of this exclusive commercial policy, the laws designed to develop the shipping industry were the most significant. Ships and sailors were required alike for commerce, the foundation of national wealth and power, and for war, the instrument by which commerce was to be protected and by which the fields of trade were to be multiplied and extended. Indeed, shipping was regarded as in itself one of the means by which wealth and power were acquired, "for the gain accruing from freight was all profit to the nation." The exclusion of foreign vessels from all traffic save the carrying of their own products, the encouragement of the fisheries as the great school for seamen, and the bounties on the building of ships, all served to stimulate the shipping industry and to create a national monopoly of the carrying trade.

Commercial Policy in International Relations

In the sphere of international relations and diplomacy serious consequences arose from the specific regulations of the several countries upon trade and navigation. When the navigation policies defined by Richelieu, Colbert, Cromwell, Utariz, and others came to mean that domestic products could be carried to market only in native ships manned by native crews, and that forign carriers could unload in domestic ports only the goods produced in their own country, coastal trade was automatically reserved for native shipping. Foreign vessels were not only excluded from the coastal trade of a country, but they were also prohibited from carrying any commodity from a port in one country to a port in another unless one of these was

located in their own territory. Of still greater significance, perhaps, were the regulations which prescribed that all trade between the colonies and the mother country must be carried in the ships of the latter, or, as in the case of England, in ships belonging to subjects residing either at home or in the colonies.

By the time the statesmen of Northern Europe had learned to appreciate the immense value of colonial products and the importance of the shipping monopoly, the trade of the most valuable colonial regions had been gathered in by the subjects of a few states, to the exclusion of others who were late in entering this competitive field. Some of the latter projected great schemes to remedy their earlier neglect of this branch of commerce. To them the naval wars of the eighteenth century presented broad opportunities for the execution of their projects.

In these wars the economic interests of neutral and belligerent clashed. Foreign and colonial trade, affording the chief source of national wealth, the most ready means by which to raise armies and to equip fleets, became, from a purely commercial point of view, at the same time both the cause and the object of the maritime wars. The contestants were fighting for trade advantages, the capture of which would weaken the enemy and increase the power of the captor. While each belligerent was bent upon the ruin of the other, neutral traders sought to profit from the adversity of both. Neutral statesmen like Bernstorff and neutral publicists like Hübner hoped to gather the fruits of neutrality.[4] So it happened, in neutral lands at

[4] Eggers, C.U.D., *Denkwürdigkeiten aus dem Leben des königl. dänischen Staatsministers Andreas Peter Grafen von Bernstorf* (Copenhagen, 1800), pt. I, p. 127.

least, that a period of war was looked upon as a time of opportunity and economic expansion, when private fortunes were to be accumulated and empty public coffers replenished. Neutral trading nations were therefore wont to look forward to a naval war as an agent that would lift them from the slough of depression.[5] And with good reason. One reads of the Norwegian merchant marine that it "shot up spontaneously, so to say, in the time of the great naval wars between France, England, and Holland in the second half of the eighteenth century, and shrivelled again when peace was restored and the great commercial fleets of the maritime Powers were set free." [6] The shipping of other neutral states profited in an equal degree.

Such conflicting interests engendered bitter controversy, though often only between the neutrals and one of the belligerents. The weaker naval Power, its merchant marine driven from the sea, shaped its policy relative to the neutral states so as to escape with their aid the effects of that disability. Relaxation of old restrictions and other inducements were offered to enlist the neutrals to carry on this lost trade. To the extent to which they engaged in this trade the neutrals became parties to the commercial war and subject to the counter measures of the other belligerent, who, having used his superior naval forces to prevent the merchant vessels of the enemy from carrying things useful in war, began to apply his forces to prevent

[5] Report of the Danish councillor Ryberg, Oct. 30, 1770. *Cf.* Nathanson, M. L., *Danmarks Handel, Skibsfart, Penge– og Finantzvaesen fra 1730 til 1830* (Copenhagen, 1832), I, pp. 102 f.; Amneus, G., *La ville de Kristiania, son commerce, sa navigation, et son industrie, resumé historique* (Kristiania, 1900), pp. 55 f.

[6] Bugge, Alexander, *et al.*, *Den Norske Sjöfarts Historie* (Christiania, 1923), p. 528.

neutral ships from furnishing such supplies to the enemy. That is, he proceeded to capture neutral merchantmen.

Since this practice had been resorted to by all belligerents in every war, there was evolved the right of the nations at war to seize and confiscate, under given conditions, the ships of those who remained at peace. The bitterness arising from conditions which called for the exercise of this right was intensified by the fact that there were no purely commercial wars, and as a consequence the neutral trader, in helping to replenish the stores of the warring nations, might affect the settlement of their domestic affairs. The protracted wars between Louis XIV and William III, in a large measure political and dynastic, furnish an instance. Here was involved the right of a people to determine its own form of government and to elect its own ruler. The supplies and services provided by neutral traders tended to influence the outcome of this political struggle.

The ambition of neutrals to gain a larger share of international commerce, with their consequent participation in a trade affecting the interests of belligerents, was justified by considerations other than the mere greed for easy profit. It was inspired by the arguments of men who were not primarily interested in economic gain, but rather in the movement to free the individual from the heavy chain of governmental restrictions. Perhaps the great monopolies had outlived their usefulness; certainly they worked to the disadvantage of many districts, tending to further the interest of some cities to the detriment of others. At all events, in the eighteenth century the whole economic system came under the scrutiny of men who were chafing beneath the heavy hand of state guard-

ianship. Some demanded the removal of all restrictions, so that the volume of trade and shipping might be enlarged by the free participation of all who were interested in following those occupations; others demanded the shifting of the emphasis from commerce to agriculture. Some of the critics were practical men; some mere theorists. Of the latter many were wont, when their ideal system of a reconstructed society was too far removed from the facts of the economic situation, to appeal to the law of reason, the law of nature, and the law of God.

Such arguments were charactistic of that day, and were advanced by many neutrals and neutral publicists at the time of the Armed Neutralities. These facts explain in part why the contentions of these leagues found sympathetic hearers in many men of that day, and sympathetic historians in succeeding generations. But the foundation on which they based many of their arguments found no counterpart in the law of nations, and their appeal to the law of nature and the law of reason little response in the prize courts. The judges were inclined to agree with the statement of Hale that "though a certain and determinate law may have some mischiefs in relation to particulars which cannot all by any human prudence at first be foreseen and provided for, yet . . . (it) is preferable before that arbitrary and uncertain rule which men miscall the law of reason." [7]

Still other historical facts explain the difficulty under which the neutrals were laboring. The laws and usages governing their trade with belligerents had originated and developed under conditions dissimilar from those under

[7] Holdsworth, W. S., *A History of English Law* (London, 1922), V, p. 503, a criticism of Hobbes' "Dialogue on the Common Law."

which they began the struggle to broaden their privileges. Three centuries earlier nearly all the Powers were constantly at war, and those that remained at peace carried little weight in the balance of international rivalries. Neutral rights were therefore accorded scant attention.

Grotius has recorded a number of instances of this fact. "In 1552 when there was war between the Danes and the Swedes, the King of Denmark requested the Hanseatic Cities not to carry on commerce with the Swedes. Some of the cities, being in need of his friendship, complied, but others did not." [8] This incident points to the fact that the assertion of neutral rights was contingent upon the relative strength of neutral and belligerent and upon their immediate need of each other's friendship. Thus in 1551 the Dutch were in a position to disregard the summons of Lübeck to discontinue trading with the Danes, and in 1627 the King of Denmark was able to stipulate that in return for specific advantages he would prohibit all trade with the enemies of Sweden.[9] But in their relations with the Great Powers — with France, Spain, and England — the lesser states, while remaining neutral, were compelled to accept a situation in which their trade was regarded more as a matter of sufferance than as a right. This condition determined to a great extent the nature of the usages, precedents, and treaty stipulations which constituted the body of international law regulating neutral trade with nations at war.

With the passage of time the grouping of the Powers changed. In the eighteenth century both Russia and Prussia entered the field as full-grown states. In that

[8] Grotius, *De Jure Belli ac Pacis*, Bk. III, ch. 1, art. 5.
[9] *Ibid.*

century, when the importance of commerce was at last fully appreciated, some of the greater states remained neutral during the naval wars, or for some time during that period. Reversing their former principles, these states combined to push the customary neutral demands for extended trading privileges, and began to define their rights as neutrals.

The ensuing conflict between the commercial interests of belligerents and neutrals tended to embitter the process of defining their respective fields of activity. Since commerce was recognized as the element most necessary to the full development of national power, the neutrals argued that it should not be interfered with by foreign countries. A state of war should affect only the trade of the parties to the conflict, neutral trade remaining as if peace prevailed throughout the world. The belligerents, on the other hand, argued that, since war was recognized as a legitimate instrument for settling international disputes, the trade of neutral subjects could not be allowed to interpose so as to affect the result of such a settlement. The issue clearly drawn, would not soon be decided.

Observations of Early Commentators

These complications were not much simplified by the early commentators on the law of nations. Even by Grotius, the greatest of them, belligerent rights and neutral duties were more clearly understood and more fully explained than were neutral rights.

Grotius was sufficiently close to the war for Dutch independence and the wars of religion to believe that it was possible to find a satisfactory definition of a just war, and

that neutral merchants would so act that the aggrieved party might be benefited. Hence he declared that it "is the duty of neutrals to do nothing which may strengthen the side which has the worse cause or which may impede the action of him who is carrying on a just war . . . and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions, in helping persons besieged." [10] In commenting on the rights of belligerents he was more specific: "Regarding things useful in both war and peace, we must take into consideration the condition of the war. For if I am unable to protect myself without intercepting the goods which are being sent to the enemy, necessity . . . will give me the right to interrupt such goods, but with the obligation to make restitution, unless another cause arises." [11] To the judgment of the neutral was left the decision as to which party in the conflict was waging a just war, to the judgment of the belligerent that as to when the occasion of necessity had arisen.

After the publication of *De Jure Belli ac Pacis*, theory and practice slowly changed, while four generations passed on before Vattel published his *Droit des gens* in the middle of the eighteenth century. By that time it was possible to write more definitely about neutral trade than it had been in the days of Grotius. Vattel's conclusions are therefore clearer and more definite, particularly on the matter of neutral rights. These were fairly well established. Since neutral states were not parties to the quarrel involving two or more countries in war, they were under no obligation to discontinue their customary trade. That is, they had the right to continue their trade as though

[10] Grotius, *De Jure Belli ac Pacis*, Bk. III, ch. 17, art. 3.
[11] *Ibid.*, ch. 1, art. 5.

nothing of inconvenience had occurred. But to retain their status of neutrality they were obliged to trade impartially with either belligerent. "Should they refuse to sell me any of those articles by taking measures for transporting them to my enemy, with manifest intention of favoring him, such partiality would exclude them from the neutrality they enjoyed." [12]

On the other hand, the rights of the belligerents were equally well established. Whenever a nation found itself at war, necessity required that it should deprive the enemy of those things which tended to increase the effectiveness of his military forces. The same law warranted the seizure of those goods which neutrals might be carrying to the enemy if these would contribute to his efficiency in waging the war. "It is therefore very suitable to the law of nations, which disapproves of multiplying the causes of war, not to consider those seizures of goods of neutral nations as acts of war." If the neutrals would jeopardize their safety and status as disinterested parties by supplying the enemy, "let them not complain if their goods fall into my hands; for I do not declare war against them because they attempted to carry such goods . . . I do not oppose their rights, I only make use of my own; and if our rights clash with, and reciprocally injure each other, it flows from the effect of an inevitable necessity." [13] The nations have been unable to escape the uncompromising logic of that conclusion.

The principles governing the British prize court were similar to those upon which Vattel based his observations. But in the controversies involving the demands of neutrals

[12] Vattel, *The Law of Nations*, p. 40.
[13] *Ibid.*

for the right to trade freely between enemy ports, the Court made distinction between the arguments which were drawn from commercial theory and practice and those founded on the legal precepts of the law of nations, holding that the former could not affect the latter. A change in the commercial policy of one nation would bring no corresponding change in international law.[14] In a pronouncement upon the rights of neutrals during the wars of the French Revolution Sir William Scott, Judge of the High Court of Admiralty, followed the language of Vattel: "Upon the breaking out of war, it is the right of neutrals to carry on their accustomed trade. . . . I do not mean to say that, in the accident of a war, the property of neutrals may not be variously entangled and endangered; in the nature of human connections, it is hardly possible that inconvenience of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargements of their commerce. The trade of belligerents is usually interrupted in a great degree, and falls, in the same degree, into the laps of neutrals. But without reference to accidents of one kind or another, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that trade is capable.

"Very different is the case of the trade which the neutral has never possessed, which he holds by no title of use in time of peace, and which, in fact, he can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very bel-

[14] Robinson, *Adm. Rep.*, I, case of the *Emanuel*.

ligerent under whose success he sets up his title . . . and such I take to be the colonial trade, generally speaking."[15] Such was also the coastal trade. Both these branches of trade were generally reserved for the exclusive use of the mother country. It was held that if these were taken over by neutrals, it would be for the peculiar accommodation and relief of a belligerent who was suffering from the pressure exerted by the successful naval Power.

Nevertheless, the colonial trade and the coastal trade were thus taken over from the weaker naval power. Lest they be completely disrupted or captured by the enemy, they were often at the beginning of a war delivered by the possessor into the hands of accommodating neutral traders. Such transfer of trade in time of war engendered the controversies which led to the adoption of the principle later embodied in the Rule of War of 1756: That neutrals were not permitted to engage in a trade from which they were excluded in time of peace.

The Principle Embodied in the Rule

The occasion which led to the definition of this principle was afforded by the close coöperation established between the French government and the neutral Dutch traders. At the commencement of the Seven Years' War France, finding her trade with the colonies cut off by the superior naval forces of Great Britain, or even while yet anticipating that it would be so disrupted, relaxed her old monopoly in favor of Holland, as she had done on previous occasions, and by means of special licenses or passes

[15] Robinson, *Adm. Rep.*, I, case of the *Emmanuel*.

allowed the neutral Dutch vessels to carry on this trade for her. The British held that the Dutch merchants by taking over this trade tended to nullify the effectiveness of the superior English navy, and that they were enabling France to withdraw from her mercantile marine, now superfluous, men for service in her military forces. Counter measures were presently adopted. British diplomats protested to the Dutch government; British cruisers and privateers captured Dutch vessels. When the captured ships and their cargoes were brought up for adjudication, the High Court of Admiralty declared them good prize to the captors.

The court acted upon the principle that the captured vessels were in fact incorporated into the navigation system of France, that they had become French transports, and thus French property, and as such might be seized and confiscated. The old rule which served as a guide to the court was that "where a neutral is engaged in a trade which is exclusively confined to the subjects of a country . . . and interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national that it must follow the hostile situation of the country." The British prize court clothed this principle in the formula in which it has since been known, debated, and denounced.

Theoretically, this rule should not have given rise to a new controversy between neutral and belligerent, but, as a matter of fact, it did so. It was ever held by the powers that remained at peace, and conceded by those at war, that by the law of nations and by the law of nature neutral states had the undisputed right to enjoy in time of war those commercial enterprises in which they had been en-

gaged in time of peace. The Rule of 1756, as defined by the court, would allow such trade to be carried on to the utmost extent of which it was capable; it prohibited only such trade as the neutrals had never enjoyed and which they could not even hope to enjoy except through the circumstance of war. These two principles are far from being contradictory; they are complementary. The controversy arose, not from conflicting legal principles, but from causes inherent in the economic system and in human nature. Martin Hübner in the course of his commentary on the matter of commerce in time of war remarked that he could see no reason why the sovereign societies (the neutrals) should not enjoy the great boon which presented itself through the availability of trade previously closed to them.[16] That observation explains in part why a new subject for controversy had arisen.

By historians the Rule of 1756 has been variously treated. Some have asserted that it was based on legitimate considerations; [17] others have confined themselves to a mere statement of the rule, or of the principles involved.[18] A few, like Professor Hart, declare that the so-called Rule of 1756 constituted an infraction of neutral rights, and accordingly was one of the chief grievances entertained by neutrals against Great Britain.[19] Other criticism has been more definite and more severe. Professor Bemis calls it "the innovative Rule of 1756," and

[16] Hübner, Martin, *De la saisie des bâtiments neutres, ou du droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis* (The Hague, 1759), I, ch. 4, sect. 6. *Cf.* Manning, William Oke, *Commentaries on the Law of Nations* (London, 1839), p. 200.

[17] Beer, G. L., *British Colonial Policy* (New York, 1907), p. 94.

[18] Latané, J. H., *A History of American Foreign Policy* (New York, 1928), pp. 124, 137.

[19] Hart, A. B., *The Formation of the Union* (New York, 1931), p. 176.

points out the inconsistencies which he has discovered in the British interpretation of international law. "Though English jurists and statesmen," he writes, "expressed with nice clarity the opinion that a series of special treaties could not change a general rule from which the treaties made particular departures, the same jurists and statesmen themselves had instituted during the Seven Years' War the famous Rule of 1756 and now claimed for it only thirty-seven years later all the rigor of long-established international law." [20]

But the Seven Years' War was not the first occasion on which belligerents had enforced the principle embodied in the Rule of 1756. Certainly it was not the first war in which belligerent resources were replenished through the activities of neutral traders, or the first in which warring nations had endeavored by force to dissuade neutrals from performing such services for an enemy. Ever since man had turned his hand to waging war and had bent his mind to gaining wealth, neutral countries had willingly furnished supplies to nations at war. Treaties, court adjudications, and general instructions to naval forces show that belligerents had always tried to interrupt the transit of such commodities, whether they were conveyed by neutrals or by the enemy. Nor was the Seven Years' War the first occasion when France had attempted by means of neutral vessels to keep the communication with her colonies open and the accustomed trade flowing between her other ports, nor the first time when such relief had proved to be insufficient.

How old then was the principle expressed in the Rule

[20] Bemis, S. F., *The Jay Treaty, A Study in Commerce and Diplomacy* (New York, 1924), pp. 153 f.

of 1756? If it had been generally recognized by the maritime nations, what exceptions had been granted? and under what conditions? At the beginning of the seventeenth century the principle of the *Consolato del Mare,* sometimes strengthened by bilateral treaties, governed the maritime practices of Europe in all matters touching the capture of neutral vessels upon the high seas and their subsequent adjudication by a prize tribunal. There was at that time no treaty in force among the Western Powers stipulating that free ships should make free goods; hence there was no exception to the common usage, which prescribed that the neutral flag could not legally be used to screen enemy property. Enemy goods in neutral ships were subject to confiscation when captured and brought to a court for adjudication. In short, neutral ships could not carry enemy property anywhere in Western European waters, or between Europe and foreign plantations.[21] This principle was the fundamental regulation on the matter of neutral trade with the belligerents. It is evident that until exceptions from this general regulation were granted neutrals could neither participate in the coastal trade of nations at war, nor carry on commerce between them and their colonies. As yet the principle of the Rule of 1756 was undefined, but for all practical purposes it was enforced throughout Europe. Trade which was not open in time of peace remained closed in time of war.

A different situation arose in the latter half of the seventeenth century, when some countries began to stipulate in bilateral commercial treaties that in their relations

[21] The Franco-Turkish treaty of 1604 and the understanding between Holland and Turkey of 1612 did not affect the situation in the West.

with each other neutral ships should make the cargo free. That is to say, in these treaties immunity from the operation of the old rule was granted, so that the subjects of either of the treaty Powers while neutral might without fear of seizure and confiscation of ship and lading carry the property of the other's enemy. Thenceforth the question of neutral trade with belligerents became more complicated. In any given controversy some nations, through the nature of their treaties, might be governed by the new principle, others by the old, and still others by both. Thus England and Denmark in their relations with each other continued to follow the principle of the *Consolato del Mare;* [22] but in their relations with France each adopted the new principle that free ships should make free goods. For instance, if England were at war with Spain, the ships of neutral Denmark might not traffic in Spanish property, while neutral French ships might do so; Dutch ships might carry Spanish property, while Swedish ships might not, both Holland and Sweden remaining neutral. Neither Denmark nor Sweden during such a war could legally permit its subjects to engage in the coastal trade of Spain, or to participate in the trade between Spain and her colonies.

But might French and Dutch subjects take part in either of these branches of the Spanish carrying trade? That is, could any neutral Power by agreeing to the treaty provision that free ships should make the cargo free obtain the privilege of carrying enemy property from one enemy port to another? At the time when the new prin-

[22] That enemy property on board neutral ships was good prize, neutral property on board enemy ships was not to be confiscated.

ciple of "free ships, free goods" was being introduced in the second half of the seventeenth century, some differences arose upon this question.

Anglo-Dutch Interpretation

At The Hague, in November, 1674, a disagreement upon the meaning of such treaties was aired by the representatives of England and Holland. Holland was waging a bitter war against Louis XIV; England was neutral, having in February of that year broken her alliance with France and concluded peace with Holland. One country being a belligerent, the other a neutral, they were seeking to find a common definition for the term "free ships, free goods." In the ensuing discussion the Grand Pensionary, Caspar Flagel, contended on behalf of the Dutch that the treaty concluded between the two countries in 1667, though stipulating that either party might carry the property of the other's enemy, did not allow England while neutral to participate in the coastal trade of Holland's enemy. Sir William Temple, who represented England, argued that the treaty authorized such trade.

The specific arguments of each party constitute a summary of the chief issues generally involved in all such discussions. They are indeed essential to the understanding of the evolution of the principle of the Rule of War of 1756. Sir William Temple, the English representative at The Hague, held that the treaty provided for free trade in enemy goods, contraband excepted, and that the trade from one enemy port to another enemy port was not specifically prohibited. He argued that the Dutch could

not presume to say that, by the terms of the treaty, participation in the coastal trade was forbidden. "If any doubt might arise upon the sense of any article in treaties, subsisting between his Majesty and them, it could not be solved without his Majesty's consent, and till that was obtained, they could not make themselves the sole judges or interpreters against the plain sense of any words, and to the prejudice of his Majesty's subjects." [23] But the logic of the Dutch reply was irrefutable, and was probably so recognized by Temple, who admitted that he evaded it. The Grand Pensionary held that it could not be the meaning of a treaty concluded between two friendly states that one of them might carry on the trade of the other's enemy. The only aim was to preserve the neutral trade of the one, and, obviously, the belligerent rights of the other.

Temple advanced another argument, perhaps irrelevant to the legal principles involved, but pertinent in that it explains in part the notives underlying such controversies. "I added," he wrote to Williamson, "what I said in my memorial; how unjust their pretences were, to make a wrested interpretation of plain words, without his Majesty's consent. That it was not fair to do it at a time when the advantage of such articles was cast only on our side, by the common revolution of war and peace, which might be in their favor tomorrow, as they were in ours today; whereas when the advantage was by like accident cast in their side, as it had been with France and Spain, they had

[23] Temple to Williamson, Nov. 6, 1674, in Swift, Jonathan, *Letters to the King, the Prince of Orange, the Chief Ministers of State and Other Persons, by Sir W. Temple, bart.* (London, 1703), III, pp. 70 f.

ever insisted on the very same point, that we do now, and never given instances upon it, whether they received satisfaction or not." [24]

For the moment the discussion produced no tangible results. After "long and warm debate" the two diplomats contrived to find a way of graceful exit from an interview which might have developed into an embarrassing situation. The Pensionary admitted that for his own part he would be content to leave the interpretation of the treaty as Temple desired it, but he said that he could "do nothing upon it in the States-General, till the States of Holland assembled, which would be about a fortnight hence."

There were many sound precedents to support the Dutch in their interpretation of the treaty with England, and their enforcement of a principle which a century later came to be defined as the Rule of 1756. To prove his contentions in the discussion with Temple, the Grand Pensionary referred to the commentaries of several authorities, and cited the practices of France, Spain, and Sweden. England, he said, had herself applied the same principle in the reigns of the first two Stuarts.

Of greater significance was the fact that the Dutch had enforced this principle in their war for independence. In 1604 they captured and condemned as good prize two Venetian ships that were trading under Spanish licenses between Spain and the Spanish colonies in America. To the Venetian ambassador's protest the Dutch replied that it was universally known that Spain treated as hostile all ships trading south of the Tropic of Cancer. She aimed to reserve the trade south of that line for Spanish subjects.

[24] Temple to Williamson, Nov. 6, 1674, *loc. cit.*

By trading under Spanish warrants and participating in a navigation exclusively national the Venetians had, in fact, made themselves the allies of Spain. Their ships were therefore "fair prize and no claim for damage could lie." [25]

Not valid precedents alone, but mature consideration of the articles under dispute, came to the aid of the Dutch in their argument with Temple. It had been one of the main objects of the commercial treaty of 1667 to clarify the English navigation act so that Dutch subjects might lawfully carry into England, in addition to goods of their own growth and manufacture, "all such commodities as growing, being produced or manufactured in the Lower or Upper Germany, are not usually carried so frequently and commodiously into seaports (thence to be transported to other countries) any other way but through the territories and dominions of the United Netherlands, either by land or by rivers." [26] The purpose was to free Dutch merchants and Dutch shipping from a severe handicap imposed by the English navigation acts. The treaty of 1667 also specified that free ships should make free goods, and it made definite arrangements for the free navigation of the subjects of either state to and from the ports of the enemy of the other. When these provisions were later explained and defined, they verified the arguments of the Grand Pensionary that the only aim of the treaty of 1667 was to preserve the trade of a friend.

The articles dealing with navigation to enemy ports

[25] *Calendar of State Papers and Manuscripts Relating to English Affairs, Existing in the Archives and Collections of Venice and Other Libraries of Northern Italy* (London, 1900), X, no. 184.

[26] Chalmers, George, *A Collection of Treaties Between Great Britain and Other Powers* (London, 1790), I, p. 151, art. 2.

were restated more fully in the marine treaty of December, 1674, a month after Temple's interview with the Pensionary. It was specified in article one that the subjects of either Power might sail and trade, "and exercise all manner of traffic" in the ports of all countries which were or might thereafter be at peace or neutrality with their government.[27] In this navigation and trade they were not to be molested by the ships of war or by the private vessels belonging to the other party, "upon occasion or pretence of any hostility which may exist," or thereafter should occur between it and other princes not signatories to the treaty.

Upon first consideration it might seem that this provision, like that of "free ships, free goods," sustained Temple's interpretation. The next article in the treaty, however, defined the trade which might be carried on in enemy ports.[28] It was declared that this freedom of navigation should extend to all commodities which "shall be carried in time of peace," those only excepted which were classified as contraband. The language of this article implies that neither the English nor the Dutch while neutral might carry on with the enemy of the other trade which was not open to them in time of peace. Therefore neither the coastal navigation nor the colonial trade of the enemy was open to them during a war.

Within a short time other difficulties arose in the interpretation of the Anglo-Dutch treaties, and further definitions were required. In December, 1675, the two countries signed an explanatory declaration upon certain

[27] Dumont, VII, pt. 1, p. 282, art. 1.
[28] *Ibid.*, pt. 1, p. 282, art. 2.

articles of the treaties concluded in 1667 and 1674. In this declaration it was held that the true meaning of these treaties ought to be that the ships of either party while neutral might trade from neutral ports to places belonging to a country with which the other party might be at war, and from such places to neutral ports. They might likewise traffic between the ports of that enemy, whether such ports belonged to one prince or state, or to several princes or states.[29]

Even this declaration failed to clarify every point of dispute. It specifically defined the ports between which the ships of the neutral party might navigate; it was silent on the matter of the commodities which ships might carry between enemy ports. In their relations with each other England and Holland were governed by the principle that free ships should make the cargo free, but only as far as this applied to trade open to their vessels in time of peace. Such were the provisions of the commercial treaty of 1674. Since the explanatory declaration does not refer to the article which specified that the liberty of commerce should extend only to commodities which could be legally carried in time of peace, it is evident that no difficulty had arisen on that point, and that the prohibition of that article remained in force and unquestioned. Accordingly, the subjects of either England or Holland while remaining neutral might sail from port to port of the other's enemy, but in such voyages they might not carry enemy property. Thus the trade which was closed

[29] *Ibid.*, p. 319. Chalmers, *op. cit.*, p. 125, refers to this article as designed to prevent "disputes between the English and Dutch East India Companies," although it does not so appear in Dumont.

to them in time of peace remained closed to them in time of war, notwithstanding the other principle in the treaty that neutral ships should neutralize the cargo.

This was the interpretation of the British prize court during the hundred years which elapsed before the formation of the Armed Neutrality of 1780. In a letter of May, 1762, Lord Harwicke explained to Lord Bute that during the War of the Austrian Succession the Lord Commissioner of Appeals in prize cases "upon the solemn consideration of the marine treaty of 1674 . . . (had) adjudged by several decisions that the rule of 'free ships, free goods' did not extend to the carrying on of trade to the American colonies of France . . . because that was a trade which the Dutch could not carry on in time of peace, and the treaty of 1674 was intended to reserve to them in time of war between England and any other Power such trade as they held in time of peace." [30] Thus in 1762 Lord Harwicke was making use of an argument which had been first advanced by the Grand Pensionary in 1674, when he discussed with Sir William Temple the proper interpretation of certain articles in the Anglo-Dutch commercial treaty of 1667.

Such was the agreement between the two Powers while the Dutch were engaged in a war and the English remained at peace. The same policy was continued when they were allied in a war. In 1689, when they stood together to oppose the ambition of Louis XIV, they agreed to use their combined naval forces to prevent neutrals from carrying on trade with their enemy, just as the Baltic states had done earlier in the century. This prohibitive measure resulted in serious disagreements with the

[30] Marsden, II, p. 397.

neutral countries, particularly with Denmark. But in the ensuing negotiations Holland convinced the Danish King that it was illegal for his subjects to carry merchandise from one French port to another.[31] In 1691 Holland and England signed a convention with Denmark which provided that Danish ships should not take part in the coastal trade of France, but that they might trade freely between an enemy port and a place in their own country.[32] Here again trade that was closed to a neutral state in time of peace was not to be open in time of war. During the wars which began in 1688 and ended in 1713 the Dutch consistently adhered to this policy.

Throughout the seventeenth century, then, Holland had exercised her right as a belligerent to prevent neutrals from aiding the enemy by carrying on his coastal trade. She had also indicated that in her relations with certain countries she was willing to be guided by the opposite principle. This change in policy was probably dictated by the merchant aristocracy of Amsterdam. Such reversal in policy was not peculiarly Dutch; rather it was a practice common to all the maritime states of Europe.

From these Anglo-Dutch negotiations and from seemingly contradictory provisions in treaties of this period certain definite conclusions may be drawn. At the beginning of the seventeenth century Holland, like England and every other maritime state of Europe, followed the general principle of the *Consolato del Mare* that neutral vessels might not legally carry enemy property anywhere

[31] See "Christian den Femtes Dagböger" for June 13, 1691, in *Dansk Historisk Tidsskrift* (1847).
[32] Dumont, VII, pt. 2, p. 292, art. 3.

upon the high seas, and certainly not from one enemy port to another. Even in the period when such rules obtained throughout Europe, both Holland and England made specific regulations prohibiting neutral ships from carrying the goods of an enemy from one hostile port to another. But in the middle of the century they agreed that in their commercial relations with each other they would thenceforth follow the rule that free ships should make free goods. The treaty was ambiguous, however, lending itself to contradictory interpretations, as in 1674, when England held that the treaty allowed her subjects to engage in the coastal trade of Holland's enemy and the States-General objected. After much discussion and after the conclusion of two separate treaties, the interpretation held by the representative of Holland came to prevail in both countries, so that in the course of the next century it was faithfully followed by the judges of the English prize court. Beginning with the War of the League of Augsburg in 1689, Holland and England combined to enforce this old principle upon the traders of the other states of Europe. This coöperation continued until the middle of the eighteenth century.

Practices of the Great Maritime Powers

The tendency among nations to adopt the principle that free ships should make the cargo free led on occasion to the granting of exceptions to the old rule that enemy coastal and colonial trade was not open to neutrals. In other words, when two states had once agreed that the neutral vessels of either might carry the property of the enemy of the other, they might then find it convenient to

enter into specific agreements that enemy property might be carried from one enemy port to another. Such agreements were few before 1756, and the privileges granted were to be considered as exemptions from the general practice and not as a right inherent in neutrality. States whose relations were governed by the *Consolato del Mare* did not ordinarily enter into agreements conferring such privileges.

As the Dutch were among the first Powers to agree that free ships should make free goods, so were they likewise among the first to allow neutrals to carry enemy property between enemy ports. In 1676 they signed with Spain a declaration designed to clarify the marine treaty of 1650. By this declaration the meaning was held to be that the subjects of either country might "sail with their vessels and traffic with their merchandise," without any distinction as to who were the proprietors, from a foreign port as well as from their own to any place in a country at war with the other. They might likewise sail and traffic from a place in an enemy country to a place in a neutral country, and from one belligerent port to another, whether such ports were under the jurisdiction of one sovereign or several.[33] Holland signed a similar treaty with France in 1678,[34] and with Sweden in 1679.[35] The former remained in force during the rest of the seventeenth century, and was renewed in 1713 and again in 1739.

In the War of the Austrian Succession Dutch traders continued to enjoy the privileges which had been conferred on them by the commercial treaty between Hol-

[33] Dumont, VII, pt. 1, p. 325, art. 1.
[34] *Ibid.*, p. 357.
[35] *Ibid.*, p. 432.

land and France, notwithstanding the general restrictive measures which in 1744 the latter applied to neutral shipping.[36] Even while Dutch troops were operating in Germany under George II, a French ordinance proclaimed that Dutch ships not carrying contraband and not bound for a place under blockade might freely navigate between two enemy ports. Thus the Dutch merchants were again granted immunity from the general enforcement of maritime law.

Other traders, not Dutch subjects, sought to broaden this field of immunity by giving a new interpretation to the Anglo-Dutch treaty of 1674. They took part in the coastal trade of France under the protection of the Dutch flag. It was reported to the English law officers, as a basis for ascertaining what might be the opinion of the judges on the legality of this trade, that several ships had obtained Dutch passes, and in pursuance of the marine treaty of 1674 had sailed directly to some French port, where for many months they had traded, laden with enemy goods, from port to port of France and Spain. In order that this trade might continue unmolested by British men-of-war or privateers, these ships had sailed under Dutch masters and Dutch colors. The report continued: "They had their Dutch passes on board, and fictitious bills of lading for goods as if bound for Holland. Many of these Dutch masters are not native of Holland, but French, Irish and other nations, made burghers by the States of Holland." [37]

The opinion, signed by George Lee, followed the old regulations: "I am of the opinion an English privateer

[36] Lebeau, II, p. 1.
[37] Marsden, II, p. 401.

may safely seize a Dutch ship under the circumstances above stated, and will not be liable for cost and damages for such seizures. . . . It has been several times determined in the Admiralty Court that a Dutch ship carrying a cargo of enemy's goods upon freight from one port to another of the enemy is not privileged under the treaty of 1674, and cannot protect the enemy's goods, and has accordingly in such cases been condemned as lawful prize, but the ships have been restored." [38]

In the next war the Dutch engaged in the same traffic, and a similar question came before the Court of Admiralty. Again the judges declared such trade to be illegal, just as the Grand Pensionary in 1674 had considered it illegal. In 1756, as in 1674, it was held that, according to the terms of the Anglo-Dutch commercial treaty, trade not open to the subjects of the two countries in time of peace could not be open to them in time of war, despite the exceptions granted by France to the peace-time regulation of her navigation system. The provisions of the Anglo-Dutch treaty, which prohibited such trade, could not be invalidated by the system of passes and licenses resorted to by France.

France had followed the principle which England and Holland adhered to in their relations with each other, and like them had granted very few exceptions from that principle, which she had defined in her declaration of 1650. In the Treaty of the Pyrenees in 1659 France and Spain agreed that, in the event one of them should be at war with any other Power, the subjects of the other if neutral might carry on foreign trade with the same freedom as

[38] *Ibid.*

in time of peace, contraband goods and trade to blockaded ports excepted.[39] This provision, or other provisions similar in purpose, appeared in most of the commercial treaties signed in Europe for the next hundred years. The meaning was obviously that the subjects of the contracting parties could not in time of war be engaged in a foreign trade which was closed to them in time of peace. In the twenty years following the Peace of the Pyrenees France concluded several treaties which provided that free ships should make free goods. Nevertheless, in the great ordinance of 1681 she repeated the declaration of 1650, that enemy property on board neutral vessels would be good prize to the French captor.[40] That regulation, followed in time of war, excluded neutrals from the coastal traffic of an enemy of France and from trading between the enemy mother country and her colonies.

During the War of the Spanish Succession French regulations became more detailed and more positive. According to the English navigation laws Danish ships could not carry to the English market any commodities which were not produced in Denmark. France built upon that foundation. The first ordinance of 1704 authorized French warships and privateers to seize all Danish vessels sailing to an enemy port from any place not within the dominions of the King of Denmark. When brought in for adjudication, such ships and their cargoes would be declared good prize.[41]

Another French ordinance of 1704 governed the navigation of all neutrals. In this it was boldly declared that

[39] Dumont, VI, pt. 2, p. 264, arts. 10, 11.
[40] Lebeau, I, p. 91.
[41] *Ibid.*, p. 326.

neutrals were to enjoy the same liberty of commerce as they were enjoying in time of peace, and proceeded to define such liberty of commerce as they might rightfully have. Neutral subjects might sail from a home port to an enemy port with merchandise produced in their own country. They might also depart from an enemy port and sail to their own country with a cargo belonging to the owner of the ship or to some other neutral subject. Moreover, they might trade with neutral ports. If in any of these cases there was found on board the vessels any merchandise belonging to the enemies of France, the whole cargo would be condemned as good prize. Neutrals should not carry enemy property between two enemy ports.[42] There never was a clearer and more logical exposition of the Rule of 1756 than this French ordinance.

In the War of the Austrian Succession the general French regulations upon neutral trade were equally as stringent as those in the previous war, the ordinance of 1704 being repeated in 1744.[43] But at this time relaxations were granted in favor of Danish ships. The political situation in the North had impelled England and France to compete for the alliance of both Sweden and Denmark, and an Anglo-Danish alliance was at last formed in 1739. When it expired three years later, Denmark preferred to join France. In March, 1742, she signed at Versailles an alliance and subsidy treaty, which provided that Denmark was to have a substantial yearly grant of money from the French treasury. A few months later a commercial treaty was also concluded, of which

[42] *Ibid.*, p. 328, arts. 1–6.
[43] *Ibid.*, II, p. 1.

the most significant feature was that Danish subjects were to enjoy trading privileges similar to those which France had conferred on the Dutch.[44] In the regulations of 1744 Danish and Dutch subjects were treated alike, inasmuch as they were specifically exempted from the restrictions provided by the general law. By 1749 the political situation in Northern Europe had again changed. In that year Denmark lost the trading privileges she had enjoyed since 1742. Unless definite immunity were again granted by France, Danish ships could not, at a time when France was at war, be employed in any trade with her enemy which had not been open to them before the war began.[45]

Different considerations influenced the policy which France adopted with respect to the ships of Sweden and to those of the Hansa Towns. According to the regulations of 1744 these ships were allowed to navigate between enemy ports, provided they did not carry enemy property. In that year the King of Sweden asked that his subjects be given privileges similar to those conferred upon the Dutch and the Danes, and the request was granted.[46] The Swedes might thenceforth trade under a temporary relaxation of the law. A similar temporary relaxation was conceded in September, 1757, to both the Swedes and the Danes.[47] But the subjects of the Hansa Towns were not accorded such privileges. Their trade was circumscribed by the general regulations. It is evident that in formulating her policy respecting neutral trade and neutral shipping, France was motivated primarily by political considerations.

[44] De Clercq, Alexandre, *Recueil des traités de la France*, I, p. 46.
[45] Martens, Georg Friedrich von, *Supplement au recueil* [*1701–1808*] (Göttingen, 1802–1808), I, p. 225.
[46] Lebeau, II, p. 13.
[47] *Ibid.*, pp. 155, 156.

Mindful of the efforts which the neutral nations made to free their commerce from belligerent restrictions, and of the bearing which this might have upon the issue of the War for American Independence, France, when she became one of the parties in the war, extended to all neutrals the temporary relaxations of her law, which previously had been accorded to but a few nations. It was this move which caused the English Admiralty Court to apply the Rule of 1756 so hesitatingly during that war. No such measure as that adopted by France had previously interposed to affect the views of the judges. Before the Seven Years' War they were governed mainly by definite treaty stipulations, by old practices, and by many court precedents alike in England and in other countries.

When England in 1756 defined the principle that trade closed in time of peace could not be open in time of war, these precedents were one hundred and fifty years old. Holland had begun to establish them in 1604, England almost as early. In the interview in 1674 between Sir William Temple and the Grand Pensionary, the latter asserted without contradicton that England had enforced the principle in the early part of the century. The correctness of this assertion is confirmed by the records of the Admiralty Court. In February, 1653, "before the peace was concluded between England and France," the *Fortune of Hamburg* was seized and brought to an English port for trial. When judgment was pronounced three years later, the court declared: "And for that, according to the process and proofs had and made in this cause, it

appears to us that all and singular, the goods, wares and merchandises that were taken and seized in the said ship, the *Fortune of Hamburg,* were laden and received at Rouen in France, and were bound therewith to Bordeaux upon the account of Frenchmen, and for that as well by the law of nations as by due reprisals lawfully granted, the said ship and goods are to be proceeded against in this court and to be . . . lawfully confiscated." [48] In this statement is found evidence that this was not the first time the court had adjudged a case of this sort, and that it was guided by precedents of previous decisions.

Here were two grounds upon which ship and cargo might be declared good prize: the Hamburg ship carried enemy property, and it sailed between two enemy ports. Either offense was sufficient reason for confiscation; probably both were considered by the court. At all events, it was condemned because in time of war it was carrying on a trade closed to Hamburg ships in time of peace.

There are other illustrations of English adherence to this principle. It was prominent in the commercial treaties which in the latter half of the seventeenth century England concluded with Spain, Sweden, Denmark, and Holland. When it was rigidly enforced in time of war, friction with neutral nations was inevitable. A notable instance was the Danish resentment at the interdiction of neutral trade with France by the Allied Powers in 1689. Denmark, even while her troops were serving under William III in Ireland, seized Dutch ships in the Sound and in the harbor of Copenhagen to compensate her for losses that might be unjustly inflicted upon her subjects by belligerent privateers. Their treaty of compromise of 1691

[48] Marsden, II, p. 30.

evidences that not only Holland and England, but Denmark also, recognized the rule that neutral participation in enemy coastal trade was unjustifiable.[49]

This rule was later more fully explained. It was continued through the War of the Spanish Succession, and was again applied by England in the naval wars of the eighteenth century. The regulation agreed to by Denmark and the Allied Powers finally came to mean, when enforced by England, "that Danish ships being furnished with passports together with authentic certificates relating to the oath required by the convention with Denmark . . . and there being no suspicion of their having naval stores on board, may pass freely; except such ships as have not disposed of their whole lading in the first port of France where they touched, but, together with the remainder of their lading, have taken in other goods in the first port of France, and are proceeding towards another place within the territory of the French king with the same." [50] The principle is more succinctly stated in the oath required of the Danish skipper who wished to sail for a French port. He had to swear that he would not "unload any goods, once laden in France, in any other port of France." Such was the principle agreed to by three of the chief naval Powers of Europe.

With one notable exception, English practice for the next two generations was uniformly governed by the principle that trade closed to a country in time of peace could not legally be opened to it by an enemy at the outbreak of a war. The form and substance of the agreement with Denmark and Holland reappeared in the instructions

[49] Dumont, VII, pt. 2, p. 292, art. 3.
[50] Marsden, II, p. 414.

which the English government issued to the fleet in 1693 and in 1704.[51] No exemptions from the general rule were granted to a neutral country in the wars which ended with the Peace of Utrecht. The commercial treaty concluded with Spain in 1713 and the agreement with Holland in the same year made no alteration on this point in the understanding between England and the other two Powers. In the brief war with Spain in 1727 the rule which the British were enforcing was again reviewed by the prize court. After he had summarized the facts relative to the adjudications in the War of the Spanish Succession, the judge, in justifying court decisions, continued: "I shall only add that if the Spanish in time of war have their effects carried in French ships from port to port without being stopped by us, whilst the Spaniards take our merchant ships in all places, such a war would be unequal, and the Spaniards would have no more to do than to hire French ships to bring all their treasure from the West Indies, and then it might pass through our fleet without being molested or questioned, to Cadiz or any other port." [52] Thus in 1727 Great Britain questioned the right of French subjects to carry Spanish property from one Spanish port to another, notwithstanding her treaty with France which allowed such a right.

The same principle was uniformly applied in the War of the Austrian Succession. On one occasion a Hamburg ship was brought in for trial and declared lawful prize because it was sailing from one enemy port to another and was carrying enemy property. One of the explanations given for this seizure was that if a Hamburg ship should

[51] Marsden, II, pp. 414, 420.
[52] *Ibid.*, p. 266.

be permitted to engage in such trade, "the enemies of England might lay up their own ships and trade with safety in neutral bottoms." In the case of the *Goede Pearle,* a Hamburg ship which was captured in 1747 while bound from Cette to Havre, the judge of the Admiralty Court pronounced that it was "a case upon the law of nations [in contradiction to cases under special treaty], by which neutrals cannot let out their ships to trade from French port to French port." [53] Again in the case of the *Ceres* the Court treated the principle of the Rule of 1756 as a well-established law.[54]

England made at least one notable departure from her otherwise constant enforcement of the Rule of 1756. The susceptibility of the Stuarts to the allurement of the Bourbons determined the nature of the Anglo-French commercial treaty of 1677. The two sovereigns agreed that the subjects of either, being neutral, should be allowed to trade in enemy property upon the coast of the other's enemy. This treaty provision remained in force for the rest of the seventeenth century and was renewed in the commercial treaty which France and England concluded in 1713.[55] At that time it was declared that the English and the French might sail in liberty and security, "no distinction being made who are the proprietors of the merchandise laden thereon," from places, ports and havens of the enemies of both or either "without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place

[53] Robinson, *Adm. Rep.*, VII, case of the *Johanna*, n. 1.
[54] Marsden, II, p. 436.
[55] Dumont, VIII, pt. 1, p. 345, art. 17.

belonging to an enemy," whether they were under the jurisdiction of one prince or several.

The principle of this exception was clearly stated, but it failed when events put it to the test. The first case arose in 1727 when French ships entered into the coastal trade of Spain.[56] The English held then, as the Dutch had held in 1674, that it could not be the meaning of a treaty signed between two friendly sovereigns that the subjects of one of them could carry on the trade of the other's enemy. Services thus performed would interject into the conflict a new element not anticipated at the commencement of hostilities; and would tip the scale heavily in favor of the enemy, so that such a war would be unequal.

The English prize court had not advanced beyond that interpretation at the opening of the Seven Years' War in 1756, when Dutch participation in the colonial trade of France gave it occasion to define in concise language the old principle that trade not open to neutrals in time of peace could not be open to them in time of war. To this interpretation it adhered at the time of the Armed Neutrality of 1780.

In the second half of the eighteenth century commercial theory and practice had not advanced far beyond the point at which they stood at the beginning of the Modern Era. The wealth flowing from trade and commerce had been an indispensable element in the process of unifying the national states; and as it came to be regarded as the foundation of national growth and power, an exclusively national commercial policy was evolved. When colonies were established, trade in colonial products was reserved

[56] Marsden, II, p. 267.

for the mother country; and as the carrying trade became important, it was monopolized by native subjects. Regulated by the state, commerce was regarded as the property of the state. It became alike the cause and the object of maritime wars: requiring to be protected from attacks, and to be extended by the successful operation of the nation's military and naval forces.

Such commercial policies were common to the maritime Powers, but the Northern countries were late in entering the competiton for trade in colonial products. In the eighteenth century the fever of mercantilism urged Denmark and Sweden to new activities; the alignment of the Powers, which made them, like Holland, neutral in the great naval wars, afforded them an opportunity to gain new fields of commerce. Neutral participation in the trade of belligerents, always a vexing question, was greatly extended, and the controversies it engendered between neutral and belligerent governments became more bitter, even as the naval wars became more bitter.

The controversies centered in the question of the respective rights of neutral and belligerent. While the principle that neutral ships might not carry enemy property obtained, this question was relatively simple, though even at that time it was found necessary to declare explicitly that neutrals had no right to enter the coastal or colonial trade of a nation at war. But in the second half of the seventeenth century some treaties introduced the principle that free ships should make free goods, in consequence of which the question of belligerent and neutral rights became more complicated. Through bilateral treaties, instructions to naval forces, and court decisions the old rule was maintained that trade closed to a nation in

time of peace could not be open to it in time of war. In the enforcement of this rule Holland took the lead, followed closely by England, France, Denmark, and Spain. Exceptions to this general principle were granted in some cases, in which move Holland was again in the van.

Such was the history of the principle which was subjected to the censure and condemnation of the Armed Neutrality of 1780. It had been too deeply rooted in the maritime usages of Europe before the introduction of the principle that free ships should make free goods, and had stood too firmly thereafter, to be readily abandoned at the bidding of a few Powers. Before the time at which it was expressed in the formula known as the Rule of War of 1756 it had been a part of the maritime code of every seafaring nation of Europe. It was neither innovative nor English; it was European and as old as the national states. It had been consciously applied in Holland earlier than in England, and given a more complete definition by Louis XIV in 1704 than by the High Court of Admiralty in 1756. Sanctioned by treaty provisions of which the Neutral Powers of 1780 were signatories, and enforced by these Powers when the course of events involved them in a war, the principle could not constitute an infraction of neutral rights, and it could not justly be an object of criticism on the part of the Armed Neutralities.

CHAPTER III

THE PRINCIPLE OF "FREE SHIPS, FREE GOODS"

In the first centuries of the Modern Era the European society of nations, composed as it was of a number of independent states whose existence was contingent upon the fostering of a spirit of self-glorification in the several peoples, and upon the adherence of the several governments to a policy of self-interest, was without a universally recognized system of rules to govern the conduct of its sovereign members toward each other, and without an authority or tribunal to compose individual dissensions when they occurred. A confusion in international affairs, a clash of interests among the dynastic states, with a resort to arms as the final arbiter, were inevitable consequences of the existing conditions. When the ensuing wars were extended to the sea, they forthwith involved the interest of nations not otherwise entangled in the combat between the belligerents.

The lines of conflicting interests of the Powers that remained at peace and of those that were at war became clearly drawn as in the course of time the emphasis of the wars came to be largely shifted from the original desire for territorial unity and aggrandizement to the newer urge to capture points of trade advantage. Neutral ships and sailors afforded invaluable services; neutral coun-

tries furnished supplies essential to the successful prosecution of war. Discovering that they could profit from the naval wars which dislocated the trade of belligerents, neutral states planned accordingly. A new element was thus introduced into the scramble for world commerce, and a new weight thrown into the variable balance of international rivalries. The wars would thenceforth represent, on the one hand a struggle between belligerents, on the other a contest between one or both belligerent parties and the neutrals.

The Complex Rules of Modern Prize Law

Such a development had an unwholesome effect upon the growth of international prize law. Each party contending for commercial advantage in time of war interpreted the rules of naval warfare in terms compatible with its immediate interest. Having evolved under a less complex situation, these rules were not flexible enough to cover every contention of all the parties. Belligerents enforced them in their prize courts; neutrals contested prize court decisions. On certain occasions neutral states threatened to employ their military forces to compel the application of principles of international law as these were interpreted by neutral statesmen and publicists. Inasmuch as this situation engendered suspicion between neutral and belligerent, and obliged some states to move cautiously in their relations and treaty commitments with nations that came habitually to remain at peace during the great naval wars, it tended to retard the normal development of international prize law. That tendency was increased by the fact that statesmen and diplomats sometimes lost sight of the foundation of that law, so that in the diplomatic negotiations there were inconsistencies, and evidence of failure to appreciate the principles governing prize court adjudications.

The difficulty for both parties concerned would have been simplified by a strict adherence to the general theory of the law of nations, that when the maritime rights of one nation clashed with those of another, justice required that the party which would suffer the least damage by yielding its rights in favor of the other should do so. In the conflict which arose between the interests of belligerent and neutral states, compensation for injury suffered by the latter could more readily be found than for injury suffered by the former. The neutral should therefore yield to the more urgent requirements of the belligerent. Whenever a neutral vessel was captured on the high seas, it was possible for a just indemnity to be made by the captor, who, though he had the right to confiscate enemy property found on board the captured vessel, had also the obligation to pay the freight and to compensate unjustifiable damage sustained by the neutral carrier. Neither the neutral trader nor the belligerent privateer was willing at all times to abide by this principle of law, and the result was that long and costly litigations were carried on in the belligerent prize courts.

Difficulties over prize court adjudications arose also from the fact that beginning with the middle of the seventeenth century two opposite principles governed the decisions of the judges. From the commencement of oceanic commerce there had been a common law, so to say, built upon the foundation of the *Consolato del Mare*. After the bewilderment attending the wars of religion and the first

great dynastic wars, it became necessary to redefine the old principles governing naval warfare and the capture of merchant vessels on the open sea. This redefinition was accomplished during the second half of the seventeenth century by means of bilateral treaty stipulations, of which the majority tacitly or by declaration followed the maxims of the fundamental law that the neutral flag might not be used to protect enemy property. During the same period, however, there were concluded several treaties in which was incorporated a new principle, allowing the neutral flag to protect enemy goods. The relationship between such states as did not enter into either of these forms of agreement continued to be governed by the prize regulations of the *Consolato del Mare*. When the disputes between neutral and belligerent reached their climax in the eighteenth century, some states were bound by the old principle, some by the new. The old was more often of advantage to the belligerent that commanded the superior naval forces, the new to the other belligerent and to the neutrals whose merchant vessels might profit by entering as carriers into the disrupted navigation systems of the nations at war.

These opposite principles of law served to condition subsequent procedure in the prize courts. When a neutral ship was captured and its case was under consideration, the function of the judge was to determine which of the two principles was applicable, and to conduct the trial under an equitable interpretation of that principle. The trial was also complicated by the ambiguity of the language of certain treaty provisions, arising from the altered conditions, and by the fact that the precedents which the courts followed varied, just as the details of previous cases

varied. Thus every prize court adjudication afforded ample ground for diplomatic controversy between the governments whose subjects were contending in the Admiralty Courts.

The Uniform Rules of the Consolato Del Mare

Before the introduction in various treaties of the principle that free ships should make free goods had produced an innovation in the established practice, that section of the prize law which governed the treatment of enemy property on board neutral vessels and neutral goods on enemy vessels was, in its general terms, fairly uniform throughout Western Europe, and almost invariable from generation to generation. In naval warfare the right of a belligerent to seize the property of an enemy wherever found was unquestioned and uniformly exercised, and the neutral flag could not legally be employed to screen such property from capture and confiscation. This regulation was regarded as constituting no restraint on neutral commerce and no infraction of neutral rights; it was considered rather as a necessary measure for the protection of the interest of belligerents.

On this point the rules of the *Consolato del Mare* were definite and clear.[1] No formal regulation was deemed necessary to govern the action of a belligerent warship meeting an enemy vessel carrying enemy goods, for common sense would point out what should be done. Ship and cargo were to be seized as good prize. However, if there was neutral property on board the ship, it was not subject

[1] Chapter 273, arts. 1–3, 5–8, given in Robinson, *Collectanea Maritima*, pt. II.

to confiscation, but some arrangement was to be made in regard to it between the captor, who had succeeded to the ownership of the vessel, and the neutral merchants who owned the cargo. In the event the merchants refused to enter into a reasonable agreement, the captor was to send the vessel to a port in his own country, charging the merchants freight equal in amount to that which would have been earned if the ship had reached the port of its original destination. On the other hand, if the captor should refuse a similar arrangement with the merchants and forcibly send the cargo away, the merchants would not be bound to pay the whole or any part of the freight; and, besides, the captor would be compelled to make compensation for any damage he might have occasioned them. The enemy character of the ship and part of the lading did not affect the neutral part of the cargo, which therefore could not be confiscated or taken as spoil by the captor.

Equally definite was the law which governed the treatment of neutral ships carrying enemy property. Such vessels might be seized and compelled by the captor to sail to a place of safety, in his own or in any other country, where the enemy merchandise would be declared good prize and the vessels released, the owners being allowed the whole freight which they would have earned if the ships had reached the ports of their original destination. The question of freight allowance was not left to the chance decision of the captor; it was to be determined from the ship's papers, or, in default of necessary documents, upon the sworn statements of the master. If the master of the captured vessel should refuse to carry the

cargo, it being enemy property, to the place of safety at the command of the captor, the latter might sink the vessel if he saw fit, taking care to preserve the lives of those on board. Such action was to be resorted to only in cases where the whole lading or at least the greater part of it belonged to the enemy. This was an extremely harsh penalty for the refusal to comply with the peremptory demands of the captor, but no other regulation was possible. The neutral character of the ship did not protect the enemy property in its cargo.

Thus the regulations of the ancient code contained two maxims. The first decreed that the goods of a neutral found on board the ship of the enemy were free; the second that the property of an enemy found on board a neutral ship was good prize to the captor. The captured neutral vessel was restored to the owner and freight was allowed on the confiscated enemy merchandise. These were equitable regulations founded on the long experience of practical traders. Before the beginning of the seventeenth century these principles were generally followed by the maritime states of Western Europe.

Treaties and Ordinances Confirming the Consolato Del Mare

Such were the provisions recorded in the *Consolato del Mare*. Regulations confirming them were enforced at an early date by the various states. In their treaty of 1353 England and Portugal agreed that if the subjects of either country should seize an enemy vessel and find on board any merchandise belonging to the subjects of the other

country, they should preserve it until the merchants had been given an opportunity to prove their ownership.[2] In other words, neutral property on board enemy ships was to be restored to the owners. A similar agreement had been concluded in 1351 between England and the maritime cities of Castile and Biscay.[3] The converse principle was also enforced, that all enemy property was subject to confiscation. Enemy merchandise on board neutral vessels was therefore regarded as good prize to the captor. In 1346 a neutral Spanish vessel with a lading belonging to the enemies of England was seized by an English warship and brought into the island of Guernsey. The owner of the ship appealed to Edward III, who forthwith restored the vessel and allowed freight upon the confiscated enemy property.[4] Similar cases were under consideration in 1375 and again in 1378.[5] The enemy goods found on board were declared good prize, and the ships, together with the neutral part of the lading, were restored to the owners. Lawful capture, then, extended to all enemy property wherever found, but it did not affect the ownership of neutral vessels carrying enemy goods, nor of neutral goods on board enemy vessels.

This principle was confirmed in a number of other treaties. In 1370 the government of Flanders undertook to prevent its subjects from carrying merchandise belonging to the enemies of England.[6] A similar agreement was made in 1406 between Henry IV of England and the Duke

[2] Rymer, Thomas, *Foedera, Conventiones, Literae et Acta Publica inter Reges Angliae ab Anno* 1101 *ad Nostra Tempora* [*1698*] (London, 1704–1717), V, pp. 717, 746; Marsden, I, p. 78.
[3] Dumont, I, pt. 2, p. 265.
[4] Marsden, I, p. 75; Dumont, I, pt. 2, p. 265.
[5] Marsden, *op. cit.*, I, pp. 102, 106.
[6] Rymer, *Foedera*, III, pt. 1, p. 171.

of Burgundy.[7] This treaty was renewed in 1417 and at four different times thereafter in the course of the fifteenth century. A stipulation to the same effect was likewise inserted in a treaty concluded between England and Brittany in 1468 [8] and renewed in 1486.[9] In 1460 Henry VI of England and the government of Genoa agreed that "if the ships of either party had on board goods belonging to the enemies of the other, such goods were to be delivered up immediately on requisition, an oath being taken to ascertain the ownership, and freight being paid by the captor; and, in case of such delivery being refused, the ships and goods of the recusants might be taken by force, and the crew made prisoners." [10]

These early practices were also followed by Holland and Denmark. Grotius relates that while Holland and Spain were at war the Dutch always restored neutral French ships that, on their way to or from Spain, were intercepted by Dutch vessels. The seizure of the enemy property carried on these ships was regarded as a matter of course. Neutral property in enemy vessels, however, was restored to the owner. "In Holland, in the year 1438, when the Dutch were at war with Lübeck and other cities on the Baltic and the Elbe, in a full meeting of the Senate it was decided that merchandise clearly belonging to others, even if it were found in vessels of enemies, did not form part of the booty; and since then this had been recognized as the law there. This was also the view of the King of Denmark, when, in 1597, he sent an embassy to the Dutch and their allies to claim for his subjects free-

[7] Dumont, II, pt. 1, p. 302.
[8] *Ibid.*, III, pt. 1, p. 596.
[9] Rymer, *op. cit.*, V, pt. 3, p. 178.
[10] Manning, *The Law of Nations*, p. 246.

dom of navigation and carrying of merchandise to Spain, with which the Dutch were at war." [11]

The Dutch adjudications were not always as lenient toward neutral property as indicated in the pages of Grotius. The English judge, Richard Zouche, records that, in the war for Dutch independence, when some merchants of the Netherlands, still adherents of the King of Spain, were in the habit of shipping cargoes secretly to Spain in English ships, "the inhabitants of Zeeland, who pursued them with bitter hostility, in their indignation captured certain English ships engaged in this practice, and secured their condemnation by the judges of the Admiralty as lawful prize. The English complained of this, and succeeded in getting some ships of the Zeelanders which had put into ports detained, and their captains imprisoned. The Prince of Orange, however, appeased the Queen, and it was agreed to restore the ships and persons captured on each side." [12]

The principle which allowed the confiscation of enemy goods on board neutral vessels and freed neutral goods on board enemy vessels was continued into modern times, and remained unquestioned until the second half of the seventeenth century. But in certain details of application, the law and practice became less uniform and less clear than they were under the *Consolato del Mare*. Law and usages were often enforced with a severity unknown in early times, and the penalty inflicted on the neutral who

[11] Grotius, *De Jure Belli ac Pacis*, Bk. III, ch. 1, art. 3, note.

[12] Zouche, Richard, *An Exposition of Fecial Law and Procedure, or of Law Between Nations and Questions Concerning the Same, Wherein are set forth Matters Regarding Peace and War Between Different Princes or Peoples, Derived from the most Eminent Jurists*, translation by J. L. Brierly (Washington, 1911), pt. II, art. 8, sect. 6.

trafficked in enemy goods was likewise becoming heavier than it formerly had been.

An English order in Council of 1557 affords an illustration. It was decreed that "if the ships of our subjects do take by sea any other ship appertaining to any other of our subjects, to our allies, confederates, and friends, in which shall be found goods, merchandises, or men of our enemies, or likewise also if they shall take the ships of our said enemies, in the which shall be found the persons, merchandises or other goods of our said subjects, allies, confederates, and friends, or in which our said subjects, confederates and allies shall be partners in any portion, then the whole shall be adjudged good prize." [13] Whereas formerly in the case of a captured vessel carrying enemy property the vessel had been restored to the owner and a reasonable freight allowance made on the seized cargo, under the application of this order in Council the result would be that such a vessel, as well as the cargo, would be forfeited to the captor. Yet this regulation was not more rigorous than those which were sanctioned by the chief commentators on international law, and it was less uniformly applied than were the equally harsh regulations adopted by France.

As a matter of fact, the order of 1557 was only intermittently enforced. In the reign of Elizabeth the neutral ship was ordinarily restored. At times freight was paid on the seized enemy property; at other times it was not allowed. In the wars of the first two Stuarts the practice varied, sometimes only the enemy goods being condemned, sometimes the neutral ship also. Occasionally the cap-

[13] Marsden, I, p. 165.

tured vessel was restored as an act of grace, by order of the Council, after it had been declared forfeited by the lower court.

The same tendency toward more severe restrictions on neutral shipping is significantly illustrated by the provisions of a treaty of 1630. In that year Spain concluded peace with England but continued her war with Holland. The treaty of peace contained the provision that English goods in Dutch ships and Dutch goods in English ships should be good prize to the Spanish captor.[14] This provision was rigidly enforced by the Spaniards, and was likewise approved by the English judges, who in 1634 sought to explain the true significance of the law then in force. It was held that "as well by the general law, civil and marine, as by law of the realm of England, if a man-of-war set out by letter of marque or commission take a ship belonging to the enemies against whom he is set to sea, although the goods in her belong to the friend or allies in league and amity with the states from whence he hath his commission, not only the ship belonging to the enemies, but also the goods belonging to friends taken in an enemy's ship are and ought to be adjudged the taker's lawful prize. And so during the late wars between Spain and England it hath been, and was continually . . . in the High Court of Admiralty of England practiced, sentenced, observed and adjudged; and such for many years past hath been and is the use, practice and judgment in the Courts of Admiralty of Flanders, Holland and other countries in causes of that nature come to be decided." [15] That is, neutral property on board enemy ships was now

[14] Marsden, I, p. 407; Dumont, V, pt. 2, p. 631.
[15] Marsden, I, p. 182; *cf.* p. 190.

subject to confiscation, and by the unvarying practice of all nations enemy property on neutral ships was likewise confiscated.

Of all the early prize regulations those of France imposed the most severe penalty upon neutral shipping. They may be classified among the maritime regulations which deviated farthest from the principles of the *Consolato del Mare*. An edict of Francis I of 1543, carried over in the ordinance of 1584,[16] provided that when found together the property of an enemy of France would cause the confiscation of that of a neutral friend. This principle is more severe than that agreed upon in the Anglo-Spanish treaty of 1630, but similar to that which was intermittently applied in England under the order in Council of 1557.[17] A neutral ship having enemy merchandise on board would, by the French decree, be subject to confiscation, and neutral property on board an enemy vessel likewise condemned.

This French regulation prevailed unmodified until about the middle of the seventeenth century. After that time its severity was somewhat tempered. When the Dutch made complaint of the unreasonable harshness of the French code, France agreed, in 1646, to suspend the ordinance of 1584 in regard to Holland for a period of four years.[18] The immunity thus granted from the general operation of the law was a temporary concession only, and it had no bearing upon the relationship between France and other countries. Within a brief time, however, France was temporarily abrogating the law in favor of certain other nations, and presently she even negotiated several

[16] Lebeau, I, p. 21.
[17] Marsden, I, p. 165.
[18] Dumont, VI, pt. 1, p. 342.

treaties in which it was stipulated that free ships should make free goods. In 1650 the severest of the regulations was reversed, when the prize courts were enjoined to free all merchandise belonging to friendly powers, and to confiscate enemy property only.[19]

Excepting such restrictive measures as the English order in Council of 1557, the French ordinance of 1584 and the Anglo-Spanish treaty of 1630, which were introduced at a comparatively late period, the common practice of the maritime states was to free neutral property on board enemy ships and to confiscate enemy goods in neutral ships, restoring the vessel and other neutral property. At first freight was allowed on all condemned cargo; later the practice varied, the freight being sometimes awarded, sometimes not. This principle had obtained for centuries, so firmly established that it was approved by all the great commentators on international law. On this particular point there was not a dissenting voice among them.

Observations of Early Commentators

The first important writer on the law of nations was the Italian jurist Alberico Gentili, whose Protestant views impelled him to quit Italy for Austria, whence he fled to England in 1580. There he became a member of the University of Oxford, first as a lecturer on Roman law, later as a professor of civil law. In 1605 he was called to be standing counsellor to the King of Spain, in which capacity he was to advocate the interest of Spanish subjects in maritime cases. After his death in 1608 his notes on the cases in which he had been engaged were published under the title of *Hispanicae Advocationis Libri Duo*. In this

[19] Lebeau, I, p. 33.

work he was not directly concerned with the status of enemy property on neutral vessels, of which the seizure was a natural consequence. His concern was with the problem of whether freight should be paid on the seized enemy property. He held that the claims upon the property went with it when it changed hands, and that the victor came under the law that governed the vanquished. Since the vanquished enemy was bound for the freight, for which the cargo was pledged, the captor was likewise bound, no matter what might have happened with reference to the persons and goods of the enemy. He made no comments relative to the disposition of the neutral vessel; its restoration he regarded as a matter of course, according to the public law of Europe.[20]

The work of Grotius, *De Jure Belli ac Pacis,* was published a dozen years after the *Hispanicae Advocationis* had appeared. Like Gentili, Grotius treated the question of captures at sea briefly, and he deferred to the principles of the *Consolato del Mare,* which, he said, contained the law and usages of the maritime states. Regarding the question of neutral property on board a captured enemy vessel, he held that it could not pass into the possession of the captor since it had not belonged to the enemy, for it was clear that "in order that something may be ours, it must belong to the enemy." In the same manner the ship of a friend did not become a prize because it was carrying goods belonging to the enemy, unless the enemy cargo had been taken on board with the consent of the owner of the ship.[21] The principle advocated by Grotius

[20] Gentili, Alberico, *Hispanicae Advocationis Libri Duo,* translation by Frank Frost Abbott (London, 1921), Bk. I, ch. 28.
[21] *De Jure Belli ac Pacis,* Bk. III, ch. 5, art. 6.

in this matter would impose a more severe restriction on neutral shipping than that of the fundamental law as based on the *Consolato del Mare;* it conformed more nearly to the restrictive practices to which the various nations were resorting in the sixteenth and seventeenth centuries. The confiscation of enemy property in neutral ships was accepted as an uncontested belligerent right.

The English civilian Richard Zouche, from 1641 to 1649 Judge of the Admiralty, published his *Exposition of Fecial Law and Procedure* in 1650. His observations closely resemble those of Grotius, his immediate predecessor as a commentator on international law. On the question of whether the goods of a friend might be seized on board an enemy ship he quoted a section from *De Jure Belli ac Pacis* and refrained from making any comments of his own. On the other hand, he expressed the opinion that neutral vessels carrying enemy property would be good prize according to the provisions of the civil law, by which a ship was forfeited if it carried an illicit cargo with the knowledge of the owner. But he regarded it as more equitable to release the ships of a friendly power after removing their seizable cargoes, unless they carried contraband. Moreover, "by the *Consolato del Mare,* in which the law of the Mediterranean is contained, one who seizes enemy goods in a friendly ship is bound to pay freight for that part of the voyage which the ship has performed." [22]

Of greater interest than the work of Zouche was the *De Jure Maritimo et Navali,* compiled by Charles Molloy, and published in 1676. Containing little that was new, it summarized opinions and usages current in the period

[22] Zouche, *Exposition of Fecial Law and Procedure,* pt. 2, art. 3, sect. 5.

which intervened between Grotius and Heineccius, and for a century was regarded in England as the standard work in its field. Its fifth edition appeared in 1690, its tenth in 1778. This book presents the view that according to the law of nations all things were the captor's which he took from the enemy; but the neutral property on board an enemy vessel did not belong to the enemy and therefore did not pass as good prize into the hands of the captor. "So, on the other hand, if the ships of friends shall be freighted out to carry the goods of enemies, this may subject them to be prize, especially if the goods shall be laden aboard by the consent or privity of the master or skipper." [23]

The summary thus presented by Molloy was but the opinion of the greater commentators — Gentili, Grotius, Zouche, and, according to Manning, Loccenius, a Swedish professor, whose work *De Jure Maritimo et Navali* appeared in 1651. In general it agreed with the tenor of the several treaties concluded before 1650, and the regulations and usages of the various maritime countries to that time. There were variations from the general principle that the flag did not cover the cargo; there were exemptions granted under given conditions; but nowhere among the states of Western Europe had the principle been adopted that neutral ships might legally carry enemy property.

Introduction of the New Principle

In the second half of the seventeenth century the law and practice were redefined and confirmed in many treaty

[23] Molloy, Charles, *De Jure Maritimo et Navali, or a Treatise of Affairs Maritime and of Commerce, in Three Books,* 7th ed. (London, 1722), Bk. I, ch. 1, art. 18.

agreements. In that period, also, several bilateral commercial treaties adopted the opposite principle, that free ships should make free goods.

Those treaties constituted exceptions from the general law and practice which had obtained theretofore, and the new principle which they contained was based exclusively upon the positive law of nations. The provisions of the treaties which established this new phase of the law, like all other bilateral treaties, were applicable to the contracting parties alone; neither the duties which they imposed, nor the privileges which they granted were extended to nations not parties to the agreement. Thus, when two states agreed that in their relations with each other they would follow the rule that free or neutral ships should make the lading free, a third state could not reasonably demand the application of that agreement as a universal principle, or assert that the treaty powers had forfeited their right to enforce the ancient law and practice in their dealings with other nations.

Political and diplomatic exigencies rather than an inclination to introduce new elements into international prize law determined the nature of these commercial treaties. In agreeing to be governed under definite conditions by the new provision the treaty powers did not renounce, in respect to the rest of the world, the rights they enjoyed under the general rule. Yet their part in the conclusion of several treaties in which this provision was contained might indicate that they were favorably disposed toward the universal acceptance of the principle that free ships should make free goods. The history of these treaties and of their enforcement, however, reveals that the treaty powers were waiving the application of the old law in their

mutual relationships only in return for substantial advantages, and that they were unwilling to bind themselves in similar agreements with some other nations. Thus England was granting to the subjects of France, Spain, Portugal, and Holland, as neutrals, the privilege of carrying the merchandise of her enemies, but deemed it inadvisable to extend similar favors to the subjects of Denmark and Sweden, chiefly because of the naval stores controlled by the Scandinavian countries. France by her treaties of the eighteenth century aimed primarily to promote the formation of alliances or friendly understanding with the maritime nations whose trade and navigation might be enlisted into her service during a naval war with Great Britain. Indeed, one object of French policy was that of inducing neutral trading nations to force from England greater trading privileges during the maritime wars. The policy of Spain was similar to that of France. But Denmark moved with caution in her negotiations with other states, lest treaty commitments should impede the action of her fleet in the event she should be engaged in a war with a neighboring power.

Some of these commercial treaty provisions were perforce limited in scope, and probably were not designed to be applied in time of war. Indeed, they could not be enforced without causing a violation of other provisions of the same treaties. The Anglo-Dutch treaty of 1674, for instance, while it provided that free ships should make free goods, also provided that the liberty of navigation contemplated in that agreement should extend to all commodities which might be carried in time of peace, those only excepted which were described as contraband. Under the prevailing navigation system Dutch ships might not carry

the merchandise of France to a foreign market in time of peace, certainly not to the English market. By the terms of this treaty they could not be so employed in time of war. The stipulation that enemy goods should be free from seizure when found on board Dutch vessels may therefore have been of little significance during a war between France and England. Until the middle of the eighteenth century, however, Holland and England were allied in wars against France or Spain, or against both, so that there was no opportunity of testing the efficacy of this treaty. A number of commercial agreements were made between nations which like France and England came habitually to be in opposite camps during the great naval wars. No occasion arose for putting the principles contained in such agreements into effect.

The New Principle in Treaty Provisions

The first deviation from the ancient rule seems to have been made by Turkey in a treaty with France. The secret negotiations which the Hugenots had carried on with the Porte were openly continued by Henry IV, who resumed the traditional policy of the French kings to break the power of Spain with the help of the Turks. Aside from the recognition of Henry IV as the successor of Francis I to the guardianship of the Christians in the Near East, the negotiations were of minor political consequence. In the treaty, which was signed in 1604, Turkey agreed that French property found on board vessels belonging to the enemies of the Porte should be restored to the owners, and that goods of her enemies laden on French ships should

not be subject to seizure.[24] The same privilege was granted by the Sultan, Achmet Chan, in the treaty which he concluded with the States-General of the United Provinces in 1612.[25]

In the history of prize law these stipulations were of no more immediate significance than were the accompanying political negotiations in the field of European diplomacy. Neither Turkey, France, nor Holland applied the new formula in their relations with other states; and the trading peoples of the West were probably either unaware of its existence, or regarded it with indifference as something innovative and impracticable. That this was the case is indicated by the treaties which the Netherlands concluded in 1622 with Tunis and Algiers respectively, providing that the effects of enemies on board neutral ships were to be good prize to the captor, and by the treaties into which France, in the time of Richelieu, entered with England and Algiers respectively, which specifically accepted the principles of the *Consolato del Mare*. At about the same time there was concluded the Anglo-Spanish treaty of 1630, which even provided for the confiscation of neutral vessels having enemy goods on board. In fact, nearly fifty years elapsed before the example set by the Franco-Turkish treaty of 1604 was followed in the treaties of the Western nations.

In the eleven-year period which intervened between the Peace of Westphalia and the Peace of the Pyrenees several treaties containing the new regulation upon neutral shipping were concluded. In 1650 the United Provinces

[24] Dumont, V, pt. 2, p. 39, art. 12.
[25] *Ibid.*, p. 205, art. 25.

and Spain agreed that the merchandise of either state, being neutral, when found in the ships of an enemy of the other might be confiscated, while the property of the enemy of either should be free from capture when carried in the neutral ships of the other.[26] Similar stipulations were inserted in the treaty of 1654 between England and Portugal.[27] Article twenty-three provided that all goods and merchandise of the two powers found on board the ships of the enemies of either should be good prize, together with the ships; but all goods and merchandise of the enemies of either on board the ships of the other should remain untouched. France in a treaty with the Hansa Towns in 1655 consented to waive in their favor the enforcement of her ordinance of 1584 for a period of fifteen years.[28] The neutral character of the Hansa Towns was to make the cargoes of their ships free; and the goods of their subjects were not to be confiscated when found in vessels belonging to an enemy of France. This provision was similar to that by which France in 1646 had promised that during the next four years enemy property on board Dutch ships should be regarded as immune from seizure by French warships and privateers.

In 1659 the long wars between France and Spain were terminated by the Peace of the Pyrenees, and there came a few years of peace to a generation that had grown to maturity since the beginning of the Thirty Years' War in 1618. The commercial treaties which were concluded during this period could point toward contingencies of the future, when one of the treaty powers might be at peace

[26] Dumont, VI, pt. 1, p. 570, art. 3.
[27] *Ibid.*, pt. 2, p. 82, art. 23.
[28] *Ibid.*, p. 103, arts. 2, 3.

while the other was at war. There now existed no immediate war-time problems to condition the terms of international agreements. The Treaty of the Pyrenees, to which the Dutch acceded within two years, provided that whatever merchandise should be found in the ships belonging to the subjects of France, when neutral, was to be free from seizure, contraband of war excepted, although the lading, or part of it, should be the property of the enemies of Spain. Identical privileges were granted to Spanish vessels while Spain should be neutral and France at war.[29] This treaty was renewed by France and Spain at Aix-la-Chapelle in 1668, and its principle was written into article eight of the treaty between France and England concluded in 1677.[30] In 1661 Holland and Portugal agreed that this rule should govern their conduct toward each other.[31] Holland executed an identical agreement with Sweden in 1675,[32] and with France three years later,[33] thereby renewing article twenty-five of the treaty of 1662.[34] Her agreement with France of 1678 was further renewed and confirmed by the treaties signed at Ryswick in 1697, at Utrecht in 1713, and at Versailles in 1739.

Thus from the middle of the seventeenth century the commercial relationship between France and Holland was governed by the rule of "free ships, free goods," but no opportunity came about for putting that rule to the test

[29] *Ibid.*, p. 264, art. 19.
[30] Merchandise of either party on board the ships of the enemy of the other was to be confiscated. The goods of the enemy of either should not be forfeited if found on board the ships belonging to the subjects of the other, excepting contraband of war. Dumont, VII, pt. 1, p. 327, art. 8.
[31] *Ibid.*, VI, pt. 2, p. 369, art. 12.
[32] *Ibid.*, VII, pt. 1, p. 316, art. 8. This treaty was renewed in art. 22 of the treaty of 1679. *Ibid.*, p. 347.
[33] *Ibid.*, p. 357, art. 22.
[34] *Ibid.*, VI, pt. 2, p. 412.

until the middle of the eighteenth century, Holland having been the enemy of France throughout the reign of Louis XIV. Nevertheless, France and Holland were of all European states the most willing to conclude treaties conferring on neutral traders of either signatory the privilege of carrying without fear of seizure the merchandise of the enemy of the other. They were likewise inclined to disregard their treaty commitments and to resort to severe restrictions on neutral navigation, particularly during the wars of Louis XIV.

Not a general legal principle, but rather a policy of opportunism, calculated to obtain some definite advantage in return for the abandonment of the old rule, governed the negotiations of the seventeenth century commercial treaties. For conventions opposite in principle were concluded severally by the Netherlands, France, Spain, Portugal, and the Scandinavian countries. Thus France, though she adopted the new principle of "free ships, free goods" in the treaty of 1659 and others, negotiated three treaties with Sweden between 1661 and 1663 [35] which made no change in the old rule allowing the seizure of enemy goods in neutral vessels and freeing neutral merchandise on board the ships of the enemy. The old usages were likewise inserted in an agreement between Holland and Brandenburg in 1665,[36] and were retained in a treaty between Holland and Denmark in 1701,[37] although Holland was already a party to several treaties following the new rule. But the most complete illustration of this opportunistic tendency is afforded by the history of the treaties which the several

[35] Dumont, VII, pt. 1, pp. 381, 446, 448.
[36] *Ibid.*, pt. 3, p. 41.
[37] *Ibid.*, VIII, pt. 1, p. 32.

Continental Powers negotiated with England. Many of these agreements exempted the neutral traders from the general provisions of the maritime code; others imposed upon them the old restrictions.

England first departed from the customary law in 1654, when she agreed in the Anglo-Portuguese treaty that all goods belonging to the Republic of England and the Kingdom of Portugal found on board the ships of the enemies of either should be made good prize, together with the ships, but all goods of the enemies of either found on board the neutral ships of the other should remain untouched.[38] The maxim of "free ships, free goods" was here accepted, as it was accepted in a few treaties of France, Spain, and Holland, not as a universal rule applicable to all nations in every contingency of neutrality, but as a bilateral agreement extending a privilege deemed commensurate with the advantages obtained.

Within the next two decades England concluded several commercial treaties, some adhering to the old principle, some accepting the new. In her agreements with the United Provinces in 1654 and 1661 [39] the old rule remained unmodified. Her treaties of 1654 with Denmark and Sweden respectively were of the same conservative nature as that with the Dutch,[40] but in her agreement with Holland in 1667, and in that with Spain in the same year,[41] it was stipulated that the rule of "free ships, free goods" should govern the reciprocal relations of England with each, while her treaty with Denmark in that year conformed to

[38] *Ibid.*, VI, pt. 2, p. 103, art. 23.
[39] *Ibid.*, pp. 88, 355.
[40] *Ibid.*, pp. 92, 80.
[41] *Ibid.*, VII, pt. 2, p. 44, art. 3, sect. 35; p. 27, art. 26.

the old usages. The Anglo-Danish treaty of 1670,[42] which was in force at the time of the Armed Neutralities, specified that, lest the trade of one party, being neutral while the other might be at war with a third country, should be to the prejudice of the other ally, and lest the goods and merchandise belonging to the enemy should be fraudulently concealed "under color of being in amity," the ships of the party that remained at peace should be provided with passes and certificates preventing them from carrying enemy property. Similar provisions were made in the treaty between England and Savoy in 1668,[43] but the new regulations were adopted in the Anglo-Dutch treaty of 1674.[44]

In the movement to establish the right of the neutral flag to protect the cargoes of neutral vessels from seizure the Baltic Powers were less forward than France, Holland, and England. This fact may partially explain the readiness with which the Scandinavian nations in 1756 and again in 1780 reverted to the seventeenth-century precedent of establishing an armed league to obtain in time of war those privileges which the Dutch had sought to acquire by diligent negotiations in time of peace. While Holland by reason of her treaties with the great maritime powers had gained for her merchant vessels the recognized position as carriers of belligerent goods in time of Dutch neutrality, Denmark in her treaties with France had agreed to the rule that the flag should cover the cargo. But in her treaty of 1670 with England it was stipulated that the neutral subjects of either power should refrain from carrying the

[42] Dumont, VII, pt. 1, p. 132, art. 20, together with the passport.
[43] *Ibid.*, p. 119.
[44] *Ibid.*, p. 282, art. 8.

property of the enemy of the other — a stipulation which governed Anglo-Danish commercial relations throughout the eighteenth century. Similar provisions were inserted in the treaty of 1701 between Denmark and Holland.

The treaty position of Sweden was much like that of Denmark. The Anglo-Swedish treaty of 1661 [45] made no alteration in the ancient usages; instead, it confirmed them. Its terms were drawn to prevent irregularities in the foreign trade of either nation that might remain neutral while the other was at war. Lest the free navigation of the neutral party should be carried on to the prejudice of the one at war, and lest enemy property should be concealed under the disguise of goods of friends, it was stipulated in article twelve that every ship should be provided with a passport by the chief magistrate of the port whence it would depart, affirming that no part of the cargo belonged to any person whatsoever but those mentioned in the papers, and that no goods were disguised or concealed therein by any fictitious name. If upon visit and search enemy property should be found in the ships of the neutral party, that part only which belonged to enemies should be made good prize, and the other part should be immediately restored. The same rule should be observed in respect to the effects of the neutral confederate found in the ships of an enemy. The treaties which Sweden signed with France in 1661 and 1663 also followed the old practice; while her treaties with Holland in 1674 and 1679 conformed to the new.[46]

So the matter stood in respect to the major commercial treaties when the War of the Spanish Succession was terminated in 1713 by the so-called Treaty of Utrecht.

[45] *Ibid.*, VI, pt. 2, p. 384, art. 12, and the passport form.
[46] *Ibid.*, pt. 1, pp. 316, 432.

Following closely upon the several treaties of peace comprehended in that term, concluded between England, Prussia, Holland, Savoy, and Portugal on the one hand, and France and Spain on the other, there were several commercial treaties signed among the Powers — between England and France, England and Spain, France and Holland, France and Savoy, Spain and Holland, and Spain and Portugal. Of these only the first three took cognizance of the question of trade between neutrals and belligerents. But even in those no alterations were made in the provisions of the old treaties between the signatories. When the article providing that free ships should make free goods was inserted in the new treaties, it was in every instance a readoption of a previous agreement, renewed under mutually advantageous considerations. That is to say, in respect to the maxim "free ships, free goods" the commercial treaties of 1713 were bilateral and separate from the general peace settlement.

The seventeenth-century system was carried over into the eighteenth century, the status of neutral trade remaining unchanged and the ensuing commercial arrangements identical with those of the preceding century. This was the case, notwithstanding the assertion in 1810 of the Duc de Bassano,[47] the French foreign minister, and of his followers, that the Treaty of Utrecht firmly established the principle that enemy goods on board neutral vessels were free, that neutral property in enemy bottoms was subject to confiscation, and that the law thus established was renewed in all subsequent commercial treaties.

[47] Edward, Thomas, *Reports of Cases Argued and Determined in the High Court of Admiralty; Commencing with the Judgment of the Right Hon. Sir William Scott, Easter Term, 1808* (London, 1810), I, Appendix P.

This declaration of the French foreign minister was as sweeping in its reach as it was unwarranted by facts. The treaty which France in 1716 concluded with the Hanseatic Cities provided that Hanseatic vessels, being neutral property, should not be forfeited for carrying the merchandise of the enemies of France, while any enemy property on board such vessels should be declared good prize; and that the merchandise belonging to the subjects of these cities should be confiscated, although not contraband, when found in vessels belonging to a nation at war with France. This agreement belonged to a class of treaties of which the Anglo-Spanish treaty of 1630 was the first notable example. Identical in purpose with the provisions of this treaty of France with the Hanseatic Cities was an agreement into which she entered with the city of Hamburg in 1769,[48] and its language was in turn copied into a treaty which a decade later the French government signed with the Duke of Mecklenburg-Schwerin.[49] The Anglo-Russian treaty of 1734 confirmed the old usages,[50] its stipulations relative to neutral trade with belligerents being, like those of the three French agreements just cited, directly opposite to the provisions of the treaties which France and England agreed to at Utrecht. Nor did the Dano-Swedish treaty which established the Armed Neutrality of 1756 make any fundamental alterations in the general rule which had come down from the *Consolato del Mare*. After 1780 a large number of similar treaties were entered into by the various states that had composed the Armed Neutrality of that year. During the eighteenth century there were like-

[48] De Clercq, *Recueil des traités de la France*, I, p. 111, arts. 14, 17, 23.
[49] *Ibid.*, I, p. 131, art. 21.
[50] Dumont, *Supplement* II, pt. 2, p. 495.

wise concluded or renewed several treaties which contained the stipulation that the neutral character of a merchant ship should make its cargo free, just as there had been several such treaties made in the second half of the seventeenth century. In both periods the treaties of this nature constituted exceptions to the general rule, and were part of the positive law of nations.

To govern neutral trade with the belligerents there was, then, in the eighteenth century, as there had been in the seventeenth, a fundamental law derived from the *Consolato del Mare,* according to which neutral property carried in enemy ships was not subject to confiscation, and enemy goods in neutral vessels was good prize to the captor. During these two centuries there were concluded a number of commercial treaties confirming this principle, and several in which the provisions were directly opposite to it. But the great majority were silent on this question, so that the trade of the signatories, as a result, was governed by the regulations of the fundamental law.

The New Principle in National Regulations

In the general system of international prize law, comprehending the fundamental law and the bilateral treaties, there were also included the regulations which the governments of the several states issued for the guidance of their naval forces and Admiralty Courts. Under the conflicting conditions which obtained because of the contradictory nature of treaty provisions in the matter of neutral trade with belligerents, these particular regulations would in high degree determine the effectiveness of the prize law. They would also indicate the extent to which the new principle of "free ships, free goods" was honored by its chief propounders.

The regulations of France governing captures at sea by French privateers and men-of-war, and controlling the ensuing adjudications in the prize courts, were for many decades at variance with a number of her treaties with other maritime nations. Disregarding his treaty agreements with the rulers of England, Denmark, Holland, and Spain, Louis XIV declared in the ordinance of 1681 that every vessel having enemy property on board, and all merchandise of neutral subjects found in enemy ships would be good prize.[51] This provision was renewed in 1692 by a resolution in the Council,[52] and in 1704 by article five of the regulations concerning neutral navigation during the War of the Spanish Succession.[53] It remained in force until 1744. At that time it was modified to the extent that when enemy property in neutral bottoms was confiscated, the ships should be released and returned to the owners. For a period of over eighty years, then, France refused to be governed by her treaty agreements that neutral ships should make the lading neutral and free from seizure.[54]

A change in French policy came about in 1744, when exemptions from the general rules were granted to Denmark and Holland, two of the powers with whom France had agreed that in her prize regulations she would be governed by the principle that the flag should cover the cargo. Article fourteen of the regulations concerning prizes contained the provision that the ships belonging to the subjects of the King of Denmark and those belonging to the

[51] Lebeau, I, p. 81, art. 7.
[52] *Ibid.*, p. 200, confirming the ordinance of Aug. 1681.
[53] *Ibid.*, p. 328.
[54] *Ibid.*, II, p. 1, art. 5 and note.

subjects of the United Netherlands might sail freely during the war then in progress, either from their own ports to the ports of other states, whether neutral or enemy, or from a neutral port to an enemy port, provided that such ports were not under blockade; and provided also that in the last two cases the ships were not laden, either in whole or in part, with contraband goods.[55] A few months later similar privileges were temporarily extended to the subjects of Sweden.[56] These relaxations were withdrawn from Denmark and Sweden in 1749.[57] In the autumn of 1757 they were again temporarily renewed, pending the final decision of the French King.[58]

A somewhat similar policy was followed by France during the War for American Independence. In that period she bent her marine regulations to the diplomatic end of winning the active support of neutral governments and neutral traders, so that through the services of their vessels she might secure the importation of commodities necessary in waging war. At first she adopted an illiberal measure. A declaration of June 24, 1778, renewed the rigid provisions of the ordinance of 1681 by announcing that neutral ships carrying enemy goods would be good prize, together with their cargoes.[59] However, pursuance of this policy was contrary to the interest of France, which had come to require the encouragement of neutral shipping and the establishment of neutral rights on a firmer basis. An ordinance of July 26, 1778, was an essential preliminary to the execution of that program.[60] By it French privateers

[55] Lebeau, I, p. 1, art. 14.
[56] *Ibid.*, p. 13.
[57] *Ibid.*, p. 73.
[58] *Ibid.*, pp. 155–156.
[59] *Ibid.*, p. 299.
[60] *Ibid.*, p. 339.

and men-of-war were prohibited from capturing neutral vessels, except when these were bound for a blockaded port or laden with contraband. The aim of this regulation became clear when it was further declared that the liberal measure which it contained would be withdrawn unless the enemy within six months should adopt identical rules. The enemy failed to do so, and the advantages of the ordinance were withdrawn from Holland in January, 1779, the city of Amsterdam being excepted, and later the city of Haarlem also.[61] After having inspired the Armed Neutrality of 1780, France became one of its adherents and proclaimed to the world that free ships should make free goods. When the war with England opened again in 1793, however, the National Convention declared, on May 19, that enemy property on board neutral vessels would be good prize, the vessels to be released and freight allowed to the owner.[62]

The English regulations were similar to those of France. In 1665, and again in 1672, when there was war between England and Holland, an order in Council directed the High Court of Admiralty to confiscate all captured Dutch vessels, together with their cargoes, except in cases where letters of safe conduct had been granted by the English government. That is, neutral property on board enemy ships was good prize. This section of the order in Council conformed to the stipulations of the commercial treaties which contained the agreement that the flag should cover the cargo, those treaties allowing the seizure of neutral goods in enemy ships. But the order likewise provided that

[61] *Ibid.*, p. 534.
[62] *Ibid.*, III, p. 355, art. 2.

when neutral vessels having enemy property on board were brought into an English port for adjudication, not only the property of the enemy, but the neutral vessel as well, should be condemned.[63] This part of the regulation followed those treaties which allowed the confiscation of enemy goods in neutral ships, but freed neutral merchandise carried in the ships of the enemy, for some of them decreed the forfeiture of such neutral vessels. This regulation taken as a whole was in fact only a readoption of the principle which had been written into such special agreements as that of the Anglo-Spanish treaty of 1650. These provided for the confiscation of neutral goods in enemy ships and condemned vessels carrying enemy property.

In consequence of the order in Council of 1665 there arose between France and England a dispute which illustrates the nature of subsequent controversies between belligerent and neutral after the principle of "free ships, free goods" had been introduced in some treaties and not in others. France remonstrated against England's application of the rule which specified that when found together enemy property contaminated the property of a friend or neutral and rendered both subject to confiscation. This rule was enforced in France; but the ambassador of Louis XIV held that it was unjust for England to base the enforcement of her laws upon the ground that an identical law was applied in another country. He added that this law was no longer being enforced in France, and that Louis XIV had suspended it in respect to the neutral nations which traded with him; and, further, that it had never been put into execution against England. So he exhorted Charles II

[63] Marsden, II, p. 58.

to drop all thought of establishing any such law; "and so much the rather that even those, who sometimes received and practiced it, have abolished and annulled it as unjust and absolutely contrary to all societie." [64] The aim of the French in this case, of course, was to obtain the privilege of carrying Dutch merchandise without fear of seizure by the English.

The English prize commissioners took issue with the contentions of the French ambassador. They held that the recent regulation conformed to the ancient law of England, Spain, and Portugal, and was word for word the same as that which was applied in France. The recent treaties which France had concluded with the Hansa Towns, Spain, and Holland indicated that the law was not abrogated or annulled in France. It had, in fact, shortly before been rigorously executed against the English, as might be instanced in several particulars of great value if the King should desire to see them. "And whereas they add upon this subject that some prohibitions have already been made by the Most Christian King, and shall be at Your Majesty's desire further enforced for the future against the mingling Dutch goods and persons in French ships, we think we may fairly observe to Your Majesty that they hereby effectually condemned the practice thereof; and conclude that Your Majesty needs some extraordinary security against it; which we humbly conceive, if you depart from these rules, cannot be established without formality of treaty; neither can Your Majesty ever hope to obtain your ends by war upon the Hollanders, if, while you at vast expense keep ships at sea to intercept their trade, they in the meantime drive it securely under counterfeit ships and papers, to

[64] Wynne, *Life of Sir Leoline Jenkins*, II, pp. 719 f.

elude the search and inquiry after them." [65] When in the following year war broke out between France and England, the Council enjoined the prize court to proceed against French ships and merchandise in the same manner as against those of the Dutch.

The main features of the regulations of 1665 and 1672 remained unaltered throughout the wars against Louis XIV, except that in the War of the Spanish Succession the neutral ship was not regarded as good prize. A judge of the Admiralty Court declared in 1707 that it was a settled rule in prize law that the effects of neutrals, friends, and subjects taken on board enemy ships were good prize, and that there was no instance to the contrary in the late war or in the war then being waged.[66] Another judge wrote in 1727: "I remember well that in the late wars it was the common custom, when a neutral ship was met with that had effects on board belonging to the enemy, those effects were always taken out, the freight paid, and the ship released." [67] That is to say, at the beginning of the eighteenth century, if not in the last decade of the seventeenth, England applied the principles of the *Consolato del Mare.*

In the wars beginning with the struggle over the Austrian Succession England departed from the ancient usages only in cases which were governed by treaty stipulations of the opposite nature. She thus recognized the principle that free ships should make free goods when this was provided for in her treaty agreements with other nations. But it was at this time explained that privileges of that nature

[65] Wynne, *Life of Sir Leoline Jenkins,* II, pp. 719 f.
[66] Marsden, II, p. 205.
[67] *Ibid.,* p. 266.

could not during a war be extended to nations not already enjoying them, and that it would be dangerous for England to insert stipulations conferring such privileges in her treaties with certain nations. In 1744 Sir Henry Penrice, Judge of the Admiralty, declared that by the law of nations property belonging to the enemy, though not contraband, might be seized as good prize "where there is no express treaty to the contrary." [68] In cases where the principle of "free ships, free goods" obtained, it was only a special privilege "introduced by special treaty contrary to the law of nations." The privileges in such marine agreements could not be extended to the subjects of a third power "without an express treaty or convention for that purpose."

But agreements of that nature might not advisably be reached with every nation. When the Danes sought in 1747 to obtain the right, previously given to the Dutch, the Portuguese, the French, and the Spaniards, of carrying the property of England's enemies, the Admiralty advocate, Paul, explained that in the previous war between Great Britain and France it was contended by Denmark that the principle of "free ships, free goods" should be applied to Danish subjects. This contention had been uniformly disallowed by the British prize court, relying upon the provisions of the Anglo-Danish treaty of 1670. The reason which Paul gave for this refusal was that French agents were constantly employed in the purchase of naval stores in Denmark and Norway, which were at that time much needed in France to equip ships of war against Great Britain. To grant the Danish request would empower the subjects of Denmark to become carriers for the enemies

[68] *Ibid.,* p. 310.

of England, and to protect a trade "infinitely to the prejudice of his Majesty's dominions, which no friend of the King of Great Britain can properly desire at the present time." [69]

The law applied by the English prize court was further explained in 1753. The occasion was the report of the law officers on the action of Frederick the Great in withholding payment of interest on the Silesian loan in reprisal for losses alleged to have been suffered by Prussian subjects at the hands of British privateers. It was generally conceded, even by the Prussians, that England did not recognize the rule of "free ships, free goods," except in cases which came under treaties containing stipulations to that effect. The Prussian minister at London had advised Frederick in 1747, after Prussia had withdrawn from the war, to prevent his subjects from loading on board neutral ships any goods belonging to the enemies of England, "but to load them for their own account, whereby they may safely send them to any country they shall think proper, without any risk. Then, if the privateers commit any damage to the ships belonging to your Majesty's subjects, you may depend on full justice being done here, as in all the like cases hath been done." The opinion of the law officers and the tenor of the subsequent reply were that when two nations were at war they had the right to capture each other's ships and merchandise found at sea, everything belonging to an enemy being good prize; but the goods of neutrals were exempt from seizure. It was consequently determined by the law of nations that the goods of an enemy might be seized when found on board the ships of neutrals, and that neutral property should be

[69] Marsden, II, pp. 339 f.

returned to the owners, although found on board the ships of an enemy.[70]

English declarations and English enforcement of the prize law were less equivocal than those of France and Spain. The aim of the Spanish regulations in the middle of the eighteenth century was similar to that of the French. A declaration of April, 1743, repeated in February, 1762, specified that neutral vessels on board which was found merchandise belonging to the enemy would be taken to a Spanish port, where the enemy property would be declared good prize. But the commercial relationship between Spain and Holland was governed by a treaty in which the two states had agreed that the neutral ship should make the cargo free. The King of Spain now announced that in order for Holland to enjoy the freedom of her flag, as provided for in her treaty with Spain, it would be necessary for her to prove that the nation to whom the goods belonged (England) did not deny her the freedom, but rather had observed it.[71] Thus, Spain in 1743, and again in 1762, like France in 1778, declared that her observation of treaties was contingent upon the policy pursued by England; and Holland sought in 1762 to induce England to announce that Spanish property in Dutch ships would be free from seizure,[72] just as between 1778 and 1780 the Northern Powers tried to retain the privileges contained in the French ordinance of July, 1778, by forcing England to adopt similar regulations relative to the navigation of their subjects. But in this effort Holland was acting in conformity with

[70] *Ibid.*, pp. 348–374.
[71] *Ibid.*, p. 395.
[72] *Ibid.*, pp. 396, 397.

her treaty stipulations, while the similar effort of the Northern Powers had no such justification.

The English government refused to comply with the request of Holland. It feared that Spain was endeavoring to turn her West Indian trade over to neutral carriers. "I beg leave, therefore," wrote Murray, later Lord Mansfield, in a letter to Lord Bute, "to submit to your Lordship my humble opinion that it is not desirable to make any particular declaration in consequence of this memorial, but only to give a general answer, that his Majesty will faithfully observe his treaties." [73] Although this seems to have been a violation of the Anglo-Dutch treaty of 1674, which provided that the effects of England's enemies should be free from seizure on board Dutch vessels, yet the fact that the colonial trade might have been involved affords a possible justification for the English answer.

Spanish regulations in the next struggle with England appeared at first to be favorable to the neutral cause. During the War for American Independence came the declaration of the Northern Powers, then leagued in the Armed Neutrality of 1780, that the property belonging to the subjects of the states at war should be free on board neutral vessels, except merchandise of contraband. The King of Spain readily endorsed that declaration, especially as the principles advocated therein were "the same as have always guided him, and which his Majesty for a long time, but without success, had endeavored to cause England to observe while Spain was neutral." The Northern states were accordingly informed that the King would once more have the glory of being the first to give the example of respecting the neutral flag of all Courts that had consented, or

[73] Marsden, II, p. 398.

should consent to defend it, "till his Majesty finds what part the English navy takes, and whether they will, together with the privateers, keep within proper bounds." [74]

The maritime policy of Spain, however, only appeared to be friendly to the neutrals. At the time when her answer to the propositions of the Armed Neutrality was dispatched her warships and privateers were enforcing the provisions of an ordinance of July 1, 1779, restated in March, 1780, that neutral vessels which were carrying cargoes belonging to the enemy should be escorted into a Spanish port and there detained until the enemy to whom the goods belonged should have ceased to deny the freedom of such cargoes. This procedure, it was said, was adopted in consequence of the action of the English, which necessitated corresponding action on the part of Spain. The ordinance was modified in 1780, so that neutral vessels having enemy goods on board were to be freed and freight charges allowed on the confiscated property.

The history of the regulations of the Northern Powers is closely associated with that of the several Armed Neutralities. On at least three occasions prior to 1780 these Powers leagued together to establish the neutral right of free navigation upon the high seas without interference on the part of nations at war. But when the states which had formed these leagues became belligerent, they departed from the principles which they had sought to vindicate while neutral, and imposed the most severe restrictions upon the trade of nations which then remained at peace.

The first of these armed leagues between the Scandina-

[74] Piggott, Sir Francis T., "Sea Power and the Armed Neutralities" in *Nineteenth Century and After* (1917), p. 832.

vian states was formed in 1691; the second in 1693, during the War of the League of Augsburg. In the War of the Spanish Succession coöperation between them was precluded by the transiently brilliant career of Charles XII, and by the military campaigns that hedged about this knight-errant king. Denmark became alike one of the chief objects of his conquering sword, and the most persistent opponent of Swedish hegemony in the North. In the ensuing wars between the Scandinavian states each equipped privateers, each declared enemy goods on neutral vessels good prize. In the course of the war Denmark announced that the neutral cargo of any vessel having enemy property on board was also subject to confiscation, and Sweden countered by adding to her standing regulations the new rule that neutral goods in enemy ships were good prize. Thus the Scandinavian regulations upon neutral trade during this war were similar to those of France, Holland, England, and Spain. When Charles XII's war was terminated by the Peace of Nystad in 1721, no stipulations were inserted in the treaty to govern the maritime policy of the two Powers toward each other in the future when one of them should be at war and the other neutral. The regulations of Charles XII were accordingly repeated in the War of the Austrian Succession, when Swedish warships and privateers were informed that if any part of the lading of neutral ships belonged to the enemy, the ship would be seized and the enemy property confiscated.

The third armed league between Sweden and Denmark was formed in 1756. In the preliminary negotiations the Swedes insisted that the two states should endeavor to vindicate the principle that free ships should make free goods, as it had been established by them in the leagues of

1691 and 1693. The Danish minister, J. H. E. Bernstorff, more cautious, deemed it inadvisable formally to insert such a principle in a treaty with another state. He probably held the view which his nephew, A. P. Bernstorff, held later, that if Denmark should in the future find herself at war with a neighboring kingdom, which, lacking things necessary in waging war, should be able to obtain them through the services of neutrals, it would be disadvantageous to be bound by the rule that the flag should cover the cargo. Such a rule would tend to circumscribe the action of the powerful Danish fleet. But he certainly thought that the two countries should insist upon this principle against England, and strive to obtain her recognition of it. "If it should not be recognized, the Danish government would be free to demand restitution from England, or to remain inactive, as the existing contingencies and the national interest should demand." [75]

The league of 1756 was of short duration. In the later months of 1757 Sweden joined with France and Austria in a war against Frederick the Great. In the ensuing naval struggle in the Baltic the Russians, also engaged in that war, seized enemy property on board neutral vessels, while the Swedes captured neutral vessels sailing to enemy ports, even when the ports were not blockaded and the ships not laden with contraband goods.

A few years after the close of the Seven Years' War there came the struggle for American independence. When the naval phase of the war spread to European waters, it afforded neutral states an opportunity for reasserting their

[75] *Denkwürdigkeiten des Freiherrn Achatz Ferdinand von der Asseburg. Mit einem Vorworte von K. A. Vornhagen von Ense* (Berlin, 1848), p. 76; Boye, Thorvald, *De Vaebnede Neutralitetsforbund, et Afsnit av Folkerettens Historie* (Christiania, 1912), p. 96.

rights by a more powerful league than had been formed in 1691, 1693, or 1756. The French declaration of July, 1778, providing that free ships should make free goods, had its designed effect upon the Scandinavian Courts: at its prompting they urged England, in her treatment of their subjects, to accept the principle which France had offered to enforce for a period of six months. A. P. Bernstorff, now the Danish foreign secretary, expressed the fear that if his government should yield to England on that point, "France would undoubtedly place herself in the same relation to Denmark as England (was), notwithstanding that in her treaties with Denmark she had accepted this principle." He therefore proceeded to impress upon the Swedish government the fact that unless England should yield, France would disregard her treaty commitments with Denmark and Sweden and revert to the June regulation. At the same time he opened negotiations with Catherine II, suggesting to her that if Great Britain were forced to recognize that neutral ships might carry enemy cargoes, the British flag would be seen less often in Russian ports, and those of neutral nations more frequently. The negotiations thus begun in 1778 were continued intermittently until the Armed Neutrality of 1780 was formed, and until its program was drawn up and presented to the several states for their acceptance. So the nations of Europe, save England among the Great Powers, solemnly promised each other to be guided in their maritime policy by the principle that property belonging to the subjects of nations at war should be free on board neutral vessels, excepting merchandise of contraband.

Observations of Eighteenth-Century Commentators

The attempt to modify international prize law so that the effects of belligerents might be carried in the ships of neutrals had had slight success. The main outlines of the law respecting this matter remained in the eighteenth century as they had been in the seventeenth. And the observations of the chief seventeenth-century commentators on the law of nations were reflected in the works of the eighteenth-century authors, Bynkershoek, Heineccius, and Vattel.

The Dutch jurist, Cornelius Bynkershoek, devoted two chapters of his *Quaestionum Juris Publici Libri Duo* to the consideration of the matter of enemy goods in neutral ships and of neutral goods in enemy ships.[76] In regard to the latter he held that the various treaties covering this point usually agreed with the French law in condemning neutral goods found in enemy vessels. But such confiscation could not be defended on rational grounds, for there was no reason why a neutral should not be permitted to use for the transportation of his goods the ships of a friend, even though that friend might be the enemy of a third power. A belligerent might seize the ships of his enemy, but no law would allow him to seize and condemn neutral merchandise found therein. With his own conclusions the regulations of the *Consolato del Mare* were in almost complete agreement "in stipulating that an enemy vessel when captured belongs to the captor, but the owners of neutral goods if present may compound for purchase of the vessel and thus continue their voyage."

In respect to the matter of enemy property on neutral vessels Bynkershoek said that there was a two-fold con-

[76] Book I, chapters 13 and 14.

sideration: "the one, whether the neutral ship itself, the other, whether the enemy goods, are liable to confiscation." If the old French law was followed, the ship would be confiscated. Grotius and Loccenius had agreed with the French regulations, particularly in cases where the owners or the master knew that there was enemy merchandise on board the ship. Bynkershoek differed from them and declared: "I approve rather of the official opinion rendered by the Dutch lawyers, which held simply that a neutral ship ought not to be confiscated though laden with enemy goods."

With regard to the question whether enemy property found in a neutral vessel was liable to be seized as good prize, he remarked that it might seem surprising that there should be any doubt about the right of a belligerent to take anything that belonged to his enemy. Yet it had been agreed in several treaties that enemy goods found in neutral ships were to be exempt from confiscation. These treaties were to be regarded as exceptions to the law enforced in the states that had signed them. Therefore he concluded: "We must rather follow the dictates of reason than the phraseology of treaties. And in consulting reason, I cannot see why it should not be lawful to seize enemy goods found in neutral ships, for this is only taking what belongs to the enemy and falls to the victor by the law of war." The neutral ship should be restored, but no freight allowed, for the master put the enemy goods on board at his own risk, "knowing that they could be taken and accordingly brought into the port of the captor."

The views of Bynkershoek were identical with those of the German jurist, Johann Gottlieb Heineccius. Of him Bynkershoek said: "After writing the above I have come

upon the collected works of the illustrious Heineccius, which contains a study 'On the confiscation of ships for carrying prohibited goods.' In Chapter Two, section nine of his essay he briefly treats the two subjects that we have discussed in this and the preceding chapter. After reading what he says I am so far from altering my opinion that I rather feel confirmed by the judgment of that illustrious authority. If the reader has leisure to compare these views with mine he will understand why I have not seen fit to make any alteration." [77]

Emerich Vattel, the best known of the eighteenth-century writers on international law, wrote "with the free spirit of his native Switzerland." His observations on the treatment of enemy property on board neutral vessels were recorded in the fourth book of his *Droit des gens,* published in 1759. On this point his language is almost identical with that of the *Consolato del Mare.* Effects belonging to an enemy and found on board a neutral ship were seizable by the right of war; but by the law of nature the master was to be paid his freight, and was not to suffer by the seizure. The effects of neutrals found in the ships of an enemy were to be restored to the owners, against whom there was no right of confiscation. Unlike the provisions in the *Consolato del Mare,* he would grant no allowance for detainer, decay of the lading, and the like. "The loss sustained by the neutrals on this occasion is an accident to which they exposed themselves by embarking in an enemy ship." [78]

Contemporary with Vattel was Martin Hübner, the Danish eighteenth-century champion of neutral rights.

[77] Bynkershoek, *op. cit.,* Bk. I, ch. 14, p. 89.
[78] Vattel, *Law of Nations,* Bk. III, ch. 6, arts. 115, 116.

His opinions, recorded in his *De la saisie des bâtiments neutres,* are difficult to classify, for his conclusions seem to entangle him in self-contradictions. Heineccius, Bynkershoek, and Vattel held that the law of war sanctioned the seizure of enemy property on board neutral vessels, although treaties might provide for exceptions. With this judgment Hübner apparently concurred, for he held that it was absurd to contend that belligerents did not have the right to do everything that was necessary in connection with waging war. They might therefore do everything to prevent neutrals from assisting the enemy. At the same time, however, he also argued that the neutrals might supply the enemy with necessary stores. Holding that neutral ships were neutral territory where no enemy property could be seized, he concluded that such ships made the cargo free. This judgment he also supported by the observation that the effect of war ought not to injure those who were not parties in the contest. He also contended, contrary to the treaties which provided for the rule of "free ships, free goods," that neutral merchandise on board enemy ships should be free from capture. He apparently felt that the neutral trader should enjoy the advantages alike of the liberal provisions of the *Consolato del Mare* respecting neutral cargoes in enemy ships, and of the seventeenth-century commercial treaties which would free enemy property on neutral vessels.

The rules of the *Consolato del Mare* prescribed that in the event of war property belonging to an enemy might be seized wherever found, and that neutral merchandise in enemy ships was not subject to confiscation. Such were the rules of all the maritime states at the beginning of the

Modern Era. These rules were restated and confirmed in numerous treaties during a period of several centuries, beginning with the evolution of the national states. They were so uniformly applied by the several maritime nations that in the general interpretation of them by the great seventeenth-century commentators on international law there was complete harmony. Beginning with 1650, however, a number of treaties were concluded which contained the principle that free ships should make free goods, and that neutral property on board enemy vessels might be seized as good prize. But nowhere before the War of the Austrian Succession were these treaty provisions enforced, and from that time only intermittently, and mainly, except by the British prize court, for political reasons. The Powers which composed the Armed Neutrality of 1780, although they proclaimed this new principle as a firmly established section of international prize law, abandoned it as impracticable at the beginning of the next war. Neither the treaties of the several states, nor the proclamations of the Armed Neutralities effected any material modifications in the prize law relative to this matter. The observations of the eighteenth-century commentators, in so far as this general principle is concerned, were therefore similar to those of the seventeenth-century authors. And each of them, from Gentili to Vattel, save Hübner alone, might say with Bynkershoek that in general his conclusions were in almost complete agreement with the regulations recorded in the *Consolato del Mare.*

CHAPTER IV

THE RIGHT OF VISIT AND SEARCH

VISIT and search of neutral merchant vessels upon the high seas and in the territorial waters of nations at war, in order to ascertain whether such vessels were in any way connected with the hostilities, was at an early date recognized by the chief maritime Powers as an uncontested belligerent right, provided that the search was undertaken by a warship or a properly commissioned privateer. This practice arose partly from the need to circumvent the activities of belligerent privateers and warships which were hoisting neutral colors, partly from the desire to prevent the furnishing of warlike stores to the enemy by belligerent merchantmen navigating under the protection of some neutral flag, and partly also from the right inherent in a nation at war to capture contraband merchandise and enemy property on board neutral merchant ships. It was the conditions which facilitated the abuse of the neutral flag rather than the status of neutrality itself which called for the recognition of the right of visit and search as a precaution rendered necessary by the natural and legal right of self-defence Being recognized and applied as a belligerent right by all the maritime states, visit and search constituted no insult to the flag of a nation at peace, no act of superiority or jurisdiction of the belligerent nation whose warships were carrying on the visit over the neutral nation whose vessels were being visited. When properly conducted, it caused no serious inconvenience to the honest neutral trader.

The Necessity for Visit and Search

In the devious ways in which wars were being waged lay one of the chief reasons for the development of the right to visit and search vessels suspected of aiding the enemy. To overcome the enemy by a strategem was ever a recognized method of warfare. The Roman jurists, according to Grotius, called it a good ruse whenever any one laid a plot against the enemy. They likewise held that it made no difference whether the escape from the power of the enemy came by force or by trickery. Similarly, St. Augustine, among the early Christian theologians, declared that in a righteous war it made no difference, in respect to justice, whether the fight was carried on openly or by an ambuscade. And Grotius, who scrupulously weighed the opinion of the chief authorities, concluded that "deceit exhibited in actions" was permissible even when unlimited in its significance.[1]

In the naval wars of the Modern Era a common ruse was the employment of a neutral flag to conceal the identity or national character of a belligerent man-of-war, privateer, or merchant vessel. The object of the belligerent merchantman in assuming a neutral character was to participate in trade that would otherwise be closed to him, or to promote the cause of his sovereign by obtaining warlike stores under the color of engaging in a legitimate neutral enterprise. The aim of the warship and the privateer

[1] Grotius, *De Jure Belli ac Pacis*, Bk. III, ch. 1, sects. 4, 5, 6.

was to deceive alike the merchant vessels of the enemy and those of the neutral in order to capture them the more readily.

Belligerent merchantmen and belligerent privateers given to this practice of deceit were wont to keep on board such flags of other nations as would best aid them in achieving their purpose. While the general policy of all maritime Powers was to prevent their subjects from holding commissions as privateers under foreign princes, no prohibition, even when seriously enforced, could stop the privateer, once at sea, from hoisting the flag of another country. All legislation to enforce such prohibitions would be futile. It was so recognized by many sovereigns, among them Louis XIV. In an ordinance of March, 1696, renewed in a less severe form in 1704, he enjoined the privateer, under pain of being deprived of the prize, not to fire the signal gun summoning the vessel thus hailed for search until the foreign flag had been dropped and the French colors hoisted.[2] That is to say, it was considered a regular practice for a privateer to navigate under a false flag until he should have come within hailing distance of the ship to be searched. At that point he was compelled to reassume his true character.

Aside from the common misuse of the neutral flag by belligerent merchantmen and privateers, there were other considerations which justified visit and search. The primitive or fundamental prize law of Europe, built upon the provisions of the *Consolato del Mare,* as well as the conventional law of treaties, authorized a nation at war to prevent neutral traders from supplying the enemy with contraband goods or articles directly useful in military

[2] Lebeau, I, pp. 260, 322.

operations. Until comparatively recent times that law also permitted a belligerent to seize and confiscate enemy property found on board neutral vessels, and to stop or deflect neutral merchantmen bound for a blockaded port. Under given conditions the neutral vessel itself might be seized and condemned as good prize. Lest he should be held responsible in the prize court for damages resulting from unjustifiable seizure, a belligerent privateer was compelled on every occasion to endeavor to ascertain the character of the lading before taking any measures to apprehend a neutral vessel suspected of carrying prohibited articles. The first essential step was therefore to stop and search neutral vessels on the high seas, for only thus could the belligerent learn whether contraband goods or enemy property were listed in the bills of lading or hidden among neutral merchandise, and whether the vessel was bound for a blockaded port.

There was still another general consideration relative to the practice of visit and search. Under the conditions which prevailed in the days when ships were small, cargoes easily loaded almost anywhere, and communication slow and inefficient, it was impossible for a neutral government to control the actions of its merchants and clandestine traders so as to prevent them from engaging in commercial ventures running contrary to treaty provisions and tending to be injurious to the interests of a nation at war. This situation was accepted as inevitable by all nations. Until the eighteenth century no serious pretence was made by a neutral government to control the conduct of its subjects on the sea. Such control fell therefore into the hands of the state which felt aggrieved or injured by the neutral trader. This arrangement seemed logical, and

was sanctioned by the majority of the seventeenth- and eighteenth-century commercial treaties.

Treaty Provisions

Of the commercial treaties recognizing the right of visit and search the first one of importance, after the religious and political settlement of Europe had been effected at Westphalia in 1648, was the Treaty of the Pyrenees. To facilitate the navigation of either Power which might remain at peace while the other should be at war, France and Spain agreed that the merchant ships of the neutral party should be provided with passes attested in the ordinary manner and acknowledged by the officers of the Admiralty at the place whence the ships would originally depart. When these passes, giving also the place of destination, should be exhibited, the ships were not to be disturbed or detained in their voyage "under any pretence whatsoever." [3]

The two states further agreed, in article seventeen, that if any suspicion should arise as to the character of these ships and their cargoes, and if the suspected ships should be met at sea by the warships or privateers of the belligerent power, visit and search should be allowed. To prevent disorder and retaliation from attending the process of search, it was agreed that the searching vessel should not come nearer than "the reach of a cannon shot." At that distance a boat containing two or three men — apparently in addition to the rowers, for that came to be the custom — might be sent to investigate the papers of the neutral vessel. The passport should be shown to them by

[3] Dumont, VI, pt. 2, p. 246, art. 14.

the master, or by the owner of the ship, "whereby might appear, not only their lading, but also the place of their abode and residence, and the name both of the master and the owner, and of the ship itself; that by these two means it may be known whether they carry any prohibited goods, and that both the quality of the said ship and of its master and owner may sufficiently appear; unto which passes and sea-letters full faith and credit shall be given. And to the end their validity might be better known, and that they might not in any wise be falsified and counterfeited, there shall be given in certain marks and subscriptions of both the said lords and kings." [4]

Specific treaty provisions prescribed what action was to be taken in the event that the searchers should discover prohibited goods on board a neutral vessel. Such articles were to be unloaded and condemned as good prize by the judges of the Admiralty, or by any other competent judges, of the country at war; but neither the ship nor the lawful part of the merchandise was to be subject to confiscation. Since this treaty provided that free ships should make free goods, the enemy property on board the neutral ship, if not contraband and not destined for a blockaded port, would be undisturbed. In cases governed by the opposite principle, the enemy property together with the articles of contraband would be condemned as good prize to the captor.

The provisions of the Treaty of the Pyrenees relative to visit and search correspond to the regulations of treaties concluded before the Peace of Westphalia, notably to the Anglo-French treaty of 1632.[5] They also conformed in

[4] *Ibid.*, art. 17.
[5] *Ibid.*, VI, pt. 1, p. 33, art. 3.

substance to the regulations of the *Consolato del Mare,* in which it is recorded that when an armed ship of a belligerent met a neutral vessel suspected of having enemy property on board, and the master and crew of the captured vessel claimed some part of the cargo as their own property, "they ought not to be believed on their simple words; but the ship's papers or invoice shall be inspected; and in defect of such papers the master and his mariners shall be put to their oaths." [6] These regulations do not specifically indicate that the inspection of the papers to determine the nature of the cargo should take place while the ships were in the open sea, but the omission was of little consequence. The ancient rules allowed the inspection of all documents and the subsequent confiscation of all prohibited articles on board a neutral vessel.

The Treaty of the Pyrenees also pointed toward the future. Its rules on visit and search were similar to the regulations recently adopted, or soon to be adopted, by the several maritime states, and they became the model for similar regulations in the great majority of treaties concluded in the course of the following one hundred and twenty-five years. Thus, in the Treaty of Whitehall, concluded in 1661, Sweden and England sought to prevent fraudulent trade by the subjects of either Power that might be at peace while the other should be at war. They agreed that the neutral vessels should be provided with passports containing definite information about the national character of the ships and their crews, and the ownership, destination, and contents of the cargoes. Upon meeting a man-of-war or privateer bent upon ascertaining the nature

[6] *Consolato del Mare,* ch. 273, sect. 4, in Robinson, *Collectanea Maritima,* II, p. 3.

of the ship and its cargo, the merchantman should produce its passport and certificates, and should not be subjected to further inquiry into the goods, ship, or men. It might then continue its voyage. "But if this solemn and stated form of the certificate be not produced, or there be any just and urgent cause of suspicion, then this ship ought to be searched, which shall only be deemed justifiable in this case and not otherwise." [7]

The precedents set by the Treaties of the Pyrenees and Whitehall were immediately followed in other international agreements. The provisions of the latter relative to visit and search were copied almost word for word in the articles of alliance and commerce concluded by England and Denmark at Copenhagen in 1670.[8] When Holland became a party to the Treaty of the Pyrenees in 1661, she agreed that Dutch merchantmen, being neutral, might be visited and searched by the warships and privateers of both France and Spain at a time when these Powers should be engaged in war.[9] At the same time, however, Holland reserved identical privileges for her own men-of-war while both or either of the other two Powers should remain at peace. The terms of this agreement were clearly defined in article thirty-three of the treaty which France and Holland signed in 1662.[10] This stipulation reappeared in the articles of navigation and commerce which Holland and England concluded in 1667.[11] It was likewise inserted in article fourteen of the Anglo-Spanish treaty of the same year.[12]

[7] Dumont, VI, pt. 2, p. 384, art. 12 and passport form.
[8] *Ibid.,* VII, pt. 1, p. 132, art. 20 and passport form.
[9] *Ibid.,* VI, pt. 2, p. 346.
[10] *Ibid.,* p. 412, art. 33.
[11] Chalmers, *A Collection of Treaties,* I, p. 151, art. 3, sect. 33.
[12] Dumont, VII, pt. 1, p. 27, art. 14.

Within a few years some of the stipulations governing visit and search became more definite. In the treaty signed by France and England in 1677, the searcher was enjoined "not to go under deck, not to open or break any chests, bales, casks, or tuns, not to take the least thing out of the ship," until it should be brought into a port, where an inventory of the cargo should be taken in the presence of the Custom House officers, but no part of the lading should then be sold until a fair trial before the judge of the prize court had resulted in a legal confiscation of the cargo.[13]

Thus in the first major treaties concluded by the Great Powers after the Peace of Westphalia and the Treaty of the Pyrenees there were definite stipulations recognizing the right of belligerent warships and privateers to visit and search neutral merchant vessels upon the high seas and in the territorial waters of the nations at war. These stipulations were restated and reconfirmed in subsequent treaties during a period which ended with the Peace of Utrecht in 1713.

The practice of the seventeenth century was followed in the eighteenth. In a period of about fifty years, beginning with 1739, there were concluded, according to the list given by Azuni, thirty-two treaties giving belligerents the right to visit and search neutral ships.[14] Of these Russia signed eight, Sweden five, Denmark four, and Holland four. These four Powers came to object most strenuously, when they were neutrals, to the belligerents' exercise of

[13] Dumont, VII, pt. 1, p. 327, art. 5.

[14] Azuni, *The Maritime Law of Europe*, II, p. 206. He lists no treaties concluded earlier than 1729; *cf.* Martens, G. F. de, *Essai concernant les armateurs, les prises, et sur tout les reprises d'après les loix, les traités et les usages des puissances maritimes de l'Europe* (Göttingen, 1795), sects. 17–21.

that right; yet they were at the same time negotiating over two-thirds of the treaties recognizing it. Of the remaining treaties France was party to eight, England to four, and Spain to three. Among these states England continued most persistently to exercise her treaty rights.

Regulations of France and England

The principle governing visit and search, thus recorded in bilateral treaty stipulations, was followed in the particular regulations of the several states. As there were treaties covering this matter before 1659, so were there also national regulations concerning the same subject before that time. The French edict of 1584, confirmed in a declaration of 1650, and restated in the ordinance of August, 1681, provided for visit and search of neutral vessels by French warships and privateers.[15]

The ordinance of 1681, summarizing previous regulations and introducing some new elements, contained stringent regulations. It provided that if a neutral merchant vessel should refuse to heed the summons to heave to for visit and search, it might be forced to do so by cannon fire or other means. If the vessel should continue to resist it might be captured and confiscated as good prize.[16] These and other rules were confirmed in 1686 and in 1704. They had been enforced in the sixteenth and seventeenth centuries, and they were continued during the naval wars of the eighteenth.

The English regulations were as old as the French, perhaps even older. During the Middle Ages the Kings of

[15] Lebeau, I, pp. 21, 45, 91.

[16] *Ibid.*, p. 91, arts. 12, 13.

England, like other rulers, had persistently exercised the right to stop and search vessels under suspicion of aiding the enemy. The first modern illustration of the English practice is afforded by the instructions which in 1512 Henry VIII issued to the Admiral of the fleet.[17] If he should chance to meet strange vessels on the sea, he should demand of the masters of such ships "what they be and whence they come." He should thereupon visit them and examine their "monuments, indentures, writings, and cokkets, and none other." In the event the examiners should find enemy property on board, or suspect the presence of such goods, "then the said vessels, with their goods, masters, and governors of the same," should be brought safely before the Admiral. The neutral property would then be freed and that of the enemy confiscated, "as to the said Admiral and the *laws of the sea shall be thought good and appertain.*" Should the merchant vessels resist the attempt to examine them, they might be captured and brought into an English port for adjudication.

The regulations of 1512 were followed by England in the reigns of Henry VIII and of Elizabeth. Evidence that such was the case is afforded by the relationship between France and England. The year 1525 found the governments of these countries considering whether exemptions should be granted from the general practice of visit and search, but nothing permanent resulted from the negotiations, for whenever occasion arose, the warships of each country resorted to the regular practice. In the wars of Queen Elizabeth and Henry IV against Philip II both England and France followed the rules which were adopted in the English ordinance of 1512 and inserted in the

[17] Marsden, I, p. 148; Robinson, *Collectanea Maritima,* pp. 1 f.

French edicts and regulations, particularly in the ordinance of 1584.[18]

After the Treaty of Vervin in 1598 had established peace between Henry IV and Philip II, and left Elizabeth and the Dutch to carry on the war with Spain, an opportunity came to England and France to reconsider the question of visit and search. At that time the relationship between them in this matter was based on a bilateral agreement in which England had consented to forbid her warships and privateers to visit French merchant vessels, an agreement made as a concession to her former ally in the war against Spain. The French government, on its part, had promised not to allow grain and other prohibited articles to be carried to England's enemy.[19]

Difficulties which developed between France and England upon the interpretation of this agreement gave rise to diplomatic negotiations that continued intermittently over a period of more than thirty years.[20] The English representative at Paris, Henry Neville, notified the King of France that Elizabeth had depended on his promise that "this great liberty which she had granted to his subjects, to pass unsearched and uncontrolled into Spain, or any other place," should not be converted by them to her prejudice by using their flag either to protect enemy property or by transporting contraband goods, "either by land or sea." Relying upon his word, Elizabeth had assented to this agreement with him, although she foresaw "that it might be very prejudicial to her." [21]

[18] Robinson, *op. cit.*, p. 41, note d.
[19] Grotius, *De Jure Belli ac Pacis,* Bk. III, ch. 1, art. 5, note 4.
[20] Winwood, Ralph, *Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James. By Edmund Sawyer* (London, 1725), I, p. 78.
[21] According to Grotius the French refused "to accede to the request of the English that the English should be allowed to search French ships that

The phrase "by land or sea" seems to indicate that in return for concessions granted by the English to French ships France promised to prevent contraband from being carried across the Spanish frontier, and that this was a political understanding with mutual advantages. Subsequent negotiations reveal the fact that by virtue of political and legal considerations this agreement could not readily be abrogated by either party without the consent of the other.

Within a period of two or three months the situation changed. The English realized that the exemption from search granted to all ships carrying the French flag was subject to abuse, and therefore constituted a great disadvantage to England. Lord Burleigh felt that "her Majesty, upon better knowledge of the abuse thereof, cannot allow of that toleration." In consequence of these considerations, Elizabeth decided in July, 1599, to retract the indulgence which she had granted. Neville was directed to inform Henry IV that the Queen was content to incorporate into the treaty between the two states such articles as might be deemed necessary for the reformation of abuses at sea; "only she desired him to allow some alteration in one of them, which concerned the free passage of all ships carrying French flags; wherein she had already found great inconvenience, as is particularly rehearsed unto him, of the four Spanish ships which escaped by that means, and of the two Biscainers which brought succors to the rebels in Ireland; and therefore (she) desired that some other expedient might be thought of, which might effect this purpose . . . without such notable prejudice to her estate, and benefit to her enemies." [22] It was later intimated to Villeroy, who represented the French government, that unless an agreement was reached the English would be compelled to follow their old practices. Neville, pointing to the French ordinances, then said: "As their kings had thought it reasonable to prescribe that law not only to their subjects, but to their allies also, so was it as reasonable and as lawful for her Majesty to do the same. And therefore I wished that we might follow those ordinances as a ground, and add thereunto such other conditions as should be reasonable." [23]

were sailing to Spain, in order that munitions of war might not be secretly conveyed therein; the reason alleged was that this was seeking a pretext for plundering and disturbing commerce." (*De Jure Belli ac Pacis*, Bk. III, ch. 1, art. 5, n. 4.) From the words of Grotius it would appear that Queen Elizabeth was asking France, as a matter of indulgence from the general rule, to grant English warships and privateers the privilege of visiting French merchantmen. It would also appear that the general rule prohibited belligerents from visiting neutral merchantmen. In view of the French and English ordinances, and of the conversation which the two countries had held upon this subject two generations earlier, such an interpretation would be extraordinary and unwarranted. The observations of Grotius, however, were only incidental, and did not merit citation in support of the contentions of those who held that the neutral vessels were under no obligation to submit to visit and search. Furthermore, Robinson, in his *Collectanea Maritima*, having had a better opportunity than Grotius to examine the documents and correspondence of the Anglo-French conversations, was able to consider this question chronologically and in detail, and could thereby correct the observations incidentally recorded in the work of the latter.

Henry IV thought that some distinction should be made between friends and foes, but Neville told him that this could not possibly be done if the mere hoisting of a flag was sufficient warrant for any ship to pass unsearched and uncontrolled. It was therefore agreed that commissioners from the French Council should treat with the English about these points.

[22] Winwood, *Memorials of State*, I, pp. 76 f.
[23] *Ibid.*

The negotiations thus initiated produced no tangible results during the reign of Elizabeth, chiefly because the English were unwilling to incorporate the French suggestions into a treaty. The negotiations were in fact discontinued in 1602. In January, 1603, the French ambassador was again urging the English government to accept the rule that the French flag should free a vessel from visitation. The English returned an answer identical with their previous arguments. They held that France had always insisted upon the right of visitation when she was at war; that Spain would still continue to insist upon it after the English should have granted the indulgence desired by France; and that under the cover of the French flag all sorts of goods would be conveyed, for the subjects of other nations had learned to avail themselves of it.[24]

The matter was not finally settled until the time of the first two Stuarts. In 1606, when peace prevailed in both countries, a treaty was concluded, but the question which had been raised immediately after the Peace of Vervin was omitted from the terms of this formal agreement, there being no urgent need of its settlement.[25] During the wars of Charles I the English therefore continued to exercise the right to search neutral French vessels. However, after Richelieu had sent Father Joseph to negotiate with Gustavus Adolphus, and France had become involved in the Thirty Years' War, negotiations were again initiated between France and England. These resulted in the treaty of commerce of 1632, of which the third article provided, in more definite terms than article twenty-seven of the Treaty of the Pyrenees, that the warships and privateers

[24] Robinson, *op. cit.*, p. 43 note.
[25] Dumont, V, pt. 2, p. 61.

of either, being at war, might without exception freely visit and search the merchant vessels of the other.[26]

By 1636 the situation was altered. Although the secretary of the French marine made complaint about certain captures by the English, at the same time he informed the Earl of Leicester, the English ambassador at Paris, that the French were "curious to visit English vessels, because their enemies communicate their advices and directions by the means of the English." Reporting the substance of this conversation to the secretary of state, Leicester added: "So, I having assured him that his Majesty would neither do them injustice, nor suffer any wrong done to himself, or his subjects, by this or any other nation, we parted." [27]

Thus ended the controversy between France and England respecting the right of the cruisers and privateers of either party, when at war, to visit and search the neutral merchantmen of the other. The indulgence granted to the neutral vessels after the Peace of Vervin operated to the disadvantage of the nation which was at war. The experiment initiated then was abandoned a generation later. By the treaty of 1632 the governments of the two countries reverted to the older principle, which authorized visit and search of neutral vessels encountered on the open sea and in the territorial waters of the belligerents.

During the struggle for naval superiority which took place between the chief states of Europe in the middle of the seventeenth century, England, like France, enforced the rules which were embodied in the English ordinance

[26] *Ibid.*, VI, pt. 1, p. 33, art 3.
[27] Collins, A. (editor), *Letters and Memorials of State in the Reigns of Queen Mary, Queen Elizabeth, King James, King Charles I, King Charles II, and Oliver's Usurpation . . . From the Originals at Pinehurst . . . and From His Majesty's Office Papers* (London, 1746), II, p. 436.

of 1512 and in the French edicts and regulations of the latter part of the sixteenth century. Thus, in 1657, when England was at war with Spain, General Montague, cruising in the Channel, sent a frigate to search some Dutch ships which were suspected of carrying silver and other goods for the Spaniards. At the same time he asked the government for new authority for this procedure. Cromwell replied: "There is no question to be made but what you have directed therein is agreeable both to the law of nations and to the particular treaty which is between this particular government and the United Provinces. And therefore we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein." [28]

A similar sanction for visit and search was granted during the Dutch wars of the next two decades. An order of the Council in 1664, renewed in 1672, provided for the seizure and confiscation of vessels resisting visitation by men from an English warship or privateer.[29] Minor variations in the rule excepted, the practice of England thereafter was to search all merchant vessels suspected of engaging in a trade which might be injurious to her interest. The rule is clearly outlined in the instructions which were issued for the guidance of the privateers in the War of the Spanish Succession. Article eleven contained the provision that "if any Danish ship be met with at sea, or upon the coast, by any privateer, such privateer shall send his boat on board such Danish ship, with only two or three of his company, to whom the master of the Danish ship shall

[28] Carlyle, Thomas, *Letters and Speeches of Oliver Cromwell, With Elucidations* (London, 1904), letter of August 30, 1657.
[29] Marsden, II, pp. 48, 407, 411.

shew his passport, certificate, and papers on board." [30] Such was the "undisputed rule" of the English Admiralty, and such came to be the rule of the Admiralties of Sweden, Denmark, Holland, and Spain. Spanish regulations of the eighteenth century were identical with the French.

Regulations of Sweden, Denmark, and Holland

As a result of the organizing genius and military prowess of the Vasa family, particularly of Gustavus Adolphus, Sweden became in the seventeenth century one of the Great Powers of Europe. Her maritime regulations were therefore of some consequence to the development of international prize law.

During the struggle between England and Holland in the time of Cromwell, when Christina was still Queen of Sweden, an attempt was made to restrict the visit and search of neutral Swedish merchantmen by belligerent warships and privateers. In August, 1653, the Queen cautiously sought to protect Swedish ships by providing them with convoys, which should serve as a guarantee to the nations at war that the ships under such protection were not engaged in fraudulent trade. Thus it was hoped to eliminate the necessity for visit and search. But the Queen carefully directed the convoying warships to protect only those ships which steered their course to neutral ports, this limitation to prevail at least until she might think it proper "to give any further direction on that account." The system was not intended to impose any hindrance upon Swedish subjects who intended "to carry their own free trade to England and Holland without convoy." [31]

[30] *Ibid.*, pp. 420 f.
[31] Thurloe, John, *A Collection of the State Papers of John Thurloe, Esq., Secretary, first to the Council of State, and afterwards to the Two Pro-*

It was commonly understood that to a belligerent, bent upon the task of protecting his own interest, the emphasis of visit and search was centered in the attempt to prevent the enemy from carrying on his trade under the protection of a neutral flag, and to check the direct trade in prohibited articles between neutral and enemy ports, although carried in neutral bottoms. Upon the exercise of that right the Swedish instructions of 1653 imposed no restrictions, and the convoy system of that year, timidly launched and limited in scope, resembled not at all the system adopted in 1800.

Any doubt that might have arisen as to the Swedish position relative to this question was clarified in the next reign. The Anglo-Swedish treaty of 1661 provided for visit and search. Article twelve prescribed that if the proper passport should be found on board the ship which was subjected to investigation, no further inquiry should be made into the character of ship and cargo; but if the formal certificate should not be produced, or if there should be other cause for suspicion, the ship ought to be searched, "which shall be deemed justifiable in this case and no other." The provisions of this article, inserted also in other treaties to which Sweden was a party, briefly outlined the policy followed by Sweden thereafter. They correspond closely to the terms of the Swedish navigation ordinances of 1715 and 1742,[32] in each of which the second article stated that neutral merchant vessels were required to respect and obey the signals of Swedish privateers and to submit their papers for examination. Articles four and five provided that all vessels which should endeavor to resist should be subject to seizure and confiscation.

tectors, Oliver and Richard Cromwell . . . By Thomas Birch. (London, 1742), I, p. 424.

[32] Lamberty, Guillaume de, *Mémoires pour servir à l'histoire du XVII^me^ siècle, contenant les négociations, traitez, resolutions et autre documens authentiques concernant les affaires d'état* (The Hague and Amsterdam, 1724–1740), IX, pp. 219–228.

In the eighteenth-century controversy over the respective rights of belligerent and neutral, Denmark occupied a position similar to that held by Sweden, and her treaty stipulations and ordinances respecting the treatment to be accorded neutral merchant vessels encountered upon the sea by her warships and privateers differed but slightly from those of her Scandinavian neighbor. During her wars with Sweden in the seventeenth century and the first two decades of the eighteenth, she exercised the right of visit and search. As a neutral state in the time of the maritime wars, she began to oppose belligerent interference with the free passage of her merchantmen as an infringement of neutral rights and a violation of international law. In the confusion which prevailed during the Revolutionary and Napoleonic Wars Denmark combined with Sweden in a determined effort to resist visit by means of a joint convoy system. Yet when the events of 1807 contrived to involve her in the war on the side of Napoleon, she reverted to the practices which she had followed in the earlier wars, and which she had helped to establish, even in the eighteenth century, by negotiating several treaties containing specific regulations upon the belligerent right to visit and search neutral ships at sea.[33]

The reaction of Holland to the principle involved in visit and search was also parallel to that of Sweden. In the

[33] For the ordinance of 1759 see Robinson, *op. cit.*, pp. 176–187; for the ordinances of 1710 and 1793, and the instructions to privateers in 1807, arts. 4–6, see Kay Larsen, *Danmarks Kapervaesen*, 1807–1814.

middle of the seventeenth century each country introduced a convoy system, and each abandoned it as impracticable. When peace between England and Holland was concluded in 1654 one of the points argued in the negotiations centered in the question whether the warships of a neutral power might be subjected to visitation. The question was presently settled in the negative. It happened that soon after peace was concluded the Dutch proceeded to execute a plan for preventing the English from searching Dutch merchant vessels. Nevertheless, a number of Dutch ships sailing under the protection of a man-of-war were searched. When the States-General took the matter under consideration, it was decided that the commanders of Dutch warships should be "anew strictly commanded . . . not to condescend to . . . commands of any foreigners at sea, much less obey the same; neither shall they anyways permit that they be searched." England readily allowed that principle, and since that time has not discussed this matter with the Dutch.

In the discussion touching visit and search of merchant vessels, however, the States-General decided, according to the report of Thurloe,[34] to conform to their previous regulations. These enjoined Dutch privateers to enforce the right of visit and search "even against the English merchant ships that were under convoy; and though they are persuaded that such a visitation and search tends to an inconvenience of trade, yet one can make no reasonable complaints on that score, nor demand that they would desist from it as illegal." The refusal to let merchantmen be searched was therefore to be abandoned. But the States-

[34] Extract from the register of resolutions of the States-General. See Thurloe, *State Papers*, II, p. 504.

General also resolved that a letter should be written to their ambassador extraordinary in England, "that they without any loss of time, shall debate upon this article, which (was) left open in the treaty of peace, with that government there, and by a salutary clause and stipulation concerning such search or visitation, . . . make such regulations and others therein, as may be done with the least hindrance and inconvenience of trade on both sides, according to the examples of the like particular treaties or regulations made with the Kings of France and Spain." [35]

The negotiations with England suggested by the States-General produced no immediate result, no change in the practices of either country, and no exemption from the enforcement of the right of search. Nor would such exemption have been to the advantage of the Dutch, who came to be almost constantly engaged in a struggle with Louis XIV. During these wars they made no further demands for the development of a convoy system. In 1661 Holland, becoming a party to the Treaty of the Pyrenees, thereby confirmed with both France and Spain severally the principle that neutral merchant vessels might be visited and under given conditions searched by belligerent warships and privateers. The article containing this provision was later inserted in the treaty which Holland and England concluded at Breda in 1667. During the following one hundred years Holland signed several treaties which restated or confirmed this principle.

Identical in purpose with these treaty provisions were the ordinances which the Dutch government issued for the guidance of its privateers and men-of-war. In the last two wars of Louis XIV, for a period ending with the Treaty of

[35] *Ibid.*

Utrecht in 1713, Holland and England were allies, and Dutch and English maritime policies were similar. Indeed, the first great naval war in which Holland was aligned against England, after peace had been concluded between the two Powers in 1674, and consequently the first naval war after that date in which the States-General was in position to follow an independent naval policy, was the War for American Independence. The Dutch ordinance of 1781, however, contains the same regulations relative to visit and search as are to be found in the ordinances of France, Spain, Sweden, Denmark, Russia, and England.

The right of belligerent warships and privateers to visit and search neutral merchant vessels during the continuance of hostilities was thus uniformly granted by treaty provisions and by the particular regulations of the several states. In the latter part of the seventeenth century and throughout most of the eighteenth it was considered an uncontestable right, and it was so recognized by the chief writers on the law of nations, with the possible exception of Hübner.

Eighteenth-Century Commentators

Bynkershoek referred to this question only incidentally in his observations concerning enemy goods found in neutral vessels. He declared that it was lawful to detain a neutral vessel in order to determine, not only from her flag, which might be deceptive, but also from the documents found on board, whether it really was neutral. "After such a search a vessel proved hostile is seized. Now, since this is considered permissible by every law, and is universally practised, it will also be permissible to examine

the documents relating to the cargo in order to discover whether any of the enemy's goods are concealed on board." [36] According to his own statement, Bynkershoek was in complete agreement with the views of Heineccius.

Vattel also treated this question briefly, and as a matter which did not call for elaboration. "Without searching neutral ships at sea," he wrote, "the commerce of contraband goods cannot be prevented. Some powerful nations have indeed, at different times, refused to submit to this search." But at the time when he wrote, while the Seven Years' War was being fought, "a neutral ship refusing to be searched, would from that proceeding alone be condemned as lawful prize. But to avoid inconveniences, violence, and every other irregularity, the manner of the search is settled in the treaties of navigation and commerce. According to the present custom credit is to be given to certificates and bills of lading, provided by the master of the ship, unless any fraud appear in them, or there be a very good reason for suspecting their validity." [37]

Unlike Bynkershoek and Vattel, Hübner apparently denied the right of nations at war to interfere with the progress of neutral ships upon the high seas. In his condemnation of the seizure of property on board neutral vessels, Hübner, writing in the middle of the eighteenth century, applied the argument that a ship on the sea ought to be considered as part of the territory of the sovereign whose flag it was flying, and that consequently it should be regarded as inviolable and free from interference from belligerent warships. "Now neutral vessels," he wrote, "are

[36] *Quaestionum Juris Publici,* Bk. I, ch. 14.
[37] Vattel, *The Law of Nations,* Bk. III, ch. 7, sect. 114.

indisputably neutral places; hence it follows, that if they are incontrovertibly laden for the account of enemies, belligerents have no right to molest them on account of their cargoes, since to take goods from a neutral vessel amounts to the same thing as to take them from neutral territory." Consequently, to search for enemy property and contraband of war on board neutral vessels would amount to the same thing as to search for them in neutral territory.[38]

Many nice arguments have been written on these contentions, but it is doubtful whether Hübner's remarks on this point should be taken seriously. His language was indeed borrowed by A. P. Bernstorff in the days of the Armed Neutrality of 1780. Bernstorff, however, held a position of too great responsibility, and was of too practical a turn of mind, to think seriously of applying this doctrine in time of war. Hübner's theory ran counter to old practices, treaty stipulations, and the particular instructions issued to govern the actions of privateers. No writer of consequence in the eighteenth century agreed with him. He neglected to take into consideration the clandestine trader, neutral or belligerent, who availed himself of the protection of a respected neutral flag, and who thus carried on his illicit commerce to the detriment alike of neutrals and belligerents. Such traders would have increased in number, and their activities would have become more multifarious, if the practice of visit and search had been abandoned. If the principle offered by Hübner had been founded in law and reason, it would have

[38] Hübner, *De la saisie des bâtiments neutres,* I, ch. 3, sects. 1–4; Manning, *Commentaries on the Law of Nations,* pp. 234–238.

been equally as unlawful for a belligerent to search a neutral vessel for warlike stores, for other contraband goods, and for provisions destined for a blockaded port. "Yet," says Azuni, "all writers on public law, and Hübner himself, are of a different opinion. The immunity of the flag which this author supposes, without any plausible reason, proves nothing, therefore, in favor of the liberty of neutral commerce, in the sense of the argument here stated." [39]

The treaties and regulations provided for restrictions upon the manner in which search should be conducted. In early modern times the merchantman faced the danger of meeting with a pirate hoisting the flag of a belligerent or neutral, and of being deceived in a similar fashion by belligerent privateers. Against these and other dangers treaties and national regulations provided for two major precautions. It came to be generally agreed that the commander of a privateer wishing to examine a neutral vessel should indicate his intention by first hoisting his national colors and then firing a signal gun. It was further stipulated, following the language of the Treaty of the Pyrenees, that after the signal gun had been fired the privateer should not bear down upon the neutral vessel, but should lie to at a distance of a cannon shot and send out a boat with two or three men entrusted to go on board the neutral vessel and to receive and examine the passports exhibited by the master.

There were several other restrictions upon the method of search, either expressed in treaties or applied in practice in conformity with other provisions of these treaties. Some

[39] Azuni, *The Maritime Law of Europe,* II, p. 186.

treaties prescribed a less thorough search in cases where good faith was evidenced in the passports, and where the ownership of the property was clearly indicated. A vessel bound to a place in a neutral country was to be subjected to less severe scrutiny than another vessel bound to an enemy port. Particular treaties declared that the goods of a friend on board the ships of an enemy were good prize, and the goods of an enemy on board the ship of a friend free; while other treaties contained the provision that enemy goods in the ship of a friend were good prize, and the goods of a friend on board an enemy ship free. The exercise of the right to visit and search was contingent upon the particular treaty provisions applicable in any given case, the methods varying as the provisions varied. There were many such variations, particularly in the enumeration and definition of contraband goods.

Although the exercise of the right to visit and search, when properly conducted, would impose few restrictions upon the honest trader, it tended to check many activities on the part of the less scrupulous, and on the part of governmental officials issuing passports, bills of lading, and other certificates to ship masters. Mercantile interests in Amsterdam, Copenhagen, and Gothenburg chafed, nevertheless, under such regulations in the time of the great naval wars, when these cities enjoyed unprecedented commercial expansion and prosperity. The resentment of the merchants was reflected in the attitude of their respective governments, of which every one was bent upon deriving the greatest possible advantage from neutral trade. Presently there developed a more serious objection to visit and search than that expressed by Hübner.

The Convoy System

The neutral governments began to contend that the presence of a convoy of warships should make the merchant vessels immune from visit and search. Convoys had been frequently employed as a measure of precaution against pirates, and by belligerents as a protection against attacks by the enemy, but not by neutral governments as agents to resist legitimate visitation. The temporary expedients resorted to by Holland and Sweden in the middle of the seventeenth century had been abandoned as impracticable, and both countries had reverted to their former practice.

There had been various other attempts, particularly by the Scandinavian countries, and, in the second half of the eighteenth century, by Holland, to protect neutral commerce by means of warships. In February, 1690, the King of Denmark resolved to send ships under convoy to Portugal, Spain, England, and Holland.[40] By May he found it advisable to direct the convoying vessels to proceed no farther than to Scotland.[41] In 1691, and again in 1693, Denmark and Sweden agreed upon a joint convoy system, but such measures for the protection of merchant vessels were not recognized by the belligerents, or long honored by the neutrals. The year 1691 found Denmark seizing German vessels which were sailing under the protection of men-of-war.[42] The belligerents, Holland among them, regularly disregarded the presence of the neutral convoy.[43]

England consistently adhered to the old practices. In

[40] "Christian den Femtes Dagböger," *loc. cit.*, Feb. 1, 1690.
[41] *Ibid.*, May 9, 15, 1690.
[42] *Ibid.*, Oct. 23, 1691.
[43] *Ibid.*, Oct. 25, 1690, May 12 and June 12, 1691.

an order of the Lords to Admiral Berkly in 1694 it was declared that Captain Faljamb, commander of her Majesty's hired ship the *Unity*, had met with a fleet of Scandinavian merchant vessels under the convoy of two Swedish men-of-war, and that he had seized three vessels laden with corn and brought them into Dover.[44] Again, in 1711 the Lords informed Henry St. John, secretary of state, that the ships belonging to the subjects of the Kings of Sweden and Denmark had often been brought in by her Majesty's ships when they had been met with under the convoy of men-of-war, "and some of them, even when they were furnished with such passes as were required, upon information they had wine and other things on board belonging to the enemy, which goods were condemned, and the ships restored." [45]

In the wars of the first two decades of the eighteenth century both Sweden and Denmark, being at war, resorted to convoys for their merchant vessels. English warships seized both Danish and Swedish vessels under such convoys. In 1772, however, the Dutch advanced the argument that the presence of a warship should exempt the merchant vessel from visitation. Yet in the negotiations and the conventions of the Armed Neutrality of 1780 there was no final stipulation to that effect.

The desire to obtain such immunity was nevertheless manifested in several neutral states at the time of the Armed Neutrality of 1780 and in the following decade, as is evidenced in certain treaties. Probably in order to win the support of the Northern neutrals, Holland took the first decisive step to recognize this principle upon becoming

[44] Marsden, II, p. 160.
[45] *Ibid.*, p. 219.

embroiled in the War for American Independence. An order of the States-General in 1781 enjoined Dutch cruisers to give heed to the declarations of convoy commanders that the ships under their protection had no contraband of war on board, and that no subsequent visit should be undertaken. In the Revolutionary and Napoleonic Wars the Scandinavian countries contended that treaties and usages allowed to belligerents the right to search neutral vessels unescorted by a convoy, but that no power had ever allowed a nation at war to visit neutral ships navigating under the protection of a warship.

This furnished an easy transition to the next logical contention, which in turn was followed by concerted neutral action. Notwithstanding the fact that until 1780, or even later, the stipulations of treaties and the practice of all the naval Powers of Europe had made visit and search a general rule without exception, the neutrals were beginning to advance the new principle that exemption from search by the presence of convoys was a right firmly established by the law of nations. They presently began to organize new leagues to enforce that section of international law.[46]

On the other hand, every belligerent, and Great Britain particularly, held that no sovereign could by mere force legally compel the acceptance of such security from visit and search. "The only security known to the law of nations upon this subject, independent of all special convenants," said Sir William Scott, "is the right of personal visit and search, to be exercised by those who have an interest in making it." [47] Such a special covenant between belliger-

[46] In 1794 and 1800.
[47] Robinson, *Adm. Rep.*, I, pp. 349 f.

ents could probably never be agreed upon under conditions such as prevailed during the naval wars of the eighteenth century.

At the time when the neutral governments commenced to base their demand for exemption upon a right allegedly inherent in the convoy system, and set about to enforce the recognition of that demand by means of naval forces, the controversy between them and the belligerent governments no longer centered mainly in points of law or in legal principles. It had become then primarily the manifestation of a clash between conflicting commercial interests, of which one side was strengthened by a widespread belief that the struggle was one for self-preservation, the other by the knowledge that with the end of the war there would vanish an extraordinary opportunity for trade.

It is true that a highly organized and efficient convoy system would have presented some advantages even to the belligerents. It would have tended to eliminate the illicit trader, be he the subject of a nation at peace or of a nation at war, who operated under the protection of a convenient neutral flag. If the system could have been sincerely applied so as to win the confidence of the belligerents, it might have made superfluous the services of a large number of warships and privateers devoted to the task of preventing unscrupulous merchants from aiding the enemy. It would have freed the *bona fide* merchant vessel from the interference of over zealous privateers. Thus would have been removed one of the great causes of friction between neutral and belligerent.

It was believed by many that a convoy system could not be so devised that it would eliminate fraud and prevent neutral trade from becoming the decisive factor in a naval

war. However, the objections raised by some statesmen, particularly during the Revolutionary Wars, tended to confuse the question in matters both of law and of fact. In the controversy between England and Denmark in 1800 Lord Grenville directed the English envoy at Copenhagen, Lord Whitworth, to declare that if the principle should be once admitted that a Danish frigate could lawfully protect from search six merchantmen of that nation in the British seas, "it will be equally true that the same Power, that Sweden, that the Powers of Italy, that even the town of Hamburg, may by means of a single sloop of war, even by commissioning one of the merchant vessels themselves, extend the same protection to the whole of the enemy's commerce in every quarter of the world." [48]

Except for its designed political effect upon the Danish government, this declaration, and those similar to it in intent and language, probably should not be taken too seriously; they probably were not intended to be taken seriously. It was a commonly recognized principle in Europe, enunciated most clearly and persistently by the English prize court, that two sovereigns might agree to follow in their mutual relations a mode of conduct differing from the general rule and not applicable to the nations which were not party to the agreement. Thus in the case of the Swedish ship the *Maria,*[49] Sir William Scott declared that "two nations may, unquestionably, agree, if they think fit, as in some late instances they have agreed, by special convenant, that the presence of one of their armed ships along with their merchantships, shall be mutually understood to imply, that nothing is to be found in that convoy

[48] Martens, *Recueil,* 2d. ed., VII, p. 143.
[49] Robinson, *Adm. Rep.,* I, case of the *Maria.*

of merchantships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge they may agree mutually to accept." The English government might, therefore, without assuming any obligation to Sweden, Hamburg, or the Italian states, have concluded a treaty with Denmark recognizing the special status of Danish convoys. It would have been a bilateral agreement, limited in scope and excluding from its special privileges the ships of all states not parties to the treaty.

The establishment of a convoy system satisfactory to both parties would perforce come only through a compromise; the continued operation of such a system would necessarily be contingent upon the integrity of the neutral government and its local officials. In the character of the correspondence relative to this question is found no indication that there was, on the part of the nations at peace, a desire for such a compromise; and in the manner in which the old laws and treaty provisions were applied, no revelation of a genuine purpose, on the part of the majority of local officials, to effect a sincere administration of the law of nations. The neutral governments maintained that by the fundamental law of nations, irrespective of all treaties, the presence of a convoy of warships exempted the merchant vessel from visit and search. If this contention were accepted, there was need, not of a compromise or of a treaty, but of a yielding attitude on the part of the belligerents.

To the neutral contention, Lord Grenville returned the only possible answer when he declared that, if this were accepted, all other questions of maritime law would be superseded by a new principle. "Nor can any question of

prize ever again be raised respecting merchant vessels, or a single capture be made by the British navy, since all that will be required is that in the whole circle of the civilized world one neutral state shall be found (however small) sufficiently well disposed to our enemies to lend its flag to cover their commerce, without risk to itself, and with certainty of large pecuniary recompense."

There were other and more pertinent arguments against the recognition of the convoy system. It is recorded that in 1657 some commissioners under Cromwell took the matter of convoy under consideration. They came to the conclusion that a belligerent "cannot, and ought not, put so much faith in particular captains at sea" as would be required under the proposed system. In no former treaty were such articles found, and the neutral Powers had "no reason to desire any such novelty." [50] This opposition persisted in England, as elsewhere among belligerents, for the next one hundred and fifty years. The objections of Cromwell's commissioners were tersely maintained by Lord Grenville in his instructions to Whitworth: "For where no examination is permitted, no detection of fraud can be possible."

The strong objections to the convoy system by those who could not profit by its adoption arose, not so much from any suspicion of the intentions of the government seeking its recognition, as from fear of the serious consequences which might come from fraudulent practices of traders using the neutral flag, and from the lack of integrity and ability of the local officers to whom fell the duty, and the profit, of issuing passports, bills of lading,

[50] Quoted in Hansard's *Parliamentary Debates*, 36, p. 214 note; Robinson, *Adm. Rep.*, I, pp. 364–378 notes.

and other certificates of merchant vessels departing from neutral ports. To interfere with this lucrative traffic of its officials and merchants was not the chief interest of a neutral government, even had the means for doing so been available. Great Britain, being the chief opponent of illegal neutral trade, felt that it would be inadvisable to rest her interest on the faith of another government, or on the honor of a class of individuals engaged in commercial activities throughout the world. It was realized that neither the neutral government, nor the neutral officials, could have adequate facilities for examining all the facts, or sufficient interest to detect fraud. This apprehension was founded on the long experience of the prize courts of England and of other countries in dealing with merchant ships illicitly carrying neutral papers and sailing under neutral flags, and upon the renewed attempts of belligerents to protect themselves through specific measures from the practices of such traders.

Ships' Papers

Against the abuses which might be practiced by belligerents in connection with their exercise of the right of visit and search, treaty stipulations provided adequate legal precautions, and specifically stated that when the papers of a vessel were found to be in proper form, it should be free to pursue its course without any molestation. On the other hand, the treaties also recognized that the searching party might have a legal and well-founded suspicion that the neutral vessel was guilty of fraudulent practices. Instances of such suspicion called for a more

rigorous search to determine the national character of ship and cargo.

The proof of its neutrality was the responsibility of the ship summoned for visitation. The neutral character of any ship was determined by the flag and the passport under which it was navigating. The passport was essentially a license, issued by a state through its local officials, granting to a given ship permission to undertake a particular voyage without hindrance or molestation by the issuer or by other states that had agreed with it to honor each other's genuine passes. It ordinarily contained the name, place of residence, and citizenship of the owner or the master, the name of the vessel and its total tonnage, the names of the ports of departure and destination, the ownership and specification of the quantity and quality of the merchandise constituting the lading, and a statement that no goods were disguised or concealed therein by any fictitious name whatsoever.[51] The passport might of itself be sufficient proof to establish the neutral character of ship and cargo, particularly in a case in which the principle of "free ships, free goods" was admitted, and the destination was a neutral port.

The chief aim of these passports was to protect the interest of the belligerent without subjecting the neutral vessel to the inconvenience of unregulated search. In this purpose they failed, mainly because it was impossible to supervise effectively the local officials who were entrusted with the authority to issue passes and other certificates to departing merchant vessels. Belligerents frequently pointed to the neglect of the neutral governments to pro-

[51] The Anglo-Swedish treaty of 1661, art. 12 and passport.

vide their ships with papers conforming in spirit and in letter to the terms of treaties. Thus, in their correspondence with Denmark in 1693, the English complained that not one of the Danish ships which had been seized at that time was furnished with passes agreeing with the form prescribed in the treaty of 1670, that even after the convention of 1691 Denmark did not observe the regulations adopted, and that Danish ships were not provided with passes in the form prescribed, "either by the said treaty or convention." [52] The correspondence also explained that in time of war all neutral ships trading to enemy ports, if not provided with passes and certificates according to the specification of treaties, might by the law of nations, as well as by the specific treaties, be examined while at sea. At the same time, however, English privateers were informed that Danish and Swedish ships, "being furnished with the passports, together with authentic certificates relating to the oaths" required by the treaties between England and each of these countries, might pass freely, unless they were engaged in prohibited trade.[53]

Similar instructions were issued in the wars of the eighteenth century. Some French instructions were identical with the English, but in the regulations of 1694, repeated in 1704, 1744, and 1778, France directed her privateers and courts not to honor the passports granted by neutral princes.[54] The reason adduced for these regulations was that the neutral traders and officials did not conform to the terms and intention of such passes.

The remissness of neutrals was balanced by the stringent laws of belligerents. According to the regulations of France, England, and other countries in the sixteenth, seventeenth and eighteenth centuries, the ship, the cargo, or both — depending on the circumstances and the nature of the particular offence — were subject to condemnation as good prize in cases where there had been an attempt to destroy the papers by throwing them overboard, burning them, or falsifying them so as to obliterate their original terms and purpose. Similar sentences were passed upon ships carrying more than one set of papers, or papers that falsified as to destination, ownership, and charter parties. Ships which were without bills of lading, or documents serving the same purpose, and those of which the crews were mainly foreign were likewise regarded as good prize to the captor. Under certain conditions, however, a ship might not be condemned for carrying false papers, provided the master could show that such tactics were adopted only in self-defence.

[52] Marsden, II, pp. 148 f.
[53] *Ibid.*, pp. 414 f.
[54] Articles 1, 8, 11, 5, respectively. See Lebeau, I, pp. 220, 328; II, pp. 1, 339.

Fraudulent Practices Under the Neutral Flag

The persistent recurrence of these regulations for a period of more than two hundred and fifty years is of some significance. It indicates that the irregularities in neutral trade, so much complained of in the second half of the eighteenth century, had accompanied every major naval war. They were, in fact, inherent in societies which sanctioned such wars as the most efficient means of adjusting international differences.[55]

The belligerent governments enforced stringent regula-

[55] French regulations of 1543, 1584, 1681, 1692, 1693, 1694, 1704, 1708, 1716, 1744, 1778. English regulations of 1665, 1676, 1693, 1704, 1757.

tions upon ships trading under colorable papers, and frequently condemned them; most neutral officials were vigilant in the issuance of ships' papers; yet false papers were easily obtained and universally employed by unprincipled merchants. Blank papers were sometimes issued to ships which did not touch at the given port of departure, and to ship masters who were not present to take the required oath. Indeed, during the wars of the French Revolution it was testified in court that an American consul in Holland was administering this oath to men who claimed to be Dutch subjects. Ships' papers were so easily procured in almost any neutral port of Europe that it became the practice of unscrupulous ship masters to carry several sets. Belligerent merchants in particular resorted to that method of protecting ship and cargo. On board a captured English East Indiaman the French found a letter which suggested to the master that if he had any surplus money while he was in Europe it would be advisable to buy two or three passports. He could then keep for his own use the passport that would seem to be most advantageous to him, and sell the others, no doubt at an increased price.[56]

The aim of the belligerent merchantman was to deceive the enemy, that of the neutral to deceive both powers at war, but particularly the English, who more often than their adversary controlled the lanes of commerce. A striking illustration of this purpose is afforded by a letter carried in an American ship, the *Calypso*. It was therein

[56] Ortolan, Theodore, *Règles internationales et diplomatie de la mer. Troisième édition mise en harmonie avec le dernier état des traités, suivie d'un appendice spécial contenant les principaux documents officiel relatifs à la dernière guerre d'Orient et les actes du Congrès de Paris de 1856* (Paris, 1856), II, p. 218, note 1.

suggested that "the most artful tricks that can be devised to elude the enquiries of the English must be put in practice; for they must not discover the real destination to Cayenne." In the words of the Court, the text of the letter "appears to have been followed up with as much zeal and industry as could possibly be exercised." [57] These were extreme but not isolated cases. They occurred in the latter years of the eighteenth century, but the art of deceiving searching parties was not peculiar to the generation of the French Revolution. Similar practices had been common in all previous wars.[58]

One of the most effective means adopted by the belligerents to protect their trade from the naval forces of the enemy was the neutralizing of their merchant ships. Fictitious sales, neutral papers, and the cover of a neutral flag would serve that purpose. The French law, however, recognized the validity of the sale of an enemy vessel to a neutral only when it was completed before the commencement of hostilities. According to the English law of the eighteenth century the transfer of ships from an enemy to a neutral was not regarded as illegal, provided good proof of a genuine transaction was given by a bill of sale and a reasonable payment of the purchase money. But such sales were often looked upon with suspicion by the prize court, particularly if after the transfer the vessel continued to be employed in the trade of the enemy.

If there was no genuine purchase, or no actual transfer of property, the sale would be regarded as colorable and collusive. To comply with the requirements for genuine

[57] Robinson, *Adm. Reports*, II, p. 298.

[58] For colorable papers see Burrell, *Report of Cases*, and Pratt, *Admiralty Cases*.

sale, the neutralizer ordinarily executed public documents purporting to attest the transfer of property in ship and cargo to him. These papers were properly signed by the shipowners, who then gave the buyers a receipt for the purchase money. Immediately upon the neutralization of the ship, private documents were exchanged. In these the neutralizer formally avowed that he never had paid any part of the purchase money mentioned in the deed of sale, and promised to deliver the vessel in question to the real proprietor whenever he should call for it.

Of transactions of this kind the English court was well aware, and frequently was provoked to reiterate statements to the effect that the enemy, from inability to navigate his own ships during the war, resorted to temporary transfers, but still kept his hands upon the vessels in order to enforce restitution on the return of peace. "The court has often had occasion to observe," said Sir William Scott, "that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it was a genuine transaction." At the time when Scott presided over the prize court, it was cities like Bremen, Emden, and Altona that were most favorably situated for the neutralizer. He felt impelled to remark that the vigilance of the magistrate of Emden had been "surprised," and that it concerned the public interest of that place "to have that vigilance more laboriously exerted against imposition of this sort." [59]

[59] Robinson, *Adm. Reports*, I, cases of the *Argo, Vigilentia, Endraught, Emden, Two Brothers; Ibid.*, IV, cases of *Sechs Geschwestern, Jemmy; Ibid.*, VI, case of the *Omnibus*. See also Brown, John, *The Mysteries of Neutralization*.

It was not alone belligerent ships and cargoes which were neutralized by means of fictitious papers; false documents were also procured to neutralize belligerent subjects, particularly ship masters and members of the crew. A Dutch ship, the *Vigilentia,* for instance, was provided with a muster roll certifying that the mariners were all neutrals, whereas, upon examination in the prize court, it was revealed that fourteen of them were subjects of belligerents. The master of the ship, one Gerritz, testified that he was born in Holland and had always been a subject of the Dutch Republic, but that the papers which he had received from the magistrates of Emden proved that he was at that time a subject of the King of Prussia, although he had never been at Emden nor taken any oath of allegiance to the King of Prussia. The Emden officials further certified, not only that he was a fellow inhabitant, but that he had hired a lodging in that town.[60]

A large number of other ship masters provided with certificates similar to those of Gerritz appeared before the prize court. There was Meyer, master of the *Emden,* a single man who had not established any domicile by family connections. He had been employed for ten years in the trade from Amsterdam to Greenland, probably in connection with the Greenland fisheries, and by occupation had become "a perfect Dutchman." Nevertheless, his ship had on board a certificate which the owner, Bauman, had obtained to prove that the master was a resident of the town of Emden. This certificate was contradicted in the deposition of the master, who declared that he had never been to Emden and that he was unacquainted with Bauman.

[60] Robinson, *Adm. Reports*, I, case of the *Vigilentia*.

Yet the latter, as the alleged owner of the ship, was the employer of Meyer and the crew.[61]

Then there were ships documented and manned in the manner of the *Calypso*. It was said that this was an American vessel under the name of the *Lady Walterstorf*, a singular name, the court observed, for an eighteenth-century American vessel. It had as master a Danish subject by the name of Speck, who, when at home, always lived at New York. One of its owners was a certain Eckhart, who, according to the depositions of the master, resided at Hamburg. The ship's papers, however, established Eckhart's domicile everywhere but at Hamburg. It was shown to be at New York, at St. Thomas, at Cayenne, and at Rochelle. There was no evidence except the testimony of the master to connect him with Hamburg. The papers contained instructions which, in the words of the Court, were "as artfully drawn for the purpose of fraud as it is possible for man to conceive; be a man's talent or genius for falsehood what it may, I defy him to fabricate a fraud more ingeniously than it is done in these instructions. That they were not without effect is evident, as the ship was [once] stopped by an English frigate and released." The ground on which this ship was condemned was the "gross leaven of fraud which runs through every part of the transaction and contaminates the whole case; even on the neutrality of the property." [62]

These cases illustrate only the method employed to protect a certain class of trade from the danger of visit and search, and from the inevitable confiscation by the prize courts in the event of seizure. These irregular practices

[61] Robinson, *Adm. Reports*, I, p. 16.
[62] *Ibid.*, II, p. 154.

operated mainly to the benefit of belligerent trade, and to the pecuniary advantage of the neutralizer and of the local officials issuing documents to merchantmen. But they operated to the detriment of the genuine neutral trader. In consequence of these practices his vessels were needlessly forced to compete with belligerent ships operating under neutral papers, and were subjected to a more rigorous exercise of the right of visit and search than would probably have been the case otherwise, for the suspicion of the nations at war was aroused, and the commanders of the searching parties were unable to distinguish between *bona fide* and fraudulent traders.

The use of false passports was but one means through which were found markets for illegal commodities. There were various others. Masters of ships were often given discretionary powers as to which of several possible trading centers they should enter, depending upon circumstances and the disposition of belligerent naval forces. Severe storms, lack of food or water, even mutiny of the crew were convenient and plausible causes for entering ports which ordinarily would be closed to vessels employed in a certain trade. Some ships sailed under colorable bills of lading and for illegal charter parties. Thus Christian Schultz, master of the *Fredericus Secundus*,[63] without first advising with the owners had entered into a charter party with Hillman and Horn, a firm at Lisbon. The agreement specified that the ship was to go to Bordeaux, but that all papers should be drawn for Lisbon. On board this ship there were six bills of lading, of which five were colorable. Similarly, the master of the *Elizabeth Catherina* swore on the twelfth interrogatory that the bills of lading he had

[63] Pratt, *Law of Contraband of War*, p. 109.

obtained were all colorable.[64] Sometimes the papers were incomplete, so that parts of the cargo would remain unclaimed if the vessel should be captured. This was found to be the case in the trial of the *Marlborough,* in which the judge declared: "I don't apprehend goods were ever discharged without being claimed. These goods were too heavy to have been loaded at sea." [65]

Still other sharp practices were at the command of the resourceful merchant bent upon increasing his trade with the nations at war. According to the terms of the passport, as prescribed in commercial treaties, the master or the owner of a merchantman was required to swear before leaving the home port that no prohibited goods were concealed in his vessel or consigned to a fictitious purchaser. This oath was frequently violated in letter and in spirit by neutral and belligerent alike. For the purpose of such concealment the timber and grain trade of the Baltic afforded a unique opportunity. Under cover of grain or fir boards, not contraband, the Baltic merchantman "might have a dozen masts or so, and a hundred loads of oak planks." What further space there was in the hold might be filled with "lasts of tar, bales of hemp, or bolts of sailcloth." [66] Cannon might be stored among the rest of the cargo, as was done on board the Danish ship *De Providentia,*[67] in which six cannons, one-pounders with new carriages, were found in the hold under the lading. The master of this vessel testified that these guns, carefully

[64] Pratt, *Law of Contraband of War,* p. 115.
[65] *Ibid.,* p. 24.
[66] Albion, Roger G., *Forest and Sea Power* (Cambridge, Mass., 1926), p. 184.
[67] Pratt, *op. cit.,* p. 144.

hidden from view, were for the ship's use and were not to be sold.

The prize courts became aware that many implements of war besides cannons and prohibited naval stores could be concealed in an otherwise neutral cargo. Muskets and shots might be packed among the most harmless commodities. Such was the nature of the lading of the *Wilhelmina Catherina,* where, "among laces and other things," were stored away "five small bags of musket and pistol shots." [68] Such also was the lading of the Danish ship *Nicoline,*[69] which had been permitted by a license to proceed, with a cargo of grain only, from Denmark to Norway, "first touching at Leith to pay tonnage duties." It was discovered that a quantity of firearms of various kinds was stowed away under the cargo. The court observed that it could not have been the intention of the British government to permit the transport of articles "of this noxious description" from Denmark to the ports of Norway, which were crowded with privateers of the enemy.

These cases illustrate the common types of fraudulent practices employed to circumvent regulations upon neutral trade with the enemy at a time when the right of visit and search was freely exercised by all nations at war and when the chances of discovery and confiscation were great. They allow little ground for belief that fraudulent trade, injurious to belligerent interest, could have been checked by any neutral government after the general adoption of the convoy system should have removed all danger of searching parties.

[68] *Ibid.,* p. 180.
[69] Edwards, *Reports of Cases in the High Court of Admiralty,* p. 364.

The historical record, reviewed over a period of more than two centuries previous to 1780, reveals that the right of visit and search had been confirmed in the vast majority of treaties. This right had been regulated by the laws of the several states, and exercised by every naval Power in time of war. During that period there had been intermittent attempts to establish a convoy system, by means of which the neutral government would guarantee that every vessel under its convoys was engaged in lawful trade. Toward the end of the eighteenth century the neutrals began to press for the recognition of the principle involved as a firmly established right.

The convoy system would have presented many advantages to neutrals and belligerents alike. Its disadvantages, flowing mainly from the fraudulent practices of traders and local neutral officials, precluded its universal acceptance. Prudent belligerents were fain to agree with the truth of the dictum of Sir William Scott that the only security then known to the law of nations was to entrust the right of personal visitation and search to those who had an interest in applying it.

CHAPTER V

THE EVOLUTION OF BLOCKADE

THAT blockade, as an instrument of war, imposed unreasonably severe restrictions upon the trade of neutral nations is a natural conclusion, often drawn. However, it was a less severe means of warfare than that which it replaced. Its application to enemy ports was dependent, however, upon certain technical and administrative developments, and until these were effected in the Modern Era, there was an indiscriminate interdiction of all trade with the enemy. When blockade could at last be applied, it tended to localize such prohibitions and to liberate commerce from unreasonable interference. Careful attention to the history of this development will indicate that in its origin and in its theory the properly regulated blockade was conducive to the expansion of neutral commerce with belligerents.

The practice of cutting off communication with an enemy port by means of blockade is now one of the incontrovertible rights of belligerents. In the beginning this practice was, perhaps, simply an unregulated act of war. Intermittently and by slow stages it became more clearly defined, and more significant for the trade of nations remaining at peace. As a measure to prevent supplies from reaching the enemy it was employed in ancient times, occasionally during the Middle Ages, and more regularly in

the maritime wars of the Modern Era, particularly in the eighteenth century. By virtue of its inherent requirements, however, it could not possibly have been employed in every naval war during the period which separates the struggle of the Athenians against the Persians in the time of Themistocles from the wars of the Dutch against the French in the time of William III.

Origins of the European Navies

The application of a sustained blockade was conditioned by the sea-worthiness of the blockading vessels and by their capacity for carrying provisions and other supplies sufficient for prolonged cruising off an enemy port. Such vessels were not constructed in ancient times or in the Middle Ages. During the centuries which elapsed between the battles of Salamis and Lepanto all action at sea was fought at close quarters, with the purpose of ramming and boarding the enemy vessel. The use of the ram was more readily available to the lighter vessels driven by oars than to the heavier sailing vessels of later times. The ideal warship in this period of two thousand years was therefore of moderate size, and of light yet sturdy construction, so that the oarsmen could move it with effect and use the ram with safety. The type of ship construction called for by the conditions of medieval warfare could not meet the technical requirements of blockade service.

For the commanders of ships like those which fought at Lepanto in 1571 the hazardous task of applying a sustained blockade was impossible without first securing a base on a near-by shore where they might store provisions and rest the crew. The warships might be of aid to the

military forces on land in carrying on the siege or investment of an enemy port, but they could not act independently. So it happened that it was only after the evolution of oceanic navigation, and the consequent construction of great fleets of merchantmen, even after the development of naval artillery, that blockade in the modern sense of the term could be undertaken successfully. From a technical point of view, such blockade could not be applied until the seventeenth century.

The ability to carry on a sustained blockade was not contingent solely upon the technical development of the blockading vessel and the skill of the crew; it depended in an equal degree upon the administrative organization of the fleet, with a single control over the vessels composing a united squadron. This was in turn dependent upon the political organization of the several communities engaged in war. That is to say, in a period of political disorganization and particularism, such as obtained during the feudal period, there was not sufficient unity of control over the entire military and naval forces of a state to enable the government to carry on systematically a prolonged naval campaign. That control would come only with the development of a strong unitary state, having all authority over the army and navy vested in a centralized administration. The matter of blockade and its effect upon neutral trade with belligerents was therefore closely associated with the evolution of the various European navies; and that evolution coincided with the development of the national states.

In the origin of the English navy geographical factors played an important part. To provide for defence against the frequent raids and invasions by the Norsemen, to

which England, by reason of her location, was exposed in the ninth century, Alfred and Ethelred [1] formed a national organization of which the shire was the unit. "Each shire was bound to furnish ships in proportion to its number of hundreds, and from the produce of what had been the folkland [2] contained in it." [3] These ships represented the naval side of the fyrd, or military contingent of the shire. By the time of the Norman Conquest, however, this system had fallen into disuse, probably because the shires had been allowed to acquit themselves of this duty by the payment of a fixed contribution of a different nature.

Another and more important unit of the Anglo-Saxon navy was formed by the ships which were maintained by the royal revenue and over which the King had complete control. Carried over into the Norman period, however, this unit fell into decay. Some monarchs, like William the Conqueror, maintained no standing navy; others, like Richard I, restricted themselves to the creation of a royal armament for special occasions. At all events, under weak or spendthrift kings in particular, but also at times under able rulers, the royal unit of the English navy was of little force, so that the coast was often ravaged by the enemy, as in the later years of Edward III and in the reign of his grandson, Richard II. Even the vigorous Henry IV was compelled to engage private shipowners to take over the duty of guarding the coast. Before the sixteenth century the chief function of the royal ships had been to protect the King when he moved by sea between different parts of his possessions. It was not until the time of the

[1] Stubbs, William, *The Constitutional History of England in its Origin and Development* (fifth ed., Oxford, 1891), I, p. 118.
[2] *Ibid.*, I, p. 81, n. 2.
[3] *Ibid.*, I, p. 131.

Tudors that they became the real foundation of the navy.

Two other elements went to compose the English navy: namely, the feudal array of the Cinque Ports and the naval quota of the shires or coastal towns. Shortly after the Norman Conquest the Cinque Ports were organized into a powerful corporation possessing all the necessary apparatus for self-government, with extensive immunities and privileges. In return for the grant of such privileges, each member of the corporation was to furnish without further compensation a number of ships and men for the King's service during a period of fifteen days each year. Until the formation of a permanent royal navy under the Tudors, the ships of the Ports constituted the main part of the war fleets of the English Kings. In time of war the few ships of the royal navy and the contingent of the Cinque Ports were supplemented by ships and men commandeered from the other coastal towns. The latter were in a certain sense the militia of the fleet. Such measures of requisition were possible at that time, because until the sixteenth century there was no essential difference between a merchant ship and a man-of-war.

These scattered units composed the English naval forces during the Middle Ages and the beginning of the Modern Era. Not until the time of the Tudors, possibly not until the seventeenth century, did the nation possess a navy of which all parts were subject to the immediate control of the Crown.

The development of other navies was similar to that of the English. The early French Kings, in their narrow confines of Ile de France, were hemmed in by their great vassals until the first decade of the thirteenth century, when Philip Augustus expelled King John of England

from Normandy and Poitou. That event gave royal France a seacoast. While the centralization of France was in progress, the Capetian Kings began to organize a navy. Like the English navy, it was composed of the King's own ships and the feudal array of the great vassals who owed service in ships. The latter element corresponded to the contingent furnished by the Cinque Ports, and was even less manageable than its English counterpart. These two units were supplemented by levies of ships from the trading towns. But, save for a short period in the last years of the reign of Francis I, the fleet languished until the seventeenth century, when Richelieu organized it on a modern basis. From his time on France possessed a navy amenable to the control and discipline of the King.

The United Provinces of the Netherlands have always been maritime, the people having served their rulers on the sea even in the early Middle Ages. During that period, however, the naval forces of the country remained divided and unorganized. In the revolt against Spain in the sixteenth century is found the origin of the modern Dutch navy. There were two lines of development. The naval part of that war was conducted by the adventurers known as the "Beggars of the Sea," a loose organization whose main warlike efforts were confined to the coast and rivers. In this body of fighters lay the nucleus of the navy. The war resulted in the establishment of the Dutch confederation in 1597. When that event had given the country a common government, it became possible to organize a naval administration susceptible to disciplinary measures and to a more centralized control. This organization of the navy was effected by an edict of 1597. Remaining in force for two centuries, that edict conditioned the administrative organization of the Dutch fleet during that time.

Similarly the fleets of the several kingdoms of the Spanish Peninsula were composed partly of royal vessels and partly of ships furnished by the coastal towns. In addition to these there were the fleets maintained by various associations of the maritime ports. The discovery of America and the acquisition of Flanders and Sicily afforded great incentives for increasing the various Spanish navies. In spite of those events, however, Spain possessed no centrally organized force of which all units were susceptible to the discipline of the government at Madrid until a navy was created by the Bourbon dynasty after 1700.

Conditions Attending the Lack of Centralized Control

These simple facts relative to the various navies of the Middle Ages are significant. They indicate that there was no centralized administration of the several European fleets, no unity of purpose, and no discipline. Since a large part of any one of them was composed of the feudal array serving for a limited number of days each year, it was difficult to keep a navy together for an appreciable length of time, except under a great stimulus like that afforded by the Crusades.

The lack of unified control was conducive to lawlessness and piratical enterprises on the part of the various independent units of the fleets. Many illustrations may be cited to show the lawless habits of the sailors, and the lack of discipline and the uncertainty that attended every naval operation during the whole period. In 1213, when the King of France, bent upon chastising the Count of Flan-

ders, sent his fleet to the port of Damme, the crews forsook their duties, left their vessels, and went inland to plunder the inhabitants. Meanwhile, the English made use of this opportunity to capture many of the French ships. Again, in 1216, the papal legate, being on his way to England, asked Philip Augustus for safe conduct thither. The King promised to give him protection throughout his dominions, but, being unable to control the French fleet then cruising in the Strait of Dover, felt compelled to add: "If you should happen to fall into the hands of Eustace the Monk or any other of Louis' men, who infest the sea, do not impute [it] to me should any harm befall you." [4] And at Sluys, in 1297, when a quarrel arose among the sailors of the English fleet, the men of the Cinque Ports boarded the Yarmouth vessels, slaying their crews and burning several ships, entirely disregarding the presence and the commands of Edward I, one of the strongest rulers of medieval England.

Piratical habits characterized the sailors of all countries. When they were not engaged in the wars of their sovereigns, they often waged war on their own account. The sailors of the Cinque Ports often fought the sailors of the semi-independent cities or feudal lords of other countries. During a truce, or even in a time of peace, they boarded ships and plundered indiscriminately. Remonstrances and demands for satisfaction were constantly made by one sovereign of another for such outrages committed on the sea.

When these demands were not satisfied, the sovereign of the injured party issued letters of reprisal. Out of this

[4] Nicolas, Nicholas H., *A History of the Royal Navy* (London, 1847), I, p. 174.

practice there gradually developed a general system of licensed private warfare, which came to be legalized by treaty provisions and other regulations. It became a part of the public law of Europe. Its significance lies in the fact that it represented a stage of development one step in advance of the indiscriminate plunderings of the earlier period. As the governments of Europe gained more power and control, the private warfare was in turn transformed into the institution later known as privateering.

It was only gradually, and conjointly with the growth of the royal power, that private wars and reprisals came to be controlled; and it was only gradually that the central government secured absolute command over its military and naval forces, and was able to assume responsibility for the misdeeds of its subjects. As the suppression of irregularities at sea progressed, international trade and communication developed, and a system of law evolved to regulate the conduct of merchant ships and men-of-war upon the sea.

Before that stage of development was reached there was a general insecurity of navigation and trading upon the sea. Neutral trade became at times impossible; neutral shipping was never secure. On occasions when a sovereign commandeered ships for the navy, there was but little discrimination between domestic and foreign ownership. Neutral vessels were therefore not always exempted from the requisition resorted to by a ruler when at war. A case in point occurred in 1242 when the barons of the Cinque Ports, assisting the sheriff of Kent in impressing ships for the King's service, were empowered to arrest foreign ships as well as native.[5] Again, in 1253 all vessels

[5] *Ibid.*, p. 195.

capable of carrying men and stores were violently impressed whether they were English or foreign.[6]

More often, however, the neutral vessels were plundered by divisions of the royal navy, or by pirates operating under the protection of certain governments. On one occasion when the English King, in order to revenge himself on the King of France, directed the Cinque Ports to commit every possible injury to the French at sea, the officers of the Ports did not confine themselves to this command, but proceeded with such ferocity that they "slew and plundered like pirates" both foreigners and their own countrymen, "sparing neither friends nor neighbors, kith nor kin." [7] In 1315 a large Genoese ship arrived in the Downs. While it was lying there, the keeper of certain ships at Calais belonging to the King of France arrived and seized the vessel, taking it back to Calais after wounding and ill-treating the merchants and the crew.[8] Some nine or ten years later the English complained that the Count of Zeeland had attacked their vessels, whereby much property was taken and many lives were lost. In 1295 a vessel, on its way from Barbary to England, was driven by stress of weather into Lagos, in Portugal. Hither came some armed Portuguese "sons of perdition" from Lisbon, boarded the vessel, robbed the merchant and the crew, and brought the vessel to Lisbon, where one-tenth of the spoils was delivered to the King of Portugal and the remainder divided among the robbers.[9]

[6] Nicolas, Nicholas H., *A History of the Royal Navy*, p. 207.
[7] *Ibid.*, p. 200.
[8] *Ibid.*, p. 240.
[9] *Ibid.*, p. 275.

General Interdiction of Trade with the Enemy

In addition to being subjected to inconveniences and destruction through violent practices on the part of the subjects or of the ruler of every state of Europe when at war, neutral trade with belligerent ports was frequently interdicted by means of specific proclamations. In 1242, for instance, when a war was in progress between Henry III of England and Louis IX of France, the former, having learned that a Spanish ship with a cargo of horses, silk, and other merchandise was bound to Rochelle, directed the men of Bordeaux, then under his allegiance, to capture the ship.[10] In 1316 Louis X of France undertook a campaign against the Count of Flanders. At that time it happened that several Spanish ships, laden with provisions for the Flemings, were seized by the constable of Dover Castle. When Louis heard of this occurrence he wrote to the King of England, "requesting him to retain the ships, they being forfeited to him, and to keep their crews as his 'serfs and slaves.'" The English King answered that as soon as he had received sufficient information about these vessels he would do "what might be agreeable to Louis." [11] At the same time it was reported by the constable of France that English subjects were conveying provisions to Flanders. Such trade being regarded as illegal, Edward II promised that if any fault existed in that respect it should be remedied and the transgressors punished.

These are illustrations of specific or localized interdiction of trade with enemy ports. The next logical step led

[10] *Ibid.*, p. 201.
[11] *Ibid.*, pp. 329–330.

to a general prohibition of all trade between the subjects of neutral and belligerent states, as well as between those of the two enemies. In the wars between England and Scotland in the first three decades of the fourteenth century, neutral trade with the Scots was prohibited in various English ordinances. When the French King, in 1321, remonstrated against these measures, Edward II of England replied that his actions were sanctioned by the common usages of those times.[12]

Through the next two hundred years the status of neutral trade with the enemy remained the same in the English application of international law. Thus in 1543, when England was at war with France, but was negotiating for a treaty of peace with Scotland, Henry VIII seized and detained some Scottish trading vessels apparently bound for France. When the Scots complained about measures so seemingly arbitrary in time of peace,[13] Sir Ralph Sadler, the English negotiator in Scotland, explained that one of the chief reasons for the seizure was that the ships in question were loaded with victuals for France, "which, I told them, was contrary to the treaties, for the same would not bear that they should minister any kind of aid to your Majesty's enemies." The Scots objected that the reasons adduced for the seizure were not sufficient, for there were no victuals on board the ships except fish, which was their common merchandise and might be carried as their accustomed traffic. "I answered," wrote Sadler, "that if they well weighed and considered the said treaties, they should fairly perceive that without offence of the same, they might not transport victuals, nor minister any kind of aid to such as were your Majesty's enemies; and fish, I told them, could not be denied, was victuals, and laden, as themselves confessed, in the said ships to be transported into France, being in open hostility with your Majesty, which cannot be avoided, is a certain kind of aid ministered to your Majesty's enemies, and therefore a lawfull and just cause to stay the said ships; requiring them to persuade themselves, that your Majesty would not have done the same, but upon such grounds as your Highness is able to justify and maintain." [14]

[12] Rymer, *Foedera*, II, pt. I, p. 448.
[13] Marsden, I, p. 155.

Such prohibitions were indeed not only sanctioned by common usages of those times, but they were confirmed by specific treaty stipulations and by the definite legal regulations of the various governments. That is to say, practices of this nature had become recognized as legitimate by the law of nations.

In the course of the fourteenth century several treaties had been concluded aiming to prevent the neutrals from carrying any merchandise whatsoever to any enemy country. Such treaties were signed by France, England, Flanders, and Brabant during the first four decades of the century. In 1370 England and Flanders entered into a treaty by which it was agreed that Flemish merchants were not to trade with the enemies of England.[15] According to Fauchille, all the treaties of the fifteenth century contained stipulations to the same effect.[16] Indeed, before the seventeenth century every treaty concluded and every

[14] *State Papers and Letters of Sir Ralph Sadler* (Edinburgh, 1809), I, p. 300, letter to the King of Sept. 24, 1543.
[15] Rymer, *Foedera*, III, pt. 2, p. 898.
[16] Fauchille, Paul, *Du blocus maritime, étude de droit international et de droit comparé* (Paris, 1882), pp. 3 f.

ordinance issued by the several states relative to neutral commerce made enemy property on board neutral vessels good prize to the belligerent captor.[17] Such treaties and regulations would naturally tend to eliminate all trade between neutrals and belligerents.

The practices of the fourteenth century were carried over into the fifteenth. Of this fact the history of the Baltic communities furnishes many illustrations. At the beginning of the century the trade of the Hanseatic Cities was interrupted by the Northern Powers then engaged in war. In 1434 several meetings were held by the Hanseatic deputies at Lübeck to deliberate upon a policy to be adopted against the general restrictions upon their commerce with the belligerents. However, they were unable to find a permanent solution to this problem, for it reappeared at the end of the century, when Denmark, then allied with Scotland, was again engaged in her perennial war with Sweden.[18] Moreover, in the sixteenth century the Hanseatic Cities were again confronted by the same difficulty. When the King of Denmark was at war with Sweden in 1522, he requested them not to carry on commerce with the subjects of that country.

In restrictive practices against neutral commerce in the fifteenth century the principle which motivated the policy of England, Sweden, and Denmark likewise guided that of all other maritime nations. In the works of Grotius there are recorded several cases illustrating frequent application of such general prohibitions.[19] In 1455 Danzig

[17] Chapter III, *supra*.
[18] *De Jure Belli ac Pacis*, Bk. III, ch. 1, note.
[19] *Ibid.*, III, ch. 1, sect. 5, note.

asked the Dutch not to carry any merchandise into the city of Königsberg. Likewise, while at war with Malmö and Memel in 1458, Danzig prevented neutrals from trading with those cities. A century later Lübeck, at war with Denmark, attempted to prohibit the Dutch from carrying on their commerce with the Danes. Grotius adds that Seraphinus de Freitas, in his book *On the Just Asiatic Empire of the Portuguese,* cites various other cases of a similar nature.

Again, in 1551 the Hanseatic Cities, then at war with Denmark, demanded that the Dutch should discontinue their commerce with the Danes. In this case, however, the Dutch replied that they possessed the right to trade with a belligerent and would continue to exercise that right. Gustavus I of Sweden, when at war with Russia, in order to prevent his enemy from being supplied with military stores asked Queen Mary of England in 1556 to forbid her subjects to navigate in the northern seas of Russia. Some years later King Sigismund of Poland, when his country was at war with Prussia, dispatched a letter to Elizabeth of England requesting her to interdict the trade of her subjects with Prussian ports. During their war for independence the Dutch, by a proclamation of 1584, renewing their regulations of 1575, prohibited the subjects of neutral states from having any commerce with the subjects of the King of Spain. Through this proclamation of 1584 they not only ordained that neutrals resorting to the port of Flanders, then under the control of Spain, were to be punished by the confiscation of ships and cargoes, but also that those who should be found along the coast of Flanders or near any of the forbidden ports should be ad-

judged to have acted contrary to the decree, "except in cases of extreme and well-proved necessity." [20] This proclamation, renewed in 1586, set the precedent for identical Dutch regulations during the seventeenth century.

The restrictions imposed by France did not differ materially from those of the other states. Grotius observed that the French in early times had always granted to nations that remained at peace the freedom to carry on commerce with the enemy. So indiscriminately had this freedom been abused that the enemies of France had been able to carry on their trade in the name of those who enjoyed the status of neutrality. As a consequence France began to impose restrictions upon neutral trade.[21] A regulation of 1543, renewed in the edict of 1584,[22] prohibited neutrals from carrying to the enemy any merchandise useful in war, by means of which the cause of the enemy might be advanced. In view of the fact that from the beginning of the fourteenth century France successively negotiated several treaties, one with Spain as late as 1605,[23] in which the contracting parties agreed that all commerce with the enemy should be prohibited, it is probable that French regulations prior to 1543 were less favorable to the neutral merchant than is suggested in the pages of Grotius.

Bilateral treaties, such as that between France and Spain in 1604, prohibiting all trade with the enemy, were signed by several maritime Powers during the first quarter of the seventeenth century. Treaties of this nature were

[20] Lamberty, *Mémoires,* IX, pp. 246–248; Robinson, *Collectanea Maritima,* p. 160; Bynkershoek, *Quaestionum Juris Publici,* p. 75.
[21] *De Jure Belli ac Pacis,* Bk. III, ch. 1, sect. 4 note.
[22] Lebeau, I, pp. 10, 21.
[23] Dumont, V, pt. 2, p. 42. For the French declaration interdicting commerce with Spain and Holland see *Ibid.,* p. 37.

concluded between the Dutch and their allies and Lübeck and its allies in 1613,[24] providing that neither the one party nor the other while neutral should permit the subjects of the other to trade within their territories, or aid the enemy with money, soldiers, ships, or provisions. Later, in 1627,[25] it was agreed between the Kings of Sweden and Denmark that the latter should prevent all commerce with the people of Danzig, who were the enemies of Sweden. A similar agreement was reached by Sweden and Holland in 1614.[26] In the course of the following two or three decades, however, such sweeping prohibitions on neutral commerce tended to disappear.

In the examples which have been here adduced there is, to borrow the language of Puffendorf, "generally something of law, and something of fact." [27] Each party to a conflict usually permitted or prohibited the maritime commerce of neutrals with the enemy, according as it was to his interest to maintain friendship with the neutrals, or as he felt himself strong enough to obtain from them what he wished. On the other hand, such neutrals as were dependent upon the good will of a nation at war might readily comply with its interdiction of their trade; others might not do so.

There were, indeed, many states which, while at peace, did not always tacitly submit to the indiscriminate interference with their commerce by the states that happened to be at war; they began to remonstrate against, and presently to resist the arbitrary proclamations of the

[24] *Ibid.,* p. 231.
[25] Rydberg och Hallendorf, *Sveriges Traktater med Främmande Magter, jemta andra det Hörenda Handlingar* (Stockholm, 1903), V, p. 240.
[26] Dumont, V, pt. 2, p. 247, art. 5.
[27] Puffendorf, *The Law of Nature and Nations* (London, 1749), Bk. VIII, ch. 6, sec. 8, n. 1.

belligerents. When war was raging between Sweden and Poland in the latter half of the sixteenth century, the Dutch did not suffer themselves to be excluded from their commerce with either belligerent, and in 1551 they disregarded the notification of Lübeck that trade with Denmark was closed to all nations. Similarly, Lübeck did not obey the summons of Danzig to discontinue trading with Malmö and Memel. In 1575, during the struggle of William the Silent against Philip for the independence of the Netherlands, Queen Elizabeth informed the Dutch that she would not allow the customary trade of her subjects with Spain to be interrupted. Even Poland found occasion to protest against the illiberal conduct of the belligerents. In 1597 the Polish government notified England that the law of nations had been violated when the English deprived its subjects of their freedom of commercial relations with Spain, the enemy of England.[28]

Localization of Trade Restrictions by Blockade

The conflicting commercial interests of belligerents and neutrals, with the attendant recriminations and protests, gradually evolved a settlement which might properly be called a compromise. When the technical development of the warship had made it capable of remaining at sea for an appreciable length of time, and when the process of centralization had given the several national governments sufficient control over their military establishments, including the navies, to make them amenable to discipline, men began to speak of blockades and blockaded ports. The harsh restrictions imposed upon neutral trade with

[28] Grotius, *De Jure Belli ac Pacis*, Bk. III, ch. 1, art. 5, sect. 4.

the enemy then came to be localized and applied to a few strategically located ports. That stage, however, was not reached until late in the seventeenth century.

Blockades of a limited nature were indeed not unknown in the later Middle Ages. The Portuguese were apparently employing blockade as a warlike measure as early as the middle of the thirteenth century, for at about that time they captured one of the warships of Henry III of England for alleged breach of blockade. During the Hundred Years' War it frequently happened that the vessels of both England and France took part in the siege of coastal towns. One of the most notable of such sieges was undertaken by Edward III immediately after his victory over the French at Crécy. In 1346 he invested Calais by land and sea. But his maritime blockade was effected with some difficulty, and it was often broken by the ships of France. Nevertheless, the siege was successful, and Calais fell into the possession of the English, there to remain until the accession of Queen Elizabeth.

In several other sieges of the Hundred Years' War the navies of England had an active part. From a naval point of view most of these sieges met with indifferent success. The year 1378 witnessed the investment of St. Malo by the English, the following year the siege of Brest by the French or their allies, both attempts unsuccessful. One of the most ambitious undertakings of France was her siege of Harfleur in 1416. For the investment of that town on the water side the French obtained the aid of the Genoese, of a number of merchants of Flanders, and of the Crown of Castile. The blockading vessels were sheltered in the estuary of the Seine, but were attacked and dispersed by the English. Thirty years later Calais was

invested by land and sea, but the French were unable to prevent supplies from reaching the garrison, and the siege accordingly failed. One of the last sieges of the war was that of Crotoy, where the Duke of Burgundy made disposition of his vessels for blocking up the mouth of the Somme to prevent the English from receiving any supplies by water. But the blockading vessels, sheltered in the river, were unable to withstand the relieving forces sent by the English, who, led by Lord Talbot, jumped from their ships into the shallow river and proceeded to free the invested town.

Blockades such as these were perforce limited in scope and duration, and until radical changes in ship construction had been developed, were undertaken only in conjunction with military operations on land. The vessels employed were of light construction, and could with safety seek protection from the elements in almost any river or estuary, as did those used at Crotoy. With the coming of artillery as an instrument of warfare, the situation was changed. After cannon fire became effective the blockading vessels were compelled to keep out of reach of the enemy batteries on shore. The vessels in their turn underwent changes. They were built larger, heavier, and of more specialized construction. More seaworthy, they were able to assume the burden of blockading an enemy port without the coöperation of military forces on land.

Blockade in the modern sense had its beginning at the opening of the seventeenth century. Two occurrences illustrate the fact that by that time squadrons could prove themselves able to keep the sea at a distance from the shore, and to maintain an effective maritime blockade independent of military coöperation on land. In 1622,

when the Dutch were blockading two Dunkirk ships in the harbors of Leith and Aberdeen, the English sent two warships to prevent an attack on the fugitives. In the following spring the vessel blockaded at Leith sought to escape and ran aground. The Dutch approached, shattered it with artillery fire, and, despite protests, proceeded to burn it.[29] The Dutch blockading vessels had apparently shown themselves able to remain at sea for a considerable time. Thirty years later, during the first Anglo-Dutch war, the English, after they had won a victory at sea, planned to close the Dutch ports and maintain a rigid commercial blockade. It was believed that Cromwell intended to keep the whole fleet off the enemy's coast. The Dutch planned otherwise. Tromp was then refitting his squadron in the Maas, De With was similarly engaged in the Texel; their common plan was to effect a junction and to employ their combined forces to break the blockade.[30] Here are indications that the two requirements of the modern blockade had been fulfilled.

Treaty Provisions

At the opening of the seventeenth century the several governments of Europe had begun, not only to localize by means of blockade the general prohibitions imposed upon the trade of neutrals with belligerents, but also to define in bilateral treaties the respective rights of neutrals and belligerents in regard to the exclusion of trade from blockaded or besieged ports. The definition inserted in the Dano-Swedish treaty of peace in 1613 was one of the first

[29] Clowes, W. L., *The Royal Navy* (London, 1897), II, p. 57.
[30] *Ibid.*, p. 192.

of these. It was therein stipulated that, in the event Sweden should lay siege to Riga, Danish subjects should be prohibited from supplying that town with necessary stores. Danish vessels which disregarded this prohibition would be good prize to the Swedish captor. Until there was an investment of the place, however, Danish commerce with it should not be disturbed.[31]

A treaty between Sweden and Holland in the following year contained an equally specific agreement. The two governments decided that until the Swedish forces should have effected an investment of the enemy ports on the Baltic littoral, Sweden should not disturb Dutch trade with these places. After the siege should have been undertaken, such trade must be discontinued.[32] This particular provision of the treaty was renewed in 1640, and again in 1644, when the matter was defined in more explicit terms.[33]

In 1653 a misunderstanding arose between the two countries over the true meaning of these treaties. In a memorial of October of that year the Swedish representative at The Hague explained to the States-General that the sixth article provided that the one confederate should not give assistance to the enemy of the other. But lest this should be too far extended, it was "expressly restrained with great consideration, and afterwards explained in the seventh article, containing this signification, that the former article is to be understood with this sense and meaning, that it shall be free for both sides' subjects to exercise their trade to all places without exception . . .

[31] Rydberg och Hallendorf, *op. cit.*, V, pt. 1, p. 216.
[32] Dumont, V, pt. 2, p. 247, art. 6.
[33] Hallendorf, *op. cit.*, V, pt. 2, pp. 453, 662.

except to such places which are assaulted and surrounded with a formal siege." [34]

Various other treaties contained similar provisions. Thus, in the agreements which the United Provinces signed with Denmark in 1645 [35] and with Spain in 1650, [36] and again, in article thirteen of the Treaty of the Pyrenees between France and Spain in 1659,[37] to which Holland acceded in 1661, it was determined that the transportation of all merchandise not contraband should be free to the subjects of any of the contracting parties, "even to places in enmity to the other (powers), except to . . . towns and places besieged, or blocked up, or surrounded."

The commercial relations of England, Sweden, Denmark, and Holland came likewise under the regulation of bilateral agreements governing trade to blockaded ports. Article eleven of the treaty of alliance between Charles II of England and Charles IX of Sweden, signed at Whitehall in 1661,[38] renewed article three of the Anglo-Swedish treaty of 1654 [39] and made it legal for either of the signatories to trade with the enemies of the other, with the right to carry to them without impediment any merchandise whatsoever, except contraband, provided that such merchandise was not consigned to ports or places which were besieged by the other. In that case the merchants should have free leave either to sell their goods to the

[34] Memorial of the Swedish resident to the States-General, quoted in Thurloe, *State Papers*, I, p. 536. See also Hallendorf, *op. cit.*, II, pp. 453 f., and Dumont, VI, pt. 1, p. 192.
[35] Dumont, V, pt. 1, p. 312.
[36] *Ibid.*, p. 570.
[37] *Ibid.*, V, pt. 2, p. 264.
[38] *Ibid.*, VI, pt. 2, p. 384.
[39] *Ibid.*, p. 80.

besiegers, or to repair to any other port which was not besieged. Similar provisions were incorporated in article sixteen of the Anglo-Danish treaty of 1670,[40] and in the treaty of 1679 between Sweden and Holland.[41] They also appear, with some limitations, in article four of the commercial treaty which England and Holland signed at The Hague in 1668.[42] When this article was renewed in the explanatory treaty of 1674,[43] its language was that merchandise not contraband might be carried to places under the obedience of the enemies of either party, "except only towns or places besieged, environed, or invested, in French, *bloquées ou investiés.*"

Definition by Commentators

Commentators on international law were influenced by the developments which led to the localization of the restrictive measures touching neutral trade with the enemy. In conformity with the most recent practice and with the terms of treaties, they began to use the word blockade. They probably began to regard indiscriminate prohibition of all neutral trade with the enemy, such as those generally resorted to before the seventeenth century, as illegal, although Gentili declared that it was not lawful for the Hanseatic Cities, after they had been notified by Queen Elizabeth that a state of war existed between England and Spain, to furnish the Spaniards with any supplies that might be of service in the war.[44]

[40] Dumont, VII, pt. 1, p. 132.
[41] *Ibid.*, p. 432.
[42] *Ibid.*, p. 66.
[43] *Ibid.*, p. 282.
[44] Gentili, *Hispanicae Advocationis*, I, ch. 20, p. 83.

Grotius was the first important writer on the law of nations to employ the term blockade. Commenting on the status of neutral trade with the enemy, he observed that it was necessary to make distinction with reference to the supplies which were carried to a belligerent. That is to say, he differentiated between contraband and non-contraband articles and also listed a third class of articles which were of use in times both of war and peace.

Regarding trade in merchandise of the third enumeration, the conditions under which the war was being waged should be taken into account. For if a nation was unable to protect itself without intercepting the goods which were being sent to the enemy, necessity would establish the right to seize such goods, but with the obligation to make restitution unless another cause should arise. If the enforcement of this right should be hindered by the neutrals' supplying these things, and if he who supplied them had been in a position to know this — "for example, in case I should be holding a town under siege or keeping ports under blockade, and a surrender or the conclusion of peace should already be in anticipation" — then he would be liable for injury culpably inflicted. He would be comparable to "one who releases a debtor from prison or secures his escape to my detriment. As in the case of the infliction of an injury, his goods may be seized, and ownership over them may be sought, for the purpose of recovering damages."

Another consideration which had a direct bearing upon the matter of neutral trade with the belligerents was noted by Grotius. That was the responsibility of the merchant who furnished supplies to a country waging an unjust war. "If the injustice of my enemy toward me is palpably evident," he wrote, "and the one who furnishes supplies to

him strengthens him in a very wicked war, in that case the latter will be responsible for the injury, not only by civil law, but also by criminal law, just as one would be who should deliver an obviously guilty party from a judge who is about to inflict punishment. On this ground it will be permissible to pass upon the furnisher of supplies a sentence which suits his crime, in accordance with what we have said regarding punishment; within the limits there indicated he may even be despoiled." [45]

Such were the observations of Grotius. The aim of his discussion was to discover what measure of punishment might be permissible against those who furnished supplies to the enemy. In his work there occurs but an incidental reference to blockaded ports. He used it as a means of illustrating a condition which was not to be violated by the neutrals, just as the reference to the injustice of the enemy was made as the illustration of another matter which should keep the neutral states from supplying him with goods useful in war. In concluding this section, Grotius remarked that he had referred to the law of nature for the reason that in historical narratives he had been unable to find "anything established by the violations of the law of nations to cover such cases."

In view of these facts it would seem to require a broad construction to hold, as Wheaton and others have held,[46] that Grotius required a strict and actual blockade or siege, but that he did not demand as a necessary element of a strict blockade that there should be an expectation of

[45] *De Jure Belli ac Pacis,* Bk. III, ch. 1, sect. 5.

[46] Wheaton, Henry, *Elements of International Law* (4th ed., London, 1904), p. 688.

peace or surrender. These two elements were linked in a conjunctive statement by Grotius. Yet Wheaton accepted the one and rejected the other, and declared that Bynkershoek appeared to have "mistaken the true sense of the above-cited passage from Grotius that, as a necessary ingredient in a strict blockade, there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case." [47] Grotius, however, discusses neither of these points.

The comments of Grotius were subjected to the criticism of Bynkershoek. In his discourse on the question whether it was lawful to convey goods to besieged places, the latter declared that he wished that Grotius had not made his rule of blockade contingent upon the condition "if there was expectation of peace or surrender," that he had not specified that the person who furnished supplies would be liable to the extent of the damages caused by his act, and that the injured would have the right, if the other had tried to cause damage, though he had not yet caused it, "by the retention of his property, to compel him to give security for the future, by hostages, pledges, or in some other way." According to Bynkershoek these clauses of Grotius were not consonant with reason or in accord with treaties. The carrier of supplies ought not to be entrusted with the power to judge whether peace or surrender was near at hand, which would enable him "to carry whatever he likes to the besieged." Moreover, he did not think that any individual who might relieve a place in distress would have sufficient wealth to pay an adequate indemnity for

[47] *Ibid.*

the loss of a city which had escaped capture through his act.[48]

It does not appear that Wheaton alone correctly interpreted the words of Grotius on the matter of blockade, or that Bynkershoek's criticism of his predecessor was justified. It is probable that both of these writers were giving too broad a meaning to the observations of Grotius. The latter was not discussing blockade as such; he was rather referring to it as a convenient illustration of the legal status of neutral trade in general.

With regard to some other details of restricting neutral trade Bynkershoek accepted the opinion of Grotius. The siege or investment of a place was regarded by both writers as a sufficient reason why supplies should not be furnished to the besieged, who might be brought to surrender, not by force alone, but by the want of food and other necessaries. If it were lawful to furnish the besieged with necessaries, the attacking Power might be compelled to abandon his operations, "which would be an injury to it, and therefore an injustice." The principles governing trade with the besieged places were of course equally applicable to ports that were blockaded, for these were considered to be under siege.

Bynkershoek also observed that since all treaties, without specifying the penalty, made it unlawful to carry any goods to a besieged place, all goods so carried must be contraband, "for what is carried contrary to treaties and edicts is contraband. It follows that goods so carried must . . . be confiscated." The confiscation of goods consigned to a blockaded port was thus to be justified on a basis different from the one used by Grotius. To enemy places

[48] *Quaestionum Juris Publici,* Bk. I, ch. XI.

not besieged, however, neutrals might carry merchandise not classified as contraband.[49] Unlike Grotius, Bynkershoek differentiated between a blockade that was not strictly kept and a blockade that carefully guarded the enemy's coast. However, he did not attempt to determine what naval forces were necessary to constitute an adequate blockade, although at the time he was making his observations this matter had already been defined in treaty stipulations. An instance was the treaty concluded by Spain and Austria in 1725.

The *Quaestionum Juris Publici* of Bynkershoek appeared in 1737, more than a hundred years later than the *De Jure Belli ac Pacis* of Grotius. In the intervening century certain changes occurred in the conception of the status of neutrality and in the relative positions of neutral and belligerent, so that in the middle decades of the eighteenth century some powerful maritime states tended to remain neutral in the naval wars. These Powers were able to effect, to the advantage of neutrals, certain modifications in the rules of warfare, which were in turn reflected in the definition of blockade.

General Interdiction and Blockade Coexistent

In the matter of regulations upon blockade the general tendency was to circumscribe the fields of operation and to eliminate the most undesirable features. The process was one of slow, uncertain, intermittent progress. For the gradual recognition of the principle which resulted in the establishment of blockades did not lead to the immediate abandonment of the older practices of forbidding by a

[49] *Ibid.*

general proclamation all trade with the enemy, and of confiscating the property of all those who contravened such a proclamation. That is to say, the localizing force of blockade and the general indiscriminate interdiction of neutral trade continued to exist side by side.

The Dutch ordinance of 1584,[50] which declared all the ports of the enemy closed to the shipping of neutrals, was renewed in substance in the ordinance of 1630.[51] The later act was to regulate the blockade of the ports of Flanders, then in the possession of Spain, the enemy of Holland. In answer to an inquiry from the Admiralty of Amsterdam as to whether neutral vessels might enter the ports and carry merchandise in and out, the States-General declared that ships and cargoes of neutrals would be confiscated if found going in or coming out of the enemy's ports in Flanders, since those ports were kept continually blockaded by Dutch men of war at excessive cost to the state in order to hinder all transport to and commerce with the enemy. Those ports were, in fact, "reputed to be besieged, which has been the example of all kings, princes, powers, and other republics, which have exercised the same right on similar occasions."

The declaration of the States-General points to the existence of an actual blockade. In that respect the ordinance of 1630 differed from that of 1584, and it represents a step in advance of the practices of the previous century. But it would seem, from various facts, such as the inquiry of the Admiralty of Amsterdam, which could not have been prompted by the application of a genuine siege to the

[50] Quoted in Robinson, *Collectanea Maritima*, p. 160, n.
[51] *Ibid.*, p. 158; Robinson, *Adm. Reports*, III, p. 326, n.; Bynkershoek, *op. cit.*, Bk. I, chs. IX, XI, *passim*.

ports of Flanders, that the blockade was not rigidly and persistently enforced; and, according to Bynkershoek, the shores of the enemy were not always carefully guarded. The blockade was, indeed, frequently relaxed, but neutral vessels were nevertheless intercepted, in conformity with the second clause of the ordinance.

A consideration of the language of that clause, of the inquiry of the Admiralty of Amsterdam, and of the comment of Bynkershoek discloses the fact that the Dutch were employing a general interdiction of all neutral trade with the enemy rather than a localized prohibition of such trade by means of a regular blockade. It was ordained that all ships and cargoes should be confiscated, "if from the letters and documents of the ships it should become evident that they were bound for the said Flemish ports, even though found at a distance; unless they of their own accord, before being sighted or pursued by our vessels, and before any act is committed, should repent and alter their course." It does not appear that the effect upon neutral trade of the so-called Dutch blockade of 1630 differed materially from that of the general proclamation of 1584.

The ordinances of 1584 and 1630 are not isolated instances of a practice which later came to be referred to as the paper blockade. The example of 1630 was followed in the first Anglo-Dutch war, when the States-General attempted to intercept the commerce of England with the rest of the world. It was also followed in 1663 by the Spaniards, who declared that they had the entire coast of Portugal blockaded. But this time the Dutch, to use the language of Bynkershoek, "refused to recognize that right (of indiscriminate blockade) which they had before

claimed for themselves against the English." [52] Fifty years later Sweden made use of similar measures. By a proclamation of April, 1711, Charles XII, then at war with Peter the Great, aimed to prohibit all commerce with the Baltic ports without employing blockading forces. Against the Swedish proclamation both England and Holland, the two Powers that a few years earlier had imposed the most sweeping restrictions on neutral trade, remonstrated. They protested that the blockade was not actually kept up by an adequate naval force.[53] The protest was forwarded to Charles XII, who was at that time sojourning at Bender as the guest of the Sultan of Turkey. It probably had little effect upon the maritime policy of Sweden, since both Holland and England were occupied in their war against Louis XIV and could not readily interfere in the Great Northern War.

The most comprehensive scheme for the interdiction of neutral commerce after the introduction of the blockade, however, was adopted by Holland and England at the commencement of the War of the League of Augsburg. In their convention of August, 1689,[54] it was agreed that, whereas several kings, princes, and states of Europe were already at war with Louis XIV, and had prohibited all commerce with his dominions, all vessels that should undertake to traffic or have any commerce with the subjects of France, and all vessels which were on their passage to any port under the allegiance of the King of France, should be attacked by the naval forces of Holland and England and brought before the proper courts, where they

[52] Bynkershoek, *op. cit.*, Bk. I, ch. IV, *passim.*
[53] Lamberty, *Mémoires,* VI, pp. 462–468; Robinson, *Collectanea Maritima,* p. 162, n.
[54] Dumont, VII, pt. 2, p. 238.

should be declared good prize, together with their cargoes. The object contemplated in this treaty was beyond the reach of the naval forces at the command of the Allied Powers. The combined fleets of Holland and England formed a mighty armada, but they probably were inadequate for their assigned task of blockading all the ports of France. The treaty therefore represents another recurrence of the old custom of interdicting all neutral trade with the enemy. However, as a war measure it was no more unreasonable, nor more ambitious, than the Dutch and Spanish proclamations in the middle of the seventeenth century, nor than the Swedish regulations of 1711 [55] and a similar Russian measure of 1716, which peremptorily demanded that the city of Danzig should discontinue all correspondence and all commercial relations with Sweden during the continuance of the war against Charles XII.[56]

The sweeping protensions of the Allied Powers called forth discussion and protest from the neutrals. Groningius in his *Tractatus de Navigatione Libera,* published in 1695, while supporting the cause of Louis XIV against Holland and England, advocated the right of neutrals to trade freely with a belligerent, except to places actually blockaded. Before he completed his work he wrote to Puffendorf in order to consult him about the thesis which he proposed to develop, and, incidentally, about the legality of the Anglo-Dutch code as exemplified in the treaty of 1689.

The reply of Puffendorf is significant. "I much fear," he wrote, "judging by what you have intimated in your letter, that you will find people who will dispute some of your notions. The question is certainly one of those which

[55] Lamberty, *op. cit.*, VI, p. 467.
[56] De Martens, F., *Traité de droit international,* III, sect. 130.

have not yet been settled on those clear and indubitable principles which may form a rule for all the world." He held that the English and the Dutch might properly say that it was permissible for them to inflict all the harm they could upon the enemy, and therefore to interdict all trade with him. The neutral nations could not justly enrich themselves at the expense of the Allies, "by drawing to themselves a commerce interrupted as to England and Holland, and furnishing to France succors, to enable her to continue the war. . . . But as this matter of navigation and commerce does not depend so much upon rules, founded on general law, as on particular conventions between nations, it will be necessary, in order to form a solid judgment of the question in dispute, to examine . . . what treaties on the subject have existed between the powers of the North and England or Holland, and whether the latter have offered terms which are just and reasonable." [57]

In concluding this letter, Puffendorf made an observation which in general principles is identical with that employed by Grotius earlier in the century. The latter alleged that the injustice of the enemy was sufficient cause for intercepting supplies with which the neutrals were providing him. Puffendorf argued that the Allied Powers were laboring with all their might to reduce to a state of "just mediocrity that insolent power (France)," who was threatening to enslave all Europe and to destroy, at the same time, the Protestant religion. This object being to the interest of the Northern Crowns also, it would be

[57] Puffendorf, Samuel, *Of the Law of Nature and Nations, Eight Books. Written in Latin by the Baron Samuel Puffendorf, Counsellor of State to His Late Swedish Majesty, and to the Present King of Prussia.* (Translated into English with a short introduction by Basil Kennet, assisted by William Percivale and George Ichener. Oxford, 1703), Bk. VIII, ch. 6, sec. 8, n. 1.

neither just nor reasonable that they should, for the sake of a little temporary profit, impede so salutary a design, which the English and the Dutch were striving to accomplish, especially as it was costing them nothing and they were running no risk.[58]

The irreconcilable maritime interests of neutral and belligerent occasioned long and complicated dispatches between Denmark and Sweden on the one hand and Holland and England on the other. The conflict of interests resulted in the adoption of retaliatory measures and in the formation by the Scandinavian countries of the armed leagues of 1691 and 1693, one of the many factors being the policy adopted in the Anglo-Dutch treaty of 1689. Both Denmark and Sweden stood strongly against this violation of neutral rights. In March, 1691, they signed a treaty, of which the second article bound each party to the duty of maintaining its commerce and navigation in accordance with the treaties which each had concluded with other nations. In their several treaties with England and Holland, respectively, each was permitted to trade freely with France, except in enemy goods and to places which were blockaded. This phase of the dispute would therefore center mainly in the question of the extent of the allied blockade. That was, in fact, a question which none of the Powers attempted to answer.

In 1693,[59] after several compromises and temporary settlements had been effected, Denmark and Sweden signed another treaty purporting to establish a militant league for the extension of their commerce. At that time, however, England's instructions to her numerous privateers or-

[58] *Ibid.*

[59] Dumont, VII, pt. 2, p. 325.

dained that Danish and Swedish ships, if furnished with proper passports and other papers required by the treaties between the two Powers, might pass freely, except such ships as attempted to participate in the coastal trade of France. In December, 1696, after long negotiations, Denmark agreed to suspend her trade with France.[60] The war came to an end shortly afterwards, and the controversies between neutrals and belligerents were accordingly terminated.

The Effective Blockade

From discussions such as that between Puffendorf and Groningius in 1692, and from controversies such as those between the Scandinavian states and the Allied Powers in the time of the War of the League of Augsburg, there came new and more satisfactory definitions of the term blockade. In the several commercial treaties concluded in 1713, after the close of the War of the Spanish Succession, there were, indeed, no substantial alterations in the language of previous treaties and conventions upon the matter of neutral trade to enemy ports. The contracting parties confined themselves to the statement that all merchandise not contraband might be transported freely to places belonging to the enemy, "such towns or places being only excepted as are at that time besieged, blocked up roundabout, or invested." [61] But a decade later came the first definition of an effective blockade. The commercial treaty which the Emperor and the King of Spain signed

[60] Thyren, Joh., *Den Första Väpnada Neutraliteten, Svensk-Danska förbunden af 1690, 1691, och 1693* (Lunds Univ. Arsskr. XXI för 1884–1885), p. 159.

[61] Treaty of navigation and commerce between France and England of April 11, 1713. See Dumont, VIII, pt. 1, p. 346, art. 20.

in 1725 [62] contained the provision that the subjects of either party, being neutral, might continue their trade with the enemy of the other in the same manner as before the war began, without hindrance, except to ports "actually besieged, or beset and blocked up toward the sea. And for removing all manner of doubt as to what may be understood hereby, it is declared that no seaport ought to be deemed actually besieged, unless it be so shut up by two ships of war, at least, in the sea, or by one battery or cannon, at the least, on shore, that its entrance cannot be attempted, without being exposed to cannon shot."

While this provision of the treaty of 1725 admits of varying interpretations both in regard to the mobility of the blockading vessels and to their location in respect to the enemy coast, it represents one of the first serious attempts to determine the proper disposition of the military and naval forces undertaking to establish an actual blockade of enemy ports. Inasmuch as it was incorporated into several other treaties concluded in the course of the eighteenth century, it had a significant bearing upon the subsequent development of the conception of an effective blockade. Thus, in the Franco-Danish treaty of 1742 a place was considered blockaded only when it was closed to navigation by the presence of at least two ships, or by a land battery. Similar provisions were inserted in the treaties which Denmark in 1748, and Holland five years later, concluded with Sicily.[63]

This conception of the blockade, requiring the presence

[62] *Ibid.*, pt. 2, art. 11, p. 114.

[63] For the treaty between Denmark and Sicily see Wenck, F. A. W., *Codex Juris Gentium Recentissimi e Tabularum Exemplorumque Fide Dignorum Monumentis Compositus* (1781–1785), II, p. 275; for that between Holland and Sicily see Hauterive et Cressy, *Recueil de traités de commerce et de navigation* (Paris, 1834), II, p. 206.

of an armed force, did not immediately become established. During the Seven Years' War it was constantly disregarded. The Russian government declared all Prussian ports to be in state of blockade, although the scant naval forces at its command left it unable to make the declaration effective. Swedish warships seized neutral vessels sailing for an enemy port, even when that port was not blockaded and when the vessels were not carrying contraband. Like measures were taken by England. In August, 1756, the English government declared that all French ports were blockaded and that any vessels attempting to trade with France would be seized as good prize, but took no steps to make the blockade effective. Moreover, in the treaty which established the Armed Neutrality of 1756 Denmark and Sweden failed to note the difference in the methods of closing an enemy port to neutral commerce.

Nevertheless, the idea continued to grow that a general blockade by proclamation, with no steps taken to enforce it, was unjust. When the Danish minister, J. H. E. Bernstorff, in his dispatch of December, 1758, protested against the Swedish method of blockade, he enunciated the principles which he thought should determine whether a port was rightfully blockaded.[64] He held that a place might properly be regarded as under blockade when it was invested by land so that the arcs described by cannon balls fired from batteries located on either side of the harbor or inlet would intersect, or when, in addition to the land forces, blockading vessels in sufficient number were so stationed that neutral merchant vessels would be unable to enter. At all events, there should preferably be an actual

[64] J. H. E. Bernstorff to Count Wedel-Friis, Dec. 16, 1758, quoted in Boye, *De Vaebnede Neutralitetsforbund*, p. 110.

investment by land, for it would be an injustice to neutral trade to pretend that a blockade could be applied at sea without at the same time preventing supplies from reaching the place over commercial routes on land.

The definition of Bernstorff was in substance and purpose similar to definitions which had appeared in several treaties, and it was destined to be reasserted with more force in the not distant future. It was, however, disregarded by his contemporary, Vattel, who confined himself to the observation that all commerce with besieged or blockaded places was prohibited, and that the blockading power might treat as an enemy any one who attempted to enter, or to carry anything to the besieged town.[65] The definition reappeared in a modified form in the *Articles fondamenteaux,* which Hübner, in 1762, submitted to Bernstorff as a possible basis for a convention between England and Denmark.[66] Hübner's language was in turn borrowed by A. P. Bernstorff in a dispatch which he sent to the Danish ambassador in London in the autumn of 1778. It was reëchoed in the Armed Neutrality Conventions of 1780, which declared: "That to determine what characterizes a blockaded port, this term shall only be allowed to those where, from the arrangement of the power which is blockading, with vessels sufficiently near, there is an evident danger in entering."

There was still ample room for controversy between neutrals and belligerents. That fact is nowhere more clearly indicated than in the two letters of *Historicus* which deal with the law and practice of blockade. The

[65] Vattel, *op. cit.*, Bk. III, ch. 7, sect. 117.

[66] Bojer, Frederick, "Fra Martin Hübners Reiseaar, 1752–1756," in *Dansk Historisk Tidsskrift,* VIII R 5 (Copenhagen, 1904); "Plan d'une convention projetée," quoted in Boye, *op. cit.*, pp. 133–138.

Armed Neutralities contended that the blockading vessels should be stationary *and* sufficiently near, the English that they should be stationary *or* sufficiently near.[67] Any attempt to carry an argument beyond this point in order to establish the relative justice of the various contentions advanced by neutral and belligerent advocates would be to no purpose. There is no standard by which to measure the relative value of such contentions.

By reason of technical and administrative difficulties, then, the application of a sustained blockade in the modern sense of the term was impracticable until comparatively recent times. From the beginning of the sixteenth century blockade was a recognized form of warfare and served as a tolerable, though not a uniform, substitute for the earlier practice of interdicting all trade with the enemy by means of a general proclamation. This transition had only a gradual and intermittent development, for blockades were so infrequently applied before the second half of the eighteenth century that no common regulations in this mode of warfare were agreed upon. Almost every nation had a different standard and advocated a different principle in its definition. Through a large number of specific treaty stipulations, however, and through the efforts of certain statesmen and commentators, the principle was gradually established that a legal blockade must be one existent in point of fact; and that in order to constitute the fact of blockade there must be present sufficient naval and military units to enforce it.

Through the judicial decisions of Sir William Scott, Judge of the High Court of Admiralty in the time of the

[67] Harcourt, W. V., *Letters of Historicus* (London, 1863), p. 89.

Revolutionary and Napoleonic wars, certain other regulations upon the application of blockades were established or reconfirmed, and thenceforth became part of the laws governing the enforcement of such war measures. Of these regulations the most important, from the point of view of the neutral trader, were those requiring that notification should be given of the existence of the blockade, in respect to both time and place, and that before the vessel of a neutral merchant could be held for the violation of blockade it must have been found guilty of some act of violence, either by entering or attempting to enter, or by going out with a cargo taken on board after the commencement of the blockade. There were various other rules in regard to such matters as distress caused by the weather, alike to the neutral vessels and to the blockading squadron, and the voluntary or forcible raising of the blockade, with its subsequent reëstablishment. These and other important regulations upon the matter of blockade were established in a period subsequent to the Armed Neutrality of 1780.

CHAPTER VI

THE DEFINITION OF CONTRABAND OF WAR

THE classification of certain commodities of international trade as contraband of war when carried to a belligerent port may have seemed to be an infringement upon the trade of neutral nations. But its object was not to injure such trade; it was, rather, to regulate it. Like blockade, of which the purpose was to localize geographically the general interdictions upon international trade, contraband of war served to delimit such interdictions to a few specific commodities, leaving the trade in others free. The history of the evolution of these institutions as weapons of warfare indicates that they served to liberate neutral trade by setting bounds to the fields in which the belligerent forces might properly operate. The principle comprehended in the term contraband of war, like the principle of blockade, came to involve the rights of both neutrals and belligerents upon the sea.

Theory and Practice of Free Oceanic Navigation

In the views of political and legal theorists navigation on the high seas should always be free to the vessels of all nations of the world, irrespective of the commodities which they might be carrying. Every nation should have the right to use the ocean as an avenue of commerce, for its ample

expanse is sufficient for the needs of all. "The winds labor no more," said Puffendorf, "to drive all the fleets in the world, than a single vessel. Nor do those tracks which the keels plough up make the way rougher for those that follow. As for the passage to the other Continent, this is not rendered less convenient to one nation though another useth the same road. And to have been the first to travel through any place doth by no means give a people the dominion of it, or prohibit others from turning it to the same advantage." [1]

From earliest antiquity navigation was available to all nations situated on the borders of the sea. As time elapsed, navigation began to bridge the expanses which separated groups of people. Presently commodities and ideas were exchanged, old modes of living gave way to new, and the lot of mankind was eased and improved. Every nation had the right to participate in this navigation, to transport the products of its soil or the fruits of its industry to neighboring peoples, there to exchange them for other necessities. In theory there could be no justification for any Power to interfere with this peaceful trade by specifying that particular commodities might not be carried between two states of which one happened to be at war while the other was at peace. Such theory would naturally leave no room for the classification of certain articles as contraband of war.

There was, however, the viewpoint of the belligerents also, from which the matter of international trade and navigation was surveyed. This survey gave rise to a theory, opposite in effect to that held by the neutrals, that in assuming the status of belligerency a nation did not for-

[1] Puffendorf, *The Law of Nature and Nations,* Bk. IV, ch. 5, sect. 9.

feit its right to free navigation upon the high seas for purposes of commercial activity and defence. Indeed, the war gave him the right to employ against his enemy whatever weapon might be necessary to weaken him. Measures calculated to sever the enemy's communication with other nations and to prevent him from obtaining supplies required in waging war were justifiable; likewise, the interception of warlike stores, or contraband of war, carried in neutral vessels.

In theory such belligerent measures were perforce adopted, irrespective of the interest of those that were at peace. They might serve to restrain the navigation and trade of neutral states, especially of those which were in position to furnish naval stores, and also of those which were able to participate in the dislocated carrying trade of the belligerents. But losses arising from such measures were regarded as accidents inherent in the condition of war. In taking steps to weaken the enemy the belligerent was not infringing upon the rights of neutrals; he was merely exercising his own, and was not responsible for the consequences to other parties. With this right the neutral trader might in nowise interfere.

In practice the theory of free oceanic navigation was modified to meet the various requirements in the frequent wars. The justice of these modifications was not seriously questioned until the seventeenth century. They were accepted as a matter of course, and applied by all nations when engaged in war. And the rôles of the several states were often interchanged. Communities which were active in war in one scene might be spectators in another; those which remained at peace on an earlier occasion might be

the protagonists in the ensuing act of war. Actors there always were during a period of a thousand years before the eighteenth century; spectators there not infrequently were; and their interests clashed, the differences to be resolved through bitter controversies.

Such theories regarding the free navigation of the high seas were not current in the period of several centuries succeeding the disintegration and fall of the Roman Empire. In that period of disorganization it was well if trade could be carried on at all. The commerce of the South was exposed to the hostility and piracy of the inhabitants of the Mediterranean littoral, that of the North to the robberies of the Northmen, who harried the Northern seas. During this period it was impossible to maintain the principle that the right to make war belonged to the sovereign state alone. Private wars were continually being waged on land and sea by semi-independent communities and feudal lords. The subjects of one state frequently violated the rights of the subjects of another, even while the two governments were at peace. In the course of these disturbances oceanic navigation was interrupted, oceanic commerce never secure. So stood the situation even after the successive waves of invasion had subsided, and after the loosely organized bands of Northmen had been brought under subjugation by the increasing power of the Scandinavian kings.

Gradually Europe emerged from the feudal period. Step by step the national sovereign was able to establish his position as the sole authority in whom was vested the power to undertake peace-time negotiations and warlike operations with the sovereigns of other states. The feudal

element in the military and naval forces were slowly being eliminated, and private warfare and reprisals at sea gave away to a regulated form of privateering.

As these changes occurred, compromises were being effected between the neutral trader and the belligerent governments. General interdiction of all neutral commerce with the enemy was localized by the establishment of the blockade. Definite rules were evolved in the matter of visit and search of neutral merchant vessels to ascertain their destination and the nature of their cargoes. The adoption in many commercial treaties of the principle of "free ships, free goods" gave to the neutral trader the privilege of engaging in the enemy carrying trade.

Early Definition of Contraband of War

Simultaneously with these developments there was another in progress relative to the classification and definition of the chief commodities of international commerce, particularly in so far as the trade in these commodities affected the relationship between neutral and belligerent states. The differentiation gradually resulted in the recognition of three classes of articles: namely, those which were of direct use in war, those which were of no significance to the issue of the conflict, and those which were susceptible of indiscriminate use in peace and war. Merchandise of the first class, when destined for a belligerent country, or for places occupied by the military or naval forces of a belligerent, came to be designated as contraband of war; merchandise of the second class was noncontraband; while merchandise of the third class came to be regarded as contraband when actually destined for the

immediate use of the military and naval forces of the belligerents.

Trade in contraband goods became generally interdicted. When the legality of such interdictions was at last established, it was no longer regarded as an interference with the rights of a third party to say that he should not carry to the enemy commodities that might serve as instruments of war. Indeed, the establishment of the principle embodied in the term contraband of war, like the establishment of the concept of blockade, was a step destined to liberalize the rules appertaining to commerce in time of war, inasmuch as it served to eliminate the indiscriminate prohibition of all trade with the enemy. As the idea underlying the establishment of blockades was to localize the interdiction of trade in all commodities between neutral and belligerent, so the idea underlying the classification of certain articles as contraband of war was to restrict the prohibitions on neutral trade with enemy ports, not blockaded, to a few articles useful in waging war.

The process of differentiating between the various commodities of international trade, and of interdicting the traffic in warlike stores between neutrals and belligerents, was the slow growth of centuries. Originating with the ancients, it lay dormant through the dark period of political disintegration and was revived in the age of feudalism. It continued, however intermittently, throughout the first centuries of the Modern Era, when the tendency was to prohibit all trade with the enemy by means of general proclamations, until the present day, when absolute classification is still an open question.

After the principle was firmly established that trade

in contraband goods was unlawful, serious controversies arose over the question as to what particular articles should be classified as contraband. The neutral nations, bent upon seizing the opportunity afforded by the war to increase their navigation and commerce, desired to diminish the list of contraband goods. As the wars of the modern period became more complicated, a greater number of articles became directly useful in the waging of war, and the belligerents were more and more inclined to enlarge the list.

Such a development would eventually reach a point at which the controversy between belligerents and neutrals could not be settled. If in the course of time participation in war should be extended to the population as a whole, and victory or defeat be contingent, not upon the forces of young men in direct contact with the enemy, but rather upon the steadiness of nerve and morale of the women, children, and old men laboring under the stress of suspense and propaganda at home to provide the sinews of war, any previous definition of contraband articles would prove inadequate. Under such contingencies the belligerents might direct their policy to the end of weakening the enemy at home by cutting off supplies destined to that part of the population which formerly had remained civilian non-participants in the conflict. Neutrals would still demand the privilege of pursuing their trade in articles not formally defined as contraband. The ensuing controversies would be interminable.

Practice Before the Seventeenth Century

Problems of this kind did not confront the ancients or the men of the Middle Ages. A number of illustrations

point to the fact that the Greeks, the Carthaginians, and the Romans relentlessly enforced restrictions upon all trade with the enemy. In the pages of Polybius it is related that when some persons, sailing from the ports of Italy to Africa, conveyed supplies to a camp of mercenaries who were enemies of Carthage, "the Carthaginians seized on these and threw them into prison." [2] Plutarch records that Demetrius hanged the master and the pilot of a ship which was carrying provisions to Athens at a time when he was attempting to reduce that city by famine.[3] Pompey the Great, in the war against Mithridates, King of Pontus, "sent vessels to cruise in the Bosporus to intercept provisions," and ordered that death should be the punishment for such as were taken in the attempt.[4]

The principle of the interdiction of trade with the enemy, as illustrated in these citations, was embodied in ancient law. To supply the enemy with provisions, armies, horses, money, and other articles useful in war was high treason under the Roman law. The Emperors forbade their subjects to sell to foreigners and barbarians harness, bucklers, bows, arrows, swords, and every other kind of arms, "a prohibition which," as Azuni observed, "at that time could concern only the Romans and the subjects of the Empire," [5] for there were no civilized neutrals capable of engaging in international trade.

The Roman method of preventing military supplies from reaching the enemy was adopted by the secular ad-

[2] Polybius, *History*, Bk. I, ch. 6, cited by Azuni in *The Maritime Law of Europe*, II, p. 115, n.
[3] Plutarch, *Lives* (Langhorne's translation), V, p. 144.
[4] *Ibid.*, IV, p. 82.
[5] See Azuni, *op. cit.*, II, p. 116.

ministration of the Roman Catholic Church. Thus, under pain of excommunication, forfeiture and loss of liberty, Pope Alexander III, in the time of the Crusades, prohibited the transportion of arms, timber suitable for the construction of ships, and other warlike stores to the Saracens. This interdiction was renewed by Innocent III and Clement V; Nicholas V and Calixtus III enforced it at the time when the Portuguese under Alphonso V discovered Guinea and other unknown countries in Africa. "By their bulls, in 1454, and in 1455, they prohibited the supplying the inhabitants of those countries (whom they treated as infidels) with iron, arms, ship-timber, and other means of defence, under pain of excommunication of the individuals, and of an interdict of the nation or cities who should contravene these orders." [6]

These were not isolated cases, nor was the Supreme Pontiff the only sovereign to follow the Roman practice. The English Kings early adopted similar regulations. In 1293, after bitter commercial rivalries had culminated in a war between France and England, Edward I informed his bailiffs and lieges that he had commanded John de Means "to arrest certain ships of Germany, which of late came to land in the ports of Ravenser, Scarborough, and Newcastle-upon-Tyne, laden with horses, boards, arms, and diverse merchandises, which they were intending to carry to Flanders and elsewhere in the Kingdom of France, for the use of our enemies, and to (afterwards) dispose of the aforesaid goods and merchandises according to further directions given to him on our behalf. And therefore we command you that in all things touching the premises, you be aiding, counselling, and assisting to the

[6] Azuni, *op. cit.*, II, p. 117.

aforesaid John, according as he shall call upon you on our behalf, and as often as he shall request you to do so." [7]

In 1336 Edward III requested the Count of Flanders, the King of Norway, and the Count of Guelders to prohibit their subjects from carrying supplies to the Scots, who had presumed to rise in rebellion against their English overlords and against Edward Balliol, their hereditary ruler.[8] And two hundred years later a proclamation by Henry VIII directed English warships and privateers capturing any vessels loaded with victuals, artillery, or any other thing consigned to a port in Scotland, then at enmity with England, to bring them into a convenient English port for adjudication before a competent English judge.[9]

Various other regulations upon trade in contraband goods were promulgated by the English government in the course of the next century. Safe conduct was granted in 1545 to the merchants of Bruges who were trading with France, provided they refrained from carrying contraband goods. A similar policy was followed in 1571 and in 1575. Again in 1585 a warrant for letters of reprisal authorized the capture of ships which might be supplying the enemy with victuals, munitions, and other articles of war.

More detailed regulations were adopted toward the end of the century. An order issued by Queen Elizabeth in 1590 allowed the Dutch to continue their trade with Spain, Portugal, and other countries under the control of Spain, notwithstanding the open war which was then raging between England and the dominions of Philip II. Neverthe-

[7] Marsden, I, pp. 21 f.
[8] *Ibid.*, p. 64.
[9] *Ibid.*, p. 150.

less, the Dutch were not permitted to carry "directly or indirectly to the enemy of England any provisions, munitions of war, powder, artillery, arms, sails, cables, anchors, cordage, masts, peas or other provisions for land war, or apparel or furniture for ships (except only what shall be necessary for their own ship's use), upon pain of confiscation of the said ship, munitions, and other provisions." A warrant of 1601 contained the information that since the issue of a similar proclamation in 1589 all food, warlike stores, and material for shipbuilding carried voluntarily by any neutral ship to Spain or her dominions had been condemned as good prize when captured, and that no freight had been allowed to the carrier.[10]

The law of ancient times interdicting trade in warlike stores or contraband was adopted, not only by the Popes and the sovereigns of England, but also by all the other rulers of Europe. It was incorporated in the several national codes of maritime law, as, for instance, in the French ordinances of 1543 and 1584.[11] In due course it was written into the great majority of commercial treaties of the Modern Era.

Definition in Treaties

Several treaties aiming to regulate the commerce of the contracting parties in time of war were concluded in the late Middle Ages. To this group belong the treaty of 1230 between Emperor Frederic II, also King of Sicily, and Abbuissac, Prince of the Saracens of Northern Africa,[12] that of 1351 between England and the maritime

[10] Marsden, I, pp. 160, 190, 242, 265, 317.
[11] Lebeau, I, arts. 49 and 62 respectively.
[12] Dumont, I, pt. 1, p. 168.

cities of Castile and Biscay,[13] and that of 1353 between England and the Portuguese cities of Lisbon and Oporto.[14] A treaty was made in 1406 between Henry IV of England and Jean sans Peur, Count of Flanders and Duke of Burgundy, in which it was agreed that the transportation of every kind of merchandise to either Power while at war should be permitted, with the exception of cannon, arms, and other warlike articles.[15] This provision was renewed in the treaty signed by Henry V and the Duke of Burgundy in 1417.[16] By another treaty between England and Burgundy, concluded in 1522 and renewed at various times in the course of the following century, trade in contraband goods was prohibited.[17]

At an early date France concluded several treaties containing stipulations intended to prohibit neutrals from supplying the enemy with victuals, arms, and other articles useful in the waging of war. Such was the nature of her treaty with England in 1303.[18] Similar stipulations were made by Francis I and Henry VIII in 1515,[19] and by Henry IV of France and Philip II of Spain in 1596 in their treaty guaranteeing the neutrality of Burgundy.[20]

The principle embodied in the treaty between France and England in 1303, and in that between England and Portugal in 1406,[21] came to prevail in nearly all the commercial treaties concluded thereafter. According to the calculations of Azuni, whose work, *The Maritime Law of*

[13] Rymer, *Foedera*, III, pt. 3, p. 70.
[14] *Ibid.*, p. 88.
[15] Dumont, II, pt. 1, p. 302.
[16] *Ibid.*, pt. 2, p. 90.
[17] *Ibid.*, IV, pt. 2, p. 380.
[18] Rymer, *Foedera*, II, p. 927.
[19] Dumont, IV, pt. 1, p. 204.
[20] *Ibid.*, V, pt. 1, p. 334.
[21] Rymer, *Foedera*, IV, pt. 1, p. 93.

Europe, appeared in 1797, during three centuries and a half but a few treaties were concluded allowing free transportation of arms and other warlike stores to the enemy, and in this regard these treaties constituted an exception to the general rule that had been introduced into the conventional law of Europe. Of such exceptional treaties he listed that concluded between Edward IV of England and Francis, Duke of Brittany, in 1468, those of 1462 and 1654 between England and Portugal, that of 1647 between Spain and the Hansa Towns, and one between Alphonso of Portugal and the United Provinces signed at The Hague in 1661.

In the earliest commercial treaties the language touching the matter of trade in warlike stores was indefinite. There was no specific or detailed enumeration of the articles which should be designated as contraband; rather, general clauses, to the effect that neither of the contracting parties should aid the enemy of the other by supplying him with arms, cannon, or other things of value in the waging of war, indicated what was to be regarded as such. Occasionally, as in the Anglo-French treaty of 1303, and in the English agreement with Burgundy in 1522, reference was made to victuals or provisions as articles not to be carried to the enemy.

The general nature of the terms employed in these treaties is reflected in the writings of Grotius. It affords sufficient explanation as to why he dealt with the matter of contraband but briefly and in the most general terms. He confined his treatment of the subject to a summary division of the goods of international trade into three classes, with a brief comment on each: those which were useful in war only, those which had no use but as articles

of luxury and therefore no bearing upon the issue of a conflict, and those which were useful both in war and peace, "as money, provisions, ships, and naval equipment." Trade with the enemy in articles of the first class was interdicted. From traffic in articles of the second class no dispute could arise. With regard to the third class, comprising articles doubtful on account of their double service in peace and war, he would "take into account the condition of the war." The necessity of self-defence conferred on the belligerents the right to intercept such goods, "but with the obligation to make restitution, unless another cause arises." [22] Even the intention to interfere with the rights of belligerents in this matter would justify the seizure of such articles. The observations of Grotius left ample room for controversy respecting the nature of those articles which were of use both in war and peace.

In the treaties made toward the close of the sixteenth century and in the beginning of the seventeenth there is evidence of a general tendency to define in more detail the terms employed in the commercial treaties between the several nations. In respect to trade in prohibited articles, there was as yet only a slight beginning of specific definition. Nevertheless, attempts were made, through enumeration of the commodities in which trade with the enemy was to be forbidden, to reach an understanding as to what articles should be comprised in the general term contraband of war.

Such enumerations of forbidden commodities began with the first treaties of the seventeenth century. In the fourth article of the treaty of peace between Philip III of

[22] *De Jure Belli ac Pacis,* Bk. III, ch. 1, art. 5.

Spain and James I of England, concluded in August, 1604, it was stipulated that neither party should supply the enemy of the other with soldiers, provisions, money, instruments of war, munitions, or any other aid.[23] Likewise, in the treaty concluded in 1614 between Gustavus Adolphus of Sweden and the States-General of the United Provinces, it was agreed that the enemy of either should not be aided with counsel, money, munitions of war, or with any other thing that might lead to the success of his plan and the injury of the treaty powers.[24] However, in the treaty of 1632 between France and England for the re-establishment of commerce after the Peace of Susa, mention was made of articles in which trade should be prohibited in time of war, although in vague terms only, without any attempt at particular enumeration.[25]

At the close of the Thirty Years' War the enumeration of contraband goods became more detailed, and also, within a few decades, more confusing. Each government, guided by its own interest, was then directing its efforts toward eliminating from the classification of contraband all articles produced in its own country, or articles affording a lucrative trade for its subjects in a time when it should enjoy the status of neutrality. Similarly, governments needing the oaken timber of the Baltic region for masts, and the deals, pitch, hemp, and tar of that region for the equipment of their men-of-war, were disinclined to list these as prohibited merchandise. On the other hand, such governments as might be independent of these supplies, or whose fleets were sufficiently powerful to protect

[23] Dumont, V, pt. 2, p. 32.
[24] *Ibid.*, p. 245, art. 5.
[25] *Ibid.*, VI, pt. 1, p. 33, art. 3.

the transportation of them from the attack of any enemy, might strive to place all such commodities on the list of prohibited articles. Differences in need, with attendant differences in policy of the several states, conditioned likewise the enumeration of all other contraband goods.

Previous to the time when the various nations began to enumerate in their agreements with each other the commodities which might not be transported to the enemy, there was an indiscriminate and uncertain application of the term contraband. But the language of bilateral treaties became more definite on this point, and the naval phase of the wars grew more orderly. Then the most serious consequences of indiscriminate classification began to be remedied, and neutral trade less restricted. Nowhere is this fact more suggestively revealed than in the confirmation of a letter which the English government sent to Hamburg in 1627, explaining that neutral ships and the free goods of their cargoes should not be subject to confiscation on account of the prohibited goods which they might carry, and that freight should be paid on the merchandise declared good prize.[26] The letter states that implements properly belonging to the household, "as fire shovels, tongs, candlesticks, snuffers, locks, basons, kettles, buckets, knives, nails, wire, and such like, shall not henceforth be accounted for prohibited goods, but for lawful merchandise; only nails proper for shipping, swords, and all weapons, metal for ordnances and what belong(ing) to the war are prohibited and confiscable."

By the middle of the seventeenth century there was in nearly all commercial treaties an enlargement of the list of commodities classified as contraband. Of such treaties

[26] Marsden, I, pp. 460 f.

one of the first was concluded by France and the United Provinces in 1646. The two Powers agreed to classify as contraband men, ships, powder, muskets, and all other articles of a warlike nature.[27] The marine treaty of 1650 between Philip IV of Spain and the States-General of the United Provinces contains a still larger list of interdicted articles.[28] The most significant of these mid-seventeenth-century treaties, however, was that of the Pyrenees, signed by France and Spain in 1659.[29] In article twelve it was specified that under the name contraband should be comprehended "fire-arms, and all things belonging to them; as cannons, muskets, mortar-pieces, petards, bombs, granadoes, saucidges, pitched-circles, carriages, forks, bandaliers, gun-powder, cords, saltpetre, bullets, pikes, swords, casks, head-pieces, cuirasses, halberts, javelins, horses, saddles for horses, holsters for pistols, belts, or any other warlike furniture."

Simultaneously with the development of a more detailed classification of commodities listed as contraband, there occurred another change. Treaties began to enumerate articles that should not be included in the term contraband, these enumerations being, of course, complementary to the prohibitory stipulations. In the treaty of 1650 between Spain and Holland,[30] article six contained the provision that under the name of contraband goods were not to be comprehended wheat, corn, and other grains, salt, wine, oil, and generally whatever was subservient to the nourishment and support of life; but they should remain free, as did all other goods not comprised in the preceding

[27] Dumont, VI, pt. 1, p. 342, art. 1.
[28] *Ibid.*, p. 570, art. 6.
[29] *Ibid.*, pt. 2, p. 264, art. 12.
[30] *Ibid.*

article, which defined what merchandise should be regarded as prohibited goods. The transportation of these goods should be free to the ports and places of the enemy, excepting cities and places besieged, blockaded, or invested. Article thirteen of the Treaty of the Pyrenees contained identical stipulations. In the matter of non-contraband the majority of subsequent commercial treaties conformed more or less closely to this enumeration.

Interpretations of Bynkershoek and Vattel

The tendencies manifested in the foregoing treaties were examined by the chief commentators of the eighteenth century.

Bynkershoek concluded from a study of a large number of commercial treaties [31] that those articles were contraband which were proper for war, and that it was of no consequence whether or not they might be of any use for other purposes, for very few of the instruments of war were unsuitable for service in time of peace. "If you will examine the treaties which we have mentioned," he wrote, "and others of other nations, you will find that everything is called contraband which serves warlike purposes in the form in which it is brought, whether it be an instrument of war or material by itself fit for use in war." However, he judged that it was not proper to include in the term contraband, material out of which instruments of war might be manufactured. If all such material should be prohibited, the catalogue of contraband goods would be immense, since there was hardly any material out of which some article useful in war might not readily be made. "If

[31] Bynkershoek, *Quaestionum Juris Publici*, Bk. I, ch. 10.

we prohibited this we would all but forbid all commerce, which would be quite useless." Although he made no formal catalogue of forbidden articles, he believed that trade in commodities like swords, gunpowder, scabbards, pistols, pistol cases, saddles for horses, belts, sword hilts, and saltpetre might properly be interdicted. Even these he introduced only here and there as convenient illustrations of the points he was developing.

Vattel was somewhat more explicit in his definition, making a formal list of such articles as he thought should be classified as contraband. According to his interpretation of the conventional law, neutral Powers possessed the right to continue their trade with the belligerents in goods that had no relation to the war. "An attempt to molest or destroy this trade would be a breach of the rights of neutral nations, a flagrant injury to them." Such merchandise as was useful in war, however, might not be carried to a belligerent. Merchandise of this sort included arms, ammunition, timber for shipbuilding, every kind of naval stores, horses, and even provisions, "in certain junctures, when there were hopes of reducing the enemy by famine." [32]

Thus in the interpretations of the two chief eighteenth-century writers on international law there is reflected the principle which underlay the cataloguing of contraband goods in the commercial treaties: that trade in commodities of immediate service in war should be prohibited and trade in other commodities free. The influence of that principle is likewise seen in the regulations which the several governments issued at the beginning of each war for the guidance of their privateers. In the majority of

[32] Vattel, *The Law of Nations*, Bk. III, ch. 7, art. 112.

such instructions there was included a list of commodities in which trade with the enemy was to be regarded as contraband.

National Regulations

Of the enumerations made by the governments in their instructions to privateers, that of the Danish ordinance of 1659 was particularly comprehensive.[33] It classified as prohibited articles all sorts of ammunition, arms, gunpowder, matches, and saltpetre; also saddles, horse-harness, and horses; oak ships' timber, and all sorts of ships' material and apparel, such as sailcloth, tackling, cordage, and whatever else is considered necessary and useful for carrying on war, besieging, blockading, or other military operations, by land and by sea. Moreover, the following was also to be considered as contraband: all sorts of provisions for food and beverage, as well as all sorts of coarse and fine salt, "without any distinction whatever, none excepted, save, solely, all sorts of wines, brandy, and spices (or grocery ware), and also such quantity of herring and salt as are destined to Narva or Reval, from which places traffic is carried on with the Russian towns and countries; to the end the trade with Russia may be carried on unmolested; which articles we have graciously, out of special consideration, consented to have excepted, and to allow them that they may be freely conveyed to Narva, as aforesaid, and the before-named Livonian cities.

"The following goods shall also be reckoned as contraband, viz., calamine, cotton, and whatever else serves for

[33] Quoted in *Collectanea Maritima*, pp. 176–187.

the furtherance of all sorts of manufactures made, woven, or otherwise put together in Sweden, and the countries and towns under its dominion. Also such articles as are cast, smith's work, or wire drawn, whether they be of copper, brass, iron, lead, or other materials, or what is made either of metal, linen, or wool, wheresoever they are met with, on board of free or unfree ships, belonging to Swedish subjects. Under this description are to be understood all sorts of ordnance and cannon, mortars of brass or iron, small or great, all sorts of arms for the use of cavalry or infantry, anchors, anchor-stocks, nails, spikes, and bolts; also all sorts of ready-made house furniture and cooper's articles; together with copper and all other coins, being the property of Swedish subjects, and exported from the dominions of Sweden, although they should be found on board of ships belonging to free, or neutral, places and persons, as aforesaid; nevertheless that, on that account, free ships and goods belonging to neutral persons, shall not be subject to confiscation; if with such legal and proper certificates, as above described, they can judicially be proved to be such."

On the other hand, neutral traders were permitted to carry to Swedish ports all sorts of silk articles, cloths, "and such like fine shop ware, and current goods, which are not properly and directly necessary and useful for any purpose of war; but all such free goods as are found or met with or overtaken in ships that are not free, shall and must after all (without any exception) be subject to confiscation as good prize."

None of the instructions of the other Powers contained enumerations as comprehensive as the foregoing. The catalogues of prohibited goods comprised in the French ordi-

nances of 1543, 1584, and 1681,[34] and of the Dutch instructions against Sweden in 1667 and against France in 1689, correspond more nearly to those of the English rules of 1665, 1667, and 1704. In the catalogues of the English instructions of 1704, more complete than previous English enumerations, there are classified as contraband of war "all sorts of fireworks and things thereto belonging, as cannon, musquets, mortars, petards, bombs, granadoes, saucisses, peckransen, carriages, rests, bandaliers, powder, matches, saltpetre, bullets, piques, swords, headpieces, cuirasses, halberts, horses, saddles, holsters, belts, sailwork, rigging, cables, cordage, masts, lead, pitch, tar, hemp, together with all other equipage that serves for sea or land." [35]

To the term contraband, then, different limitations had been assigned at different periods. At one time it was undefined, save in vague and general language, and was applied indiscriminately. In the course of time certain definitions and enumerations, more or less detailed, were inserted in treaties and in the instructions which the several governments issued for the guidance of their naval forces. In this process no uniformity obtained, no single list of contraband goods was universally acknowledged. Possibly no such catalogue could be accepted, for it was recognized that under certain contingencies it might be to the injury of a belligerent to allow merchandise to be carried to his enemy that under other circumstances would be harmless. Contingencies such as these induced the same state to make at different times differing stipulations on the ques-

[34] Ordinance of 1543, art. 42; of 1584, art. 69; and of 1681, art. 11. See Lebeau, I.

[35] Marsden, II, pp. 57, 199.

tion of contraband. An illustration of this tendency is afforded by Denmark in the history of her ordinance of 1659, her treaties with England of 1670 and 1691, her correspondence with England relative to contraband goods in the time of the War for American Independence, and the Anglo-Danish Convention of July, 1780. Indeed, it was not an uncommon practice for a state to contract concurrently varying engagements with other states in matters of contraband.

In the enumerations of contraband goods there were, nevertheless, certain classes of commodities in regard to which the listing in particular regulations as well as in treaty agreements reached a fair degree of uniformity. Articles which were held by common agreement to appertain to immediate military service were comprehended in all enumerations. Toward the end of the eighteenth century the lists included cannon, mortars, pistols, bombs, grenades, bullets, cannon balls, muskets, matches, gunpowder, saltpetre, sulphur, pikes, swords, saddles, and bridles.[36] On the other hand, a number of commodities gave rise to long and bitter controversies, particularly in the naval wars of the eighteenth century. Chief of these were provisions and naval stores.

Provisions as Contraband in National Regulations

In early times provisions were frequently included among the commodities classified as contraband. They were generally so classified in nearly all English regulations. In 1213, when several German ships suspected of having on board provisions and other war materials for

[36] Manning's classification; see *The Law of Nations*, p. 284.

the enemy of England had been driven by weather into the ports of Newcastle, Scarborough, and Ravenser, they were detained by order of the English government.[37] A proclamation issued by Henry VIII in 1536 forbade transportation of victuals from France to Scotland, then at war with England.[38] Again, in 1575 several ships bound from England to the Low Countries were enjoined not to carry any greater quantity of victuals than should be necessary for their passage from London to Antwerp, and likewise from Antwerp to London.[39] A warrant for letters of reprisal against Spain, issued in 1585, authorized the holders of such letters to take as lawful prizes all ships which attempted to relieve the Spaniards with victuals or to aid them with munitions of war.[40] A few years later Queen Elizabeth determined to prevent the Poles and the Danes from carrying provisions to Spain, declaring that by the right of war it was permitted to reduce an enemy by famine. And in 1601 the Lord High Admiral issued a proclamation containing the information that since the time of the Armada all grain victuals, and provisions found in any ship, whether French, German, Danish, English, Scottish, or of any other nation, destined to a Spanish port, had been adjudged good prize after seizure.[41]

The principle of these earlier regulations was carried over to those of the seventeenth century. In a proclamation of 1625, authorizing the issue of letters of reprisal against Spain, "as other kings in like cases have always used to do," the English government declared that it was

[37] Marsden, I, p. 21.
[38] *Ibid.*, p. 150.
[39] *Ibid.*, p. 200.
[40] *Ibid.*, p. 318.
[41] *Ibid.*, pp. 317 f.

neither agreeable with the rules of policy, nor with the law of nations, "to permit the said king, or his subjects, to be furnished and supplied with corn, victuals, arms, and provision for his shipping, navy or arms, if the same can be prevented." [42] Neutral vessels with cargoes consigned to ports in Spain and the Spanish Netherlands were accordingly captured by English naval forces.

The general policy followed by England gave rise to controversies with neutral governments and called forth reprisals by France. Two English ships lying at Rouen were apprehended, and a general embargo upon English property was contemplated.[43] This led to diplomatic negotiations between the government of England and Richelieu, and to the appointment, on July 11, 1626, of an English commission "to inquire and report as to doubtful points of prize law, and as to the practice of English and foreign Admiralties in the past." [44]

To remove all uncertainties relative to prohibited commodities and to the penalties which were to be imposed upon those who supplied the enemy with such articles, a subsequent proclamation was issued by the English government in March, 1627. It enumerated the goods which were to be deemed contraband. Among them were provisions "according to the former declarations in this behalf in the time of Queen Elizabeth." The proclamation further declared that all ships sailing toward enemy ports with any prohibited articles on board, or returning with ladings bought with the proceeds of contraband goods, were to be

[42] Marsden, I, pp. 404 f.
[43] Gardiner, Samuel R., *History of England* (1884), V, pp. 42 f.
[44] On this commission were appointed, among others, Sir Edwin Sandys and Richard Zouche, Doctor of Civil Law and author of *Juris et Judicii Fecialis*. See Rymer, *Foedera*, VIII, pt. 2, p. 73.

good prize, together with their cargoes; "whereby, as his Majesty doth put in practice no innovation, since the same course hath been held, and the same penalties have been heretofore inflicted by other states and princes upon the like occasions, and avowed and maintained by public writings and apologies, so now his Majesty is, in manner, informed thereunto by proclamations set forth by the King of Spain and the Archduchess against those who shall carry, or have carried, without limitation, the like commodities into their Majesties' dominions." [45]

In the March proclamation, probably based upon the findings of the committee of investigation appointed the previous July, it was thus declared that the English government, in its regulation relative to contraband, was adhering to practices then common to the several states of Europe. Its aim was apparently to follow those practices, not only in respect to the question of contraband in general, but also in the particular matter of provisions. At all events, the rules issued for the guidance of the Admiralty Court in the adjudication of prizes during the Second Dutch War (1665–1667) provided that any ship carrying "provision of victuals" to any port of the United Provinces should, when seized, be adjudged good prize.[46] When some members of the Lords shortly thereafter enumerated certain articles which in their view should be regarded as contraband, they included "wine, oil, brandy, fish, corn, salt, flesh, and other things that tend as provision unto the support of life." [47] "Provision of victuals" was regarded as contraband in 1673,[48] and on a specific occasion in

[45] Rymer, *op. cit.*, VIII, p. 156; Marsden, I, pp. 404 f.
[46] Marsden, II, p. 53, under proper date.
[47] *Ibid.*, p. 57.
[48] *Ibid.*, p. 84.

1694, when the Lords directed the Admiral, Lord Berkly, to bring in some neutral ships laden with corn.[49]

Following the general tendency of a large number of European commercial treaties, the English regulations of the last years of the seventeenth century began to show a change in the rules regarding contraband, a change that persisted throughout the eighteenth century. In the instructions which were issued for the guidance of the privateers during the last two wars against Louis XIV, ending with the Peace of Utrecht in 1713,[50] provisions were omitted from the enumeration of articles classified as contraband. In the following wars particular treaty stipulations determined whether provisions should be so classified. The instructions to the privateers operating against France and Spain in the time of the War of the Austrian Succession contained the rule, probably first adopted in 1706, that no goods laden in Dutch ships should be deemed contraband "other than such as are declared so to be by the treaty marine concluded between England and Holland in the year 1674." [51] By conforming to the terms of this treaty the English regulations during the great naval wars of the eighteenth century determined that provisions should be contraband when found on board neutral Dutch vessels.[52]

The English regulations of the eighteenth century thus contained a significant rule. This rule determined that in the matter of contraband English privateers and men-of-war should be governed by the stipulations of bilateral

[49] Marsden, II, p. 160.
[50] *Ibid.*, under the proper dates, pp. 414, 420, 425.
[51] *Ibid.*, p. 428.
[52] Dumont, VIII, pt. 1, p. 74, art. 4.

treaties concluded by England with other nations. Of these treaties some allowed the neutrals to carry provisions to the enemy, while others did not. In the eighteenth century the former came to prevail. The important fact is that treaty commitments would determine what articles might be classified as contraband of war. Since treaty provisions varied, national regulations would also vary. Uniform rules could not obtain until the language of treaties should have become uniform.

In regard to its enumeration of provisions as contraband in the seventeenth century, the English government might properly refer to the language of its proclamation of March, 1627. It was therein stated that in this respect the government was putting into practice no innovation. A similar course had been held and similar penalties inflicted by other states, notably by Spain. These had in turn been avowed and maintained in public writings. In the Danish ordinance of 1659 all sorts of provisions were enumerated as contraband. Moreover, "by the first clause of the edict of the States-General of the United Provinces against the English and French, dated April 14, 1672, and April 11, 1673, and by the first clause of the edict of March 19, 1665, against the English, he is punished as a public enemy who carries to the hostile nation any munition of war, provisions . . . and any other prohibited articles." [53] The same penalty would hold for any other foreigner who should convey those things from Holland to the enemy. The French ordinances and edicts did not define provisions as contraband, but France stipulated for such a classification in numerous treaties.

[53] Bynkershoek, *Quaestionum Juris Publici*, Bk. I, p. 66.

Provisions as Contraband in Treaties

Treaties forbidding the transportation of provisions to the enemy were not unknown in the Middle Ages. One of the earliest was a treaty between France and England signed in 1303.[54] Its stipulation relative to victuals was renewed in the treaty concluded by Francis I and Henry VIII in 1515.[55] On the other hand, the treaty between England and Burgundy signed in 1406 and renewed in 1417 [56] allowed the free transportation to the enemy of every kind of merchandise except "arms, artillery, cannon," and similar articles. But in 1522 and at various other times in the course of the following century these two Powers enumerated provisions among the things which were not to be furnished to belligerents.

From the beginning of the seventeenth century a large number of treaties included provisions among commodities classified as contraband. When the war between Spain and England was terminated in 1604, each of the two countries promised that it would never give any warlike assistance to the enemy of the other, and that its subjects should not, under pretence of commerce or any other pretext, furnish that enemy with money, provisions, or instruments of war.[57] In the treaties concluded by Holland and Lübeck in 1613,[58] and by Holland and Sweden in 1614,[59] provisions were named as contraband. In 1623 Russia and England agreed that neither should assist the other's enemy "with men-of-war, munitions, victuals, or

[54] Rymer, *Foedera*, II, p. 927; Robinson, *Collectanea Maritima*, p. 57, n.
[55] *Collectanea Maritima*, p. 57, n.
[56] Dumont, II, pt. 2, p. 90.
[57] *Ibid.*, V, pt. 2, p. 32, art. 4.
[58] *Ibid.*, p. 231, art. 7.
[59] *Ibid.*, p. 247, art. 5.

other warlike material or provision for war." Similar agreements were reached by Holland and England in 1625 and by England and Spain in 1630.

Toward the middle of the seventeenth century the rules were becoming less uniformly rigid. Some treaties concluded at that time specifically exempted provisions from the list of prohibited articles; others adhered to the older usages and listed provisions as contraband. Among the latter, possibly, was the treaty made in 1642 between England and Portugal,[60] which provided that "no merchandise whatsoever, even arms, victuals, and any other provisions of that nature," might be carried from Portugal or her dependencies to the ports and territories of the King of Castile. This provision was also inserted in the treaty of peace and alliance between Oliver Cromwell and John IV of Portugal, signed at Westminster in July, 1654.[61]

There followed a series of significant treaties between England and Holland. In 1654 these two Powers agreed that provisions should not be furnished to the enemy of either state.[62] The Anglo-Dutch treaty of 1667, however, allowed the subjects of either Power to transport to the enemy of the other every kind of grain, legume, and "generally everything that belongs to the nourishment or sustenance of life." [63] But in the secret article appended to the Treaty of Westminster, signed in February, 1674, it was agreed that neither England nor Holland should allow its subjects to give to the enemy "any aid, favor, or counsel, directly or indirectly, by land or by sea . . . nor furnish any ships, soldiers, mariners, provisions, moneys,

[60] *Ibid.*, VI, pt. 1, p. 33, art. 11.
[61] *Ibid.*, p. 83, art. 10.
[62] *Ibid.*, VI, pt. 2, p. 74, art. 7.
[63] *Ibid.*, VII, pt. 1, p. 74, art. 4.

instruments of war, gunpowder, or any other things necessary for making war." [64] Within ten months there was a complete reversal of policy. In the treaty of navigation and commerce concluded in December, 1674, the following articles were not to be reckoned among prohibited goods: "wheat, barley, and all other kinds of corn or pulse, tobacco and all kinds of spices, salted and smoked flesh, salted and dried fish, butter and cheese, beer, oils, wines, sugars, and all sorts of salt, and in general all provision. . . ." [65] The long list of free goods contained in this enumeration made the terms of the treaty definite. Here is an indication that serious attention was being given to the problem of eliminating the disputes that invariably arose in time of war over the interpretation of ill-defined terms of commercial treaties. Likewise in these treaties between Holland and England are indications that statesmen were beginning to question the wisdom of prohibiting trade in provisions.

Similar in nature, though not in effect, was a number of treaties concluded by England and Sweden. In April, 1654, Queen Christina of Sweden and Oliver Cromwell signed a treaty which provided that no merchandise "of that sort which shall be deemed contraband" should be carried to the enemy, and that a catalogue enumerating contraband articles should be drawn up within a few months.[66] After a lapse of two years such a catalogue was inserted in a new treaty which the two countries signed at Westminster. In that list of prohibited commodities provisions were not included.[67] But in the treaty of 1661 the

[64] Dumont, VII, p. 255, Secret article.
[65] *Ibid.*, VIII, pt. 1, p. 74, art. 4.
[66] *Ibid.*, VI, pt. 2, p. 80, art. 11.
[67] *Ibid.*, p. 126, art. 2.

two Powers stipulated that there should be liberty of trade, "provided only that no goods called contraband, especially money, [and] provisions, . . . be carried to the enemy of the other." [68] The result of these negotiations was that in their relations with each other Sweden and England might, during the remaining decades of the seventeenth century and throughout the eighteenth, properly classify provisions as contraband goods, for the treaty of 1661 remained in force until the nineteenth century. Such a result was the opposite of that of the Anglo-Dutch negotiations which terminated in the treaty of 1674.

In the majority of the commercial treaties concluded in the period of one hundred and fifty years after 1650, however, provisions were not only omitted from the list of articles classified as contraband, but they were specifically enumerated as a merchandise that might be freely carried to belligerents. Such were the stipulations of the treaty of 1650 between Holland and Spain,[69] of the Treaty of the Pyrenees in 1659,[70] to which Holland acceded three years later, and of the treaty of commerce and navigation concluded by Holland and France in 1662.[71] In 1655 France and the Hansa Towns agreed in their treaty of that year that provisions should not be treated as contraband except when carried to places under blockade.[72] Similar stipulations were inserted in the Anglo-French treaties of 1665,[73] 1677,[74] and 1713.[75] They also occur in the Anglo-Spanish

[68] *Ibid.*, p. 384, art. 11.
[69] *Ibid.*, VI, pt. 1, p. 570, art. 7.
[70] *Ibid.*, VI, pt. 2, p. 264, art. 13.
[71] *Ibid.*, p. 412, art. 29.
[72] *Ibid.*, p. 102, art. 2.
[73] *Ibid.*, VI, pt. 1, p. 121, art. 15.
[74] *Ibid.*, VII, pt. 1, p. 282, art. 4.
[75] *Ibid.*, VIII, pt. 1, p. 348, art. 20.

treaty of 1667,[76] and in that between Holland and Sweden of the same year.[77]

What was the immediate effect of these mid-seventeenth-century treaties? The question is problematical, chiefly because their stipulations were applied with hesitancy, sometimes with reservations. Thus in the treaty of commerce of 1667 between Holland and Sweden wheat, legumes, wine, copper, brass, everything for the construction and equipment of ships, as hemp, sailcloth, tar, pitch, masts, spars, planks, cordage, and anchors, were designated as commodities of which the transportation was to be permitted. But when Holland became involved in a war with England, she entered into separate articles with Sweden in which she specified that during the continuance of the war Swedish subjects should not carry to English ports any kind of merchandise suitable for the construction and equipment of ships of war. The transportation of such articles was also prohibited by a regulation of the States-General.[78] England and other countries followed, too, this practice of voiding treaty stipulations by means of special agreements, reservations,[79] or even by national regulations.

In regard to the enumeration of contraband goods, the rule set by the treaties of the seventeenth century was followed closely by those of the eighteenth. Among the latter were the several commercial agreements which were signed shortly after the termination of the War of the

[76] Dumont, VII, pt. 1, p. 27, art. 25.
[77] *Ibid.*, p. 37, arts. 4, 5.
[78] Bynkershoek, *op. cit.*, Bk. I, ch. 10 *passim;* Dumont, VII, pt. 1, p. 37, arts. 3, 4.
[79] Chalmers, *A Collection of Treaties Between Great Britain and Other Powers,* I, p. 43.

Spanish Succession. The Anglo-French treaty of navigation and commerce concluded at Utrecht in 1713 provided in article nineteen that under the name contraband should be comprehended "arms, great guns, . . . and the like kinds of arms proper for arming soldiers, . . . and all other warlike instruments whatsoever." In article twenty, however, it was determined that all sorts of cloths and all other manufactures woven of wool, all wheat and barley, and any other kind of corn and pulse, tobacco, spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugar, all sorts of meat, and in general all provisions should be excluded from the list of goods classified as contraband.[80] Similar in detail were the terms of the treaty concerning navigation and commerce between France and the Hansa Towns in 1716,[81] and the terms of the agreement between the Emperor Charles VI and Philip V of Spain in 1725.[82]

In the period between 1725 and 1780 several treaties were concluded in which it was specifically declared that provisions were not to be regarded as contraband. Such was the intent, though not the precise language of the treaty of navigation and commerce between England and Russia, signed at St. Petersburg in 1734,[83] and also of their treaty of 1766.[84] The treaties which France signed in 1769 with Hamburg,[85] in 1778 with the United States,[86]

[80] Dumont, VIII, pt. 1, p. 345.
[81] *Ibid.*, p. 478, art. 14.
[82] *Ibid.*, VIII, pt 2, p 114, art. 7.
[83] Chalmers, *op. cit.*, I, p. 2, art. 12, quoted in Pratt, *Law and Contraband of War,* p. 238.
[84] Chalmers, *op. cit.*, I, p. 2, art. 10.
[85] De Clercq, *Recueil des traités de la France,* I, p. 111, art. 16.
[86] Martens, Ch. de, and Cussy, F. de, *Recueil manuel et pratique de traités, conventions et autre notes diplomatiques . . . depuis l'année 1760 jusqu'à l'époque actuelle* (Leipzig, 1846), I, p. 145, art. 24.

and in 1779 with Mecklenburg,[87] respectively, contained this stipulation. In a large number of other treaties concluded between 1713 and 1780 there was, of course, no occasion for defining the term contraband, and the relationship between the states that were parties to these was accordingly governed by the definitions adopted in their commercial treaties of the previous century.

Notwithstanding the general tendency to define contraband in specific terms, the language of some treaty stipulations was ambiguous, and after the lapse of a few decades lent itself to interpretations incompatible with the meaning assigned to such articles by their makers. A convenient illustration is afforded by the treaty concluded by England and Denmark in 1670.[88] By article three the two parties undertook not to furnish the enemies of either with any provisions of war, as soldiers, arms, engines, guns, ships, or other necessaries of war, or suffer any such things to be furnished by their subjects. In the naval wars of the eighteenth century, and particularly in the War for American Independence, the English condemned provisions and naval stores when found on board Danish vessels, apparently classifying provisions among articles termed "other necessaries of war." Such an interpretation of article three was contrary to that held in Denmark. It called forth remonstrances, engendered bitter diplomatic controversies, and became a factor in the formation of the Armed Neutrality of 1780.

A compromise was effected between the two Powers when an explanatory article was signed on July 4, 1780.[89] They agreed to classify as contraband all naval stores,

[87] De Clercq, *op. cit.*, I, p. 131, art. 14.
[88] Chalmers, *op. cit.*, I, p. 97.
[89] *Ibid.*

such as ship timber, tar, pitch, rosin, sails, hemp, cordage, and generally whatever immediately serves for the equipment of vessels, unwrought iron and deal planks, however, excepted. Having yielded on this point, Denmark, in turn, forced England to abandon her former position relative to provisions. It was stipulated that contraband merchandise should "by no means comprehend fish and flesh, fresh or salted, wheat, flour, corn, or other grain, vegetable oil, wine, and generally whatever serves for the nourishment and support of life, so that all these articles may always be sold and transported like other merchandise, even to places in the possession of an enemy of the two Crowns, provided that such places are neither besieged nor blockaded."

By the end of the seventeenth century, then, European statesmen and diplomats had by their treaty negotiations established the general rule, which was to be recognized throughout the eighteenth century, that provisions were not to be regarded as contraband. To this general rule exceptions were provided by what might be termed residual commercial treaties, of which the most significant was that signed by England and Sweden at Whitehall in 1661.

In the eighteenth century the regulations which were issued by the several states were less uniform than the prevailing treaty stipulations. Some followed the terms of bilateral treaties; others, not based on such agreements, declared that provisions consigned to the enemy would be condemned as good prize to the captor. To this class of regulations belong the declaration issued by the Russians in their war with Turkey in 1772,[90] and the proclamation

[90] De Martens, *Recueil des Traités*, II, p. 36.

of the American Congress in 1775, which declared that all vessels "to whomsoever belonging, carrying provisions, or other necessaries, to the British army or navy, within the colonies, should be liable to seizure and confiscation." [91]

Naval Stores as Contraband

As in the case of provisions, so in the matter of the enumeration of naval stores as contraband in the commercial treaties and particular regulations, there were in the eighteenth century various interpretations. To begin with, trade in material for the construction and equipment of ships was not interdicted. Even after it became the common practice to draw up a brief list of articles in which trade with the enemy was to be forbidden, naval stores were generally omitted. As the catalogue of contraband goods became longer, these commodities were sometimes included, sometimes not mentioned. Certain treaties expressly declared that naval stores were not to be regarded as contraband. Generally speaking, however, it was not until the seventeenth century that the latter form of enumeration was made.

However, the transportation to the enemy of material suitable for shipbuilding was prohibited by the various sovereigns of Europe during a period of over two hundred years previous to the time when such prohibitions came to be inserted in any substantial number of commercial treaties. In the second half of the twelfth century, according to Azuni,[92] Pope Alexander III prohibited the transportation to the Saracens of timber suitable for the con-

[91] *Journals of the Continental Congress* (Washington, 1810), I, p. 241.
[92] Azuni, *The Maritime Law of Europe*, II, p. 117.

struction of galleys. This law of the Papal States was renewed by Innocent III and Clement V. Nicholas V and Calixtus III put the prohibition in force in 1454 and 1455, when they forbade the supplying of Guinea and other countries in Africa with ship timber and other means for defence. As early as the thirteenth century Edward I of England had enforced similar regulations. In 1293 he caused several ships which had been driven by weather into some English ports to unload 20,000 boards, ninety-nine barrels of pitch and tar, nineteen bundles of hemp, and certain other quantities of supplies suspected of being consigned to the enemy.[93]

Thenceforth until the eighteenth century English regulations followed almost uniformly the precedents set by Alexander III and Edward I. It was in 1336 that Edward III requested the Count of Flanders not to furnish the enemy with ships,[94] and in 1590 that Queen Elizabeth allowed the Dutch to continue their trade with Spain, except in any kind of "provisions . . . and sails, cables, anchors, cordage, masts, or other provisions for land war or apparel or furniture for ships." [95] Tudor precedents were followed in Stuart regulations. A proclamation of 1627 authorized English men-of-war and privateers to apprehend any vessel carrying ship supplies or materials consigned to a port in Spain, Portugal, or in any other territory under the allegiance of the Spanish Crown, and to bring such vessels into port, there to be adjudged as property duly forfeited.[96] In 1665 some members of the Council classified as contraband goods such commodities

[93] Marsden, I, pp. 21 f.
[94] *Ibid.*, p. 64.
[95] *Ibid.*, p. 262.
[96] *Ibid.*, p. 433.

as canvas, masts, pitch, tar, and other naval accommodations.[97] And in the instructions to the fleet in 1704 sailworks, riggings, cables, cordage, masts, pitch, tar, hemp, "together with all other equipage that serves for sea and land," were listed in the catalogue of prohibited goods.[98]

Such restrictive regulations upon the matter of naval stores were not peculiarly English. In the seventeenth century they were common to all the great maritime Powers. By an edict of the States-General, dated December, 1652, neutrals were forbidden to carry to the enemy of the Netherlands any munitions of war or any material serving for the equipment of ships; and by article two of their edict of 1657 the Dutch prohibited the transportation to Portugal of ships' material. Similar prohibitions were contained in the regulations of the States-General in 1665, 1672, and 1673.[99] In the catalogue of contraband goods contained in the Danish ordinance of 1659 [100] there were included "oak ships' timber and all sorts of ships' material and apparel, such as sailcloth, tackling, cordage, and whatever else is considered necessary and useful for carrying on war." The substance of this enumeration was repeated in article four of an ordinance issued by the Danish government in 1793.[101] In the French *Code des prises* contraband goods was accorded little space, and naval stores and other prohibited articles were not mentioned; [102] but in the instructions to the fleet and privateers the French government forbade the transportation of goods reputed contraband by treaties,[103] a practice adopted by England in the eighteenth century. In many of these treaties naval stores and munitions were classified as contraband of war.

[97] Marsden, II, p. 57.
[98] *Ibid.*, p. 200.
[99] Bynkershoek, *Quaestionum Juris Publici*, Bk. I, ch. 10 *passim*.
[100] Quoted in Robinson, *Collectanea Maritima*, pp. 176–187.
[101] *Ibid.*, p. 178.
[102] *Cf.* Lebeau, I, Ordinance of 1543, art. 42; of 1584, art. 69; and of 1681, art. 11.

The principle governing the classification of naval stores as contraband in national regulations became the basis for provisions to that effect in a number of commercial treaties concluded after the opening of the seventeenth century.[104] Since there were but a few states exporting naval stores, and since the shortage of ship timber, deals, and masts in western countries did not become acute until the middle of the eighteenth century, only a comparatively small number of treaties prohibited the traffic in naval materials. Of such treaties, one of the first was that of alliance between England and Holland signed at Southampton in September, 1625.[105] Ships' materials destined for Spain were therein regarded as contraband, and ships carrying them were to be condemned as good prize to the captor. Similarly, Louis XIV and the Hansa Towns agreed in their treaty of 1655 that trade in cordage and sailcloth should be forbidden in time of war.[106] Holland and Sweden in 1667 agreed that materials for naval equipment, as masts, planks, anchors, pitch, and tar, were to be specifically excluded from merchandise listed as contraband, but made the stipulation that as Holland was engaged in a naval war with England at that time, her sailors should be allowed to seize and confiscate goods of this description

[103] *Ibid.*, II, *Règlement du Oct. 1744*, art. 14.
[104] Many of these are listed in Manning, *The Law of Nations*, pp. 287 f.
[105] Dumont, V, pt. 2, p. 180, art. 20.
[106] *Ibid.*, VI, p. 2, p. 103, art. 2.

found en route from Sweden to England.[107] In 1670 England and Denmark agreed that ships and other necessaries should not be supplied to the enemy of either,[108] and in their convention of 1691, to which Holland was a party, contraband was defined as consisting of weapons, metals, horses, saddles, harnesses, sails, ropes, masts, lead, pitch, tar, hemp, and all things which would serve for the equipment of military and naval forces.[109] In the treaties between Denmark and Holland in 1701,[110] between Holland and Russia in 1715,[111] and between Philip V of Spain and the Emperor Charles VI in 1725,[112] naval stores were declared to be contraband.

Anglo-Scandinavian Controversies

The classification of naval stores as contraband of war, like the same classification of provisions, gave rise to serious diplomatic controversies during the last decades of the eighteenth century, particularly between England and the Scandinavian countries. The difficulties arose in part from conflicting interpretations of certain terms of the commercial treaties; they were complicated by the fact that according to these treaties enemy property on board neutral ships, though not contraband, was to be regarded as good prize to the captor. Particular regulations to the effect that unless the master or shipowner conformed to certain specific rules in regard to his passports, ship and

[107] Dumont, VII, pt. 1, p. 37, arts. 3, 4; see also p. 316, art. 3, and Manning, *op. cit.*, p. 288.
[108] Dumont, VII, pt. 1, p. 132, art. 13.
[109] *Ibid.*, VII, pt. 2, p. 294, *Articles à amplification et explication.*
[110] *Ibid.*, VIII, pt. 1, p. 32, art. 13.
[111] *Ibid.*, p. 468, art. 3.
[112] *Ibid.*, pt. 2, p. 114, art. 7.

cargo would be subject to seizure and confiscation rendered the ensuing negotiations more confusing. The differences that grew out of the Anglo-Danish treaty of 1670 were composed in 1780. Those arising from the Anglo-Swedish treaty of 1661 continued to vex the British prize courts and the statesmen of the treaty Powers intermittently until the nineteenth century.

The disputes between England and Sweden were of necessity conditioned by the principles which governed the prize court decisions in the High Court of Admiralty. Prize court adjudications, instructions to the fleet and to privateers, and diplomatic correspondence indicate that in the eighteenth century the general tendency was to adhere rather closely to the terms of treaties and to court precedents in matters touching the definition of contraband.[113] The pronouncement of the English court in the case of *De Kleine David* in 1748 was that treaties had determined what should and what should not be contraband.[114] Thus, in the adjudication of the case of *De Providentia* in 1747 the judge held the view — and his decision was confirmed by the Lords — that by article eleven of the treaty of 1734 Russia had the right to carry naval stores to the enemy.[115] Moreover, in the instructions to privateers in 1744 article three provided that no goods laden in Dutch ships should be deemed contraband "other than such as are so to be (regarded) by the treaty marine concluded between England and Holland in the year 1674." [116] Since in this mid-century period many treaties were nearly a hundred years old, frequent interpretation of them by the judges of the

[113] *Cf.* Lebeau, II, pp. 1 f., *Règlement du 1744*, art. 14.
[114] Pratt, *Law of Contraband of War*, p. 177.
[115] *Ibid.*, p. 98.
[116] Marsden, II, p. 428.

High Court of Admiralty had established precedents for subsequent adjudications. The English therefore held that in prize cases the only rule which could be followed had to be based upon "the constant usage in former wars, from which it is impossible we can formally and precisely depart." [117]

Notwithstanding such deference to old practices and formal agreements, Anglo-Swedish relations were not clarified by the seventeenth-century engagements between the two countries. The explanation of this fact lies in the history and nature of these treaties and in the relative position of the two governments. The treaty of 1654 contained no definition of contraband; that of 1656 mentioned ships, but did not include naval stores in the catalogue of prohibited commodities.

England ratified the latter treaty with reservations, as it were. In the explanatory convention attached to this treaty the English negotiators, with the approval of the Swedish ambassador, declared that the article dealing with contraband would be ratified only upon the condition that as long as the war continued between England and Spain neither the King of Sweden, nor his subjects, should carry pitch, tar, hemp, cables, sailcloth, or masts to any places in the dominions of Spain. On the contrary, the Swedish King should forbid it, and if any such merchandise should be carried thither contrary to the stipulations of the explanatory convention it would be subject to seizure and confiscation by the English. "Wherefore it is most ex-

[117] Instructions to Wroughton, English representative at Stockholm, Feb. 19, 1779, in Chance, *British Diplomatic Instructions* (London, 1928), V.

pressly provided, that if the said king shall not consent to it, then all the said second article, relating to contraband goods (as also the third article which depends thereupon), shall immediately become of no force, and the question relating to the specification of contraband goods shall remain in the state it was before the time there was any treaty about it at London." This explanatory article, though not inserted in the body of the treaty, was to be of the same force and virtue as the treaty itself.[118]

By the interpretation of the treaty of 1656, then, England regarded Swedish naval stores as contraband, whether the explanatory article should be ratified or not. The treaty was renewed by Charles II in 1661, the stipulations relative to contraband goods contained in the former being inserted in the latter form, with the omission of the word holsters and with the addition of the terms provisions, guardships, and arms. Both treaties added the phrase "or any other instrument of war." The secret or explanatory article appended to the treaty signed by Cromwell in 1656 was omitted from the renewal made by Charles II. Naval stores were presumably to be regarded as commodities which might be freely transported to the enemy of either Power.

The history of the naval policy of the two states during the ensuing period of a hundred and fifty years, however, indicates that neither accepted or enforced such an interpretation of the treaty of 1661. In the instructions to privateers issued by the English government, naval stores, such as sails, rigging, cables, cordage, masts, pitch, tar, hemp, together with "all other equipage that serves for

[118] Chalmers, *op. cit.*, I, p. 43.

sea or land," were generally enumerated among prohibited merchandise.[119] On the other hand, the English judges frequently asserted that in the agreement of 1661 naval stores were not enumerated, and that they could not be deemed contraband "from the treaties subsisting between England and Sweden." [120]

The judges, however, sometimes expressed the opinion that, in issuing the instructions for the guidance of privateers and the prize courts, the government had in mind a subsequent understanding with the Court at Stockholm. Sir Henry Penrice, Judge of the Admiralty, in his letter to Corbett asking that the Lords should declare whether pitch and tar, being Swedish property in Swedish ships, should be regarded as contraband, stated that no treaty marine with Sweden since that of 1661 had come to his attention. However, by article five of the instructions to privateers of June 18, 1744, he presumed that some convention had been made since that time, "which may vary from the treaty above mentioned, both as to formulary of the pass, and likewise as to contraband goods," but no such act of state had been sent down to him.[121]

There were, as a matter of fact, two treaties between England and Sweden, and also an "act of state" subsequent to 1661, which may explain the English interpretations of that treaty, and, consequently, the adjudications of the English prize courts also. These treaties, concluded in 1664 and 1666,[122] made no alterations in the terms defining contraband in the treaty of 1661. But in May, 1665, came an important state proclamation: "By his Majesty's

[119] Marsden, II, pp. 200, 290, 321, 322, 336, 414.
[120] *Ibid.*, pp. 290, 318.
[121] *Ibid.*, p. 319.
[122] Dumont, VI, p. 384.

principal commissioners of prizes, canvas, masts, pitch, tar, and all other naval accommodations (were) declared contraband goods, and so intended by his Majesty's declaration of the 22nd February, 1664." [123]

Thenceforth, as occasions arose, several Swedish vessels carrying naval stores to the enemy were apprehended by English naval forces. Among these was the *Med Guds Hielpe,* captured during the War of the Austrian Succession. This ship, together with its cargo of naval stores, was declared good and lawful prize in 1745. The case was reviewed and the sentence confirmed by the Lords, who declared in 1750 that this cargo was contraband "by the law of nations and within the treaty with Sweden." [124] In previous cases which served as precedents for this one, some Swedish ships, such as the *Fortune,* the *St. Jacob,* the *Juffrow Anna,* the *Warsaw Arms,* and the *Anna Catherina,* were restored upon condition that they would refrain from selling naval material to England's enemy; others, such as the *Arms of Plymouth,* were condemned to forfeiture of the pitch, tar, masts, and other material for naval construction carried in their holds.[125] There were sufficient precedents, then, for the decision in the case of the *Med Guds Hielpe.*

In Anglo-Swedish relations the question of naval stores as contraband was still a live issue in 1780. The treaties,

[123] Quoted in Pratt, *op. cit.*, p. 192. It is not clear whether this was a general proclamation or one particularly connected with the negotiations with Sweden, but it is in either case of great importance.
[124] Pratt, *op. cit.*, pp. 191 f.
[125] *Ibid.* In the trials of Swedish ships during the wars of the French Revolution and of Napoleon, Sir William Scott handed down decisions which correspond to that of the *Med Guds Hielpe* as reviewed by the Court of Appeals. In this he has been censured; yet it is possible that such criticism is unmerited. *Cf.* Wheaton, *Elements of International Law* (Boston, 1863), art. 485.

taken as a whole, were not clear; court precedents varied. Many cases had justified court decisions such as that handed down in the trial of the *Med Guds Hielpe;* others failed to sustain that pronouncement of the court. As long as the sailing vessel retained its position in the European navies this dispute as to whether naval stores were contraband would remain unsettled.

Relaxations

From the general rules of commercial treaties and national regulations there were relaxations in varying degree. Commodities of direct use in naval and military equipment were commonly classified as contraband. But inasmuch as a certain amount of gunpowder, bullets, cannon balls, muskets, and the like might be regarded as necessary for the use of the crew, the quantity of such implements of war found on board a neutral ship would determine whether the transportation of them should be prohibited. Likewise, the conditions under which a given cargo of warlike merchandise was carried to the enemy would often determine its classification, various exceptions being granted in cases where the articles in question were in their native or unmanufactured state. The transportation of iron as such was regarded with indifference, while trade in anchors and other instruments made of iron was rigidly prohibited. Lenient treatment might be accorded to the neutral shipmaster who transported the merchandise of his own country, or even that of a neighboring district whose trade was not being diverted from its natural channels. Less leniency might be shown to the master who

carried the merchandise of a country foreign to him and his crew.

In 1781 a cargo of timber carried by the *Juffrow Wabetha* from the city of Danzig was condemned by the English Court of Admiralty after it was proved that the lading was not the produce of the territory of that city, but of the neighboring Kingdom of Poland. Upon appeal the sentence was reversed and the cargo restored. The Court of Appeals held that Danzig, "though a free city, being within the immediate protection of Poland, was entitled to export such a commodity as one of its own products." [126] "But on this point," said Sir William Scott, " . . . it was incumbent on the claimant to shew that the hemp (or timber or other merchandise) was of the growth of those neighboring districts, whose produce they are usually employed in exporting in the ordinary course of their trade." [127] Such relaxations were granted because it was felt to be a harsh exercise of a belligerent's right to prohibit the carriage of these articles, which constituted so considerable a part of native produce and ordinary commerce.

These relaxations in favor of contraband merchandise produced in the country of the neutral carrier, or in the neighboring territories came to be subject to the condition that such merchandise might be brought in by the belligerents, not for confiscation, but for preëmption by the government to which the captor belonged. The old practice had been to confiscate unconditionally all contraband cargoes,[128] but in the course of time it had become advanta-

[126] Robinson, *Admiralty Reports,* IV, p. 163, n.
[127] *Ibid.,* p. 355.
[128] *Cf.* Manning, *op. cit.,* p. 313, for a list of treaties.

geous under certain conditions to detain such cargoes subject to the right of preëmption. In determining the compensation which was to be awarded to the neutral owner, it was customary to allow the invoice price and ten per cent profit, with freight in addition.[129] The utility of these commodities to the government of the captor, a potent factor in the development of the law of preëmption,[130] rendered the practice "no unfair compromise, as it would seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purpose of hostility." [131]

The practice of classifying certain articles of international trade as contraband of war when consigned to enemy ports, and of adjudging them good prize to the captor commenced with the ancients, was continued intermittently throughout the Middle Ages, and was followed more regularly in modern times. By limiting such classification to a few specific commodities, this practice served to eliminate the former indiscriminate prohibition of all neutral trade with the enemy. It was therefore not an infringement upon neutral commerce and navigation, but rather an agency for liberalizing the rules appertaining to commerce in time of war.

To the term contraband of war, however, various limitations were assigned at different periods. At one time it was undefined save in vague and general language, and was applied indiscriminately. In the course of time certain

[129] Robinson, *Admiralty Rep.*, II, p. 175, case of *Haabet; Ibid.*, III, p. 210, case of the *Lucy*.
[130] Marsden, II, pp. 66, 210, 266, 322, 323, 326.
[131] Robinson, *op. cit.*, I, p. 241, case of the *Sarah Christina*.

definitions and enumerations were inserted in treaties and in the instructions which the several governments issued for the guidance of their naval forces. In this process a fair degree of uniformity obtained, but no single list of contraband goods was generally acknowledged. It was agreed that articles which were of immediate service in war should be classified as contraband, but differences existed among the various states as to just what particular articles might be so enumerated. Moreover, as the methods of waging war changed, so did the listing of these commodities likewise change. In the eighteenth century such lists included cannon, mortars, pistols, bombs, grenades, bullets, cannon balls, muskets, matches, gunpowder, saltpetre, sulphur, pikes, swords, saddles, and bridles. But the definition of a number of other commodities as contraband gave rise to long and bitter controversies.

Of such commodities provisions and naval stores were the most important. In early times provisions were frequently listed as contraband, but by the end of the seventeenth century the general rule was established that trade in such merchandise was not to be prohibited. To this general rule exceptions were provided by residual commercial treaties, of which the most significant was the Anglo-Swedish treaty of 1661. In the eighteenth century, however, the regulations issued by the individual states were less uniform than the prevailing treaty stipulations, those not based on bilateral agreements frequently declaring that provisions consigned to the enemy should be condemned as good prize to the captor.

Likewise, in the matter of naval stores there were various interpretations. Trade in materials for the construction and equipment of ships was not interdicted in early times.

As the catalogue of contraband goods in the various treaties became longer and more specific, naval stores were sometimes included, sometimes not mentioned; but by national regulations the transportation of them was prohibited. After the opening of the seventeenth century the principle embodied in such regulations became the basis for similar rules in commercial treaties. To this common rule there were various relaxations in favor of native products, but these became effective only toward the end of the eighteenth century.

CHAPTER VII *

THE ARMED NEUTRALITIES TO 1780

It is frequently asserted even today that the armed neutrality formed by the Northern Powers in 1780 constituted the first organized effort by neutral states to secure freedom of navigation on the high seas.[1] Likewise, it is said that this league was promoted by Catherine II for the express purpose of protecting neutral rights.[2] Russia, however, was not primarily a maritime state, even as late as 1780, and the efforts to define in more precise language the rights and duties of such nations as remained at peace while others were at war had not been contingent upon her advent as a commercial nation. The process of defining such rights and obligations had been going on for generations before the reign of Catherine.

Aside from indicating a neglect of historical factors, the characterization of the league of 1780 as the First Armed Neutrality tends to perpetuate certain unfortunate interpretations of the relationship between neutrals and belligerents. In this view there is evidenced a disregard of the origin of the principles at issue in the controversies which often arose from this relationship. The importance of the Armed Neutrality of 1780 is overemphasized. More

* This chapter is reprinted here through the courtesy of *The American Journal of International Law.*

[1] Carusi, C. F. and Kojouharoff, C. D., *The First Armed Neutrality* (reprint from the *National Law Review*, IX, no. 1).

[2] *Ibid.*

significant still, the impression is given that there was something extraordinarily illegal in the conduct of the belligerents of that period, some arbitrary practices which had not previously characterized their treatment of neutral trade and shipping. This view of the league points to the predominant naval power of the second half of the eighteenth century as the chief violator of neutral rights. Against England and the English prize court it lays the charge of heedlessly departing from the laws of modern warfare.

The Armed Neutrality of 1780 does not, however, represent the first organized effort by the neutrals to assert their rights upon the sea. Within the ninety years preceding that time not less than three armed leagues of neutrals had been established. As early as 1613 an alliance formed between Holland and Lübeck was in certain respects an armed neutrality. Moreover, prior to the forming of the two leagues in the last decade of the seventeenth century there had been individual protests and recriminations by several states against those belligerents whose maritime policy ran counter to the interests of their neighbors.

Resistance by Individual States

Of such individual protests against measures adopted by the belligerents there are a number of instances. In the year 1575 Queen Elizabeth sent ambassadors to Holland to explain that her government could not allow the Dutch, then at war with Spain, to detain English ships which had sailed for Spanish ports.[3] Two decades later, when England was engaged in a war against Spain, Poland felt that

[3] Grotius, *De Jure Belli ac Pacis Libri Tres*, Bk. III, ch. 1, art. 5, sect. 4.

her rights were violated. A Polish embassy was accordingly sent to England to complain that the law of nations was being infringed because English privateers and men-of-war were depriving Polish subjects of free commercial relations with the Spaniards.[4] After the treaty of Vervins had reëstablished peace between France and Spain in 1598, there began the long controversy between France and England relative to the right of the English to visit and search French merchant vessels bound for Spanish ports.

The middle of the seventeenth century witnessed two attempts on the part of the neutrals to nullify the effect of regulations adopted by the belligerents. The Queen of Sweden in 1653,[5] during the war between England and Holland, and the States-General in 1655,[6] during the war between England and Spain, made protest against the molestation of their shipping by belligerent privateers, and each took steps to protect its interest.

The method adopted by the Queen of Sweden recommended itself by virtue of its reasonableness. Her first object was to remove all causes for interference by the belligerents, so that neither the Swedish government nor its subjects might be suspected of concealing or screening, under the pretext of free navigation, any ships or goods belonging to the enemy of either belligerent and there be furnished thereby "perhaps . . . a pretense for such molestations or insults as our subjects have been exposed to; under the color of which suspicion some have hindered till this very time and obstructed the navigation and trade, not only of their enemies, but also of others that are neu-

[4] *Ibid.*

[5] Thurloe, *Collection of State Papers* (1747), I, p. 224; Robinson, *Collectanea Maritima* (1801), pp. 145 f.

[6] Thurloe, *op. cit.*, II, pp. 504 f.

tral." Accordingly, it was ordained that such vessels as decided to come under the special protection of the government must carry only the goods of Swedish subjects.[7] The Queen's second step involved the establishment of a convoy system. In order to prevent fraud or clandestine designs to conceal enemy property, the passes and certificates of all vessels applying for the protection of a warship were to be examined by the Admiral or by the commander of the convoy. Fraudulent abuse of the convoy regulations should incur the penalty of confiscation to the Crown of the property involved.[8]

Definite rules were also issued to govern the conduct of the Swedish convoy commander while upon the high seas. If he should chance to meet belligerent warships, he was to give evidence of his authority but refuse all demands that the vessels under his protection submit to be searched. Since the only purpose of the convoy was to prevent inconveniences and clandestine dealings, it was expected that the ships would be allowed to proceed on their course unmolested. On the other hand, Swedish warships were enjoined not to protect merchant vessels bound to belligerent ports.[9]

The States-General of Holand also, in their measures to prevent visitation and search of Dutch merchantmen, had recourse to the convoy system, hoping by this means, according to Thurloe, "to draw all trade to themselves and

[7] Thurloe, *op. cit.*, I, pp. 424 f.

[8] If the master of the ship under convoy was party to an attempt to violate the convoy rules he was to be held liable to forfeiture of his property in the ship. If he was not the owner or part owner he was to be kept in custody until he had redeemed himself by the payment of a sum of five hundred dollars.

[9] No restrictions were placed upon those Swedish merchants who desired to carry on their trade with either belligerent without convoy.

their ships." [10] The immediate result of this policy was an encounter in 1656 between certain English privateers and some Dutch vessels under De Ruyter, who was convoying a number of merchantmen from Spain. Such an attempt to limit the rights of belligerents to intercept neutral trade with the enemy was but a passing phase of seventeenth-century naval policy, and was presently discarded when Holland again became a belligerent. In the War of the League of Augsburg she freely seized neutral merchantmen suspected of carrying supplies to the enemy, even when such vessels were proceeding under the protection of convoys.[11]

The Armed Neutrality of 1613

The preceding are illustrations of attempts made by individual states to challenge the right of belligerents to interfere with their neutral commerce. What were probably the first concerted measures to protect neutral trade were those taken at the beginning of the seventeenth century against what were termed the arbitrary regulations of Denmark, at that time the most powerful naval state in the Baltic.

The Danish regulations, unnecessarily severe in time of peace, became particularly stringent in time of war. For a period of nineteen months, beginning with March, 1611, the country was at war with Sweden, and during this period its maritime policy restricted unduly the trade of

[10] Thurloe, *op. cit.*, II, p. 504. *Cf.* Mirbach, *Die Volkerrechtlichen Grundsätze der Durchsuchungsrecht zur See* (1903), p. 74.

[11] "Kong Christian den Femtes egenhaendige Dagböger," entries for Dec., 1689, and Feb., 1690, in *Nyt Historisk Tidsskrift* (1847). This work is hereafter cited as Jour. Chr. V.

neutral countries, particularly Lübeck and Holland.[12] Denmark interdicted all trade with Sweden, and employed her naval power to prevent the armed merchantmen of Lübeck from entering Swedish ports. The Dutch she likewise subjected to various restrictions, both in respect to the Sound dues and to the trade with the Swedes.

This rigid practice gave rise to coöperation between Holland and Lübeck. Their formal treaty was not signed until after the war was terminated, but their coöperation was facilitated by the situation resulting from the war. Under the influence of English mediators Sweden and Denmark signed the peace treaty of Knaeröd on January 20, 1613. The outcome of the war left Denmark able to maintain her position as the predominant power in the North, so that her customary maritime policy remained a potential danger to other commercial nations. In May, 1613, Holland and Lübeck therefore entered into a formal treaty agreement for the purpose of protecting their trade in the Baltic and North Seas, evidently desiring to be prepared to take more vigorous action should another war break out in the North.[13]

The language of the treaty indicates that the alliance between Holland and Lübeck might properly be called the first armed neutrality, as has been suggested by Boye.[14] Article one defined the object of the league, declaring that the law of nations gave to the subjects of each party the right of free navigation and commerce in the North Sea and in the Baltic, and that the two Powers aimed to protect that right from infringement by a third Power. To achieve

[12] Dumont, V, pt. 2, p. 231.
[13] *Ibid.*, p. 231, arts. 1, 5, 6, 7, 14.
[14] Boye, *De Vaebnede Neutralitetsforbund* (1912), p. 32.

that purpose it was specified in article five that those who joined the league should make contributions in money, vessels, infantry, and cavalry, to such an extent as time and circumstances might require. In article six it was agreed that if those who were interfering with commerce and navigation in the North did not upon friendly request discontinue their unlawful practice, the members of the league were to take measures for vigorous defense of their rights. Article seven contemplated a resort to arms, and the proper method to be followed in that case, while article fourteen made provisions for adherence to the league by other princes, countries, and cities.[15]

Dano-Swedish Policy, 1648–1689

Within the next decade the relative position of the Northern Powers was changed by the rise of Sweden under Gustavus Adolphus to predominance among them. By 1629 the Baltic had become a Swedish sea. It was now the King of Sweden rather than the King of Denmark who looked askance at foreign vessels in the Baltic. The new Swedish policy was a direct challenge to Denmark, but the events of the Thirty Years' War served to postpone the conflict between them until 1657.[16]

Until nearly the close of the Thirty Years' War the practice of the two Scandinavian states had been to interdict all trade between neutrals and the enemy.[17] In 1645, how-

[15] Sweden joined the league in 1614. See Dumont, V, pt. 2, p. 245, and *cf. ibid.*, pp. 274, 276.
[16] But see the Dano-Swedish treaty of 1645, Dumont, VI, pt. 1, pp. 291, 292.
[17] *Cf.* Söderquist, *Le blocus maritime* (1908), pp. 230–253. Relaxations were granted in the treaty of 1640 between Sweden and the Netherlands. See Dumont, VI, pt. 1, pp. 192, 193.

ever, Denmark conceded that Dutch subjects might carry on their trade with Sweden, except in contraband goods and to ports under blockade,[18] and in 1657 the Dutch were again able to obtain that privilege. Sweden likewise changed her policy.[19] The Anglo-Swedish treaty of 1654 provided only that it would be unlawful for either of the signatories to give any aid to the enemies of the other.[20] A similar agreement had already been signed by Sweden and Holland.[21] These more liberal agreements indicate the abandonment of the principle of general interdiction of trade with the enemy.

During the war of 1657–1660 Denmark enforced stringent regulations upon neutral trade,[22] and Sweden did likewise. Three of the other maritime nations, France, Holland, and England, entered into an agreement to protect their interests and to end the war.[23]

Peace was concluded in 1660. In the outlook of Scandinavian statesmen and in the attitude of the Scandinavian peoples toward each other and toward the rest of the world, there was a gradual transformation, the result of which was to affect the relationship of neutrals and belligerents in the last war of the century. Despite the seemingly irreconcilable interests of the two states, a number of substantial men began to see the folly of the ever-recurring wars between Denmark and Sweden. Efforts were made for a Scandinavian rapprochement and for coöperation in respect to other maritime Powers.[24] This changed attitude made it possible to produce the temporary Dano-Swedish armed leagues of 1691 and 1693.

[18] Boye, *op. cit.*, p. 38, n. 1.
[19] *Ibid.*, p. 43, notes 4, 5.
[20] Dumont, VI, pt. 2, p. 80, art. 11.
[21] *Ibid.*, pt. 1, p. 192.
[22] *Cf.* the Danish ordinance of 1659, in Robinson, *Collectanea*, p. 176.
[23] Dumont, VI, pt. 2, p. 252. *Cf.* Boye, *op. cit.*, pp. 41–44.
[24] *Cf.* Hannibal Sehested's "political testament" in Boye, *op. cit.*, p. 47.

The foundation of that coöperation was laid in the period of thirty years following 1660. During this time there were concluded a number of treaties between each of the Scandinavian states and other governments. Of greater significance to the promotion of neutral solidarity were the many negotiations which were carried on between Stockholm and Copenhagen. Thus in 1672, while France, supported by England, was at war with Holland, the Scandinavian states were beginning to discuss seriously the matter of concerted action for the protection of neutral interests.[25] Their negotiations had no immediate result, but the complaints then made of violation of treaties on the part of the belligerents, of unjustifiable seizure of neutral merchantmen, and of the subsequent long and costly litigations in the prize courts, were to recur in the list of grievances drawn up by every armed league formed thereafter. The fertile suggestion made by Sweden that the neutral states should seize and confiscate ships and merchandise belonging to the subjects of a belligerent country whose privateers were injuring neutral trade was to bear fruit during the last war between France and Holland in the seventeenth century.

By 1675 both Denmark and Sweden had become involved on opposite sides in the conflict between France and Holland. In the negotiations for peace, which were carried on at Lund in 1679,[26] renewed efforts were made to establish future harmony between the Courts of Stockholm and Copenhagen and to formulate a policy which

[25] *Ibid.*, p. 49, n. 3.
[26] Dumont, VIII, pt. 1, p. 525.

would enable them to coöperate as neutrals in the event of another war between the greater maritime Powers. After the conclusion of peace they signed a treaty of alliance also.

The latter treaty contained certain significant stipulations. The contracting Powers agreed that they would coöperate, even to the extent of employing force, in matters of trade and navigation in time of war between other countries, and that neither would conclude any alliance which might prejudice the commerce of the other. Since it was believed that the trade of certain towns of the Empire was flourishing at the expense of Scandinavian merchants, there was included in the treaty a secret article providing that by means of appropriate navigation laws this trade should be diverted to Danish and Swedish ports. Moreover, it was stipulated in article nineteen that if either party should be at war the one remaining neutral should close its harbors to the ships of the enemy of the other. That is to say, Sweden and Denmark adopted an indirect method of interdicting trade between a neutral and a belligerent country. This treaty was to remain in force for ten years.[27]

The Convention of London of 1689

The Dano-Swedish treaty of 1679 was still in force and the attitude toward Scandinavian coöperation manifested therein still obtained when the War of the League of Augsburg commenced in 1688. Since in that war the naval forces of England and Holland were brought together in a common endeavor, the neutral states might

[27] Dumont, VIII, pt. 1, p. 431.

expect their trade with the belligerents to be subjected to more stringent supervision than in any previous war. That expectation was soon to be realized.

In August, 1689, the Convention of London was signed, whereby Holland and England undertook to prohibit trade between France and other countries.[28] The convention provided that, as several states of Europe were then engaged in war against France, and already had prohibited or would in a short time prohibit all commerce with that country, the Allied Powers should employ their naval forces to carry out similar prohibitions. This section of the convention probably did affect directly the trade of neutrals. In article three, however, it was agreed that those states which remained at peace with France should be notified that if their merchant vessels were found at sea before the neutral states had become acquainted with the new regulations they should be obliged to turn back. If, after the notification had been given, neutral subjects should attempt to carry enemy property to France, their ships and cargoes would be condemned as lawful prize to the captor.[29]

The arbitrary nature of the Anglo-Dutch agreement and its evil effect upon neutral trade have been frequently overemphasized.[30] In some respects, indeed, the convention reverted to the ancient practice of interdicting all commerce with the enemy, but this was a practice not foreign to Scandinavian policy. Until the middle of the seventeenth century the Scandinavian sovereigns had generally employed such interdictions during belligerency,

[28] *Ibid.*, pt. 2, p. 238.
[29] *Cf.* Twiss, *Law of Nations in Time of War* (1875), p. 259.
[30] *Cf.* the Danish ordinance of 1659, in Robinson, *Collectanea*, p. 176.

and in 1679 had provided for them in their treaty of alliance.[31] They were again to employ such measures in their wars of the eighteenth century. As neutrals in 1689, however, they could not subscribe to the view of Samuel Puffendorf that they should, by refusing to heed the avaricious urging of their subjects for increased trade, refrain from interfering with the designs of the Allied Powers to reduce within proper bounds an insolent and exorbitant nation, which was threatening Europe with slavery and the Protestant religion with destruction. On the other hand they could not escape the truth of the conclusions drawn by the same author that the matter of trade and navigation did not depend upon rules founded by a general law, but rather upon the conventions made between particular nations, so that to form a solid judgment of the point in question "we ought previously to examine what conventions subsist between the Northern Crowns and England and Holland, and whether the latter Powers have offered the former just and reasonable conditions." [32]

The terms of the several conventions between the Northern states and other Powers were not the same, so that by regulating its maritime practice by the stipulations of one of these conventions a government would not be able to conform to those of another. The treaties which governed the commercial relations of England with Denmark [33] and Sweden [34] respectively followed the principles of the *Consolato del Mare*. These were probably not violated by the agreements in the Convention of London. The treaties which subsisted between Sweden and Holland [35] and between each Scandinavian state and France,[36] however, followed the converse principle that free ships should make free goods, and these were certainly disregarded by the convention. These facts explain why the King of Denmark made no comment in the daily entries of his Journal, no adverse criticism, upon being notified that Holland and England had decided to forbid neutrals, under given conditions, to trade with France. He apparently accepted the regulations of August as a matter of course.[37]

[31] Dumont, VII, pt. 1, p. 431, art. 19.
[32] Letter to Groningius, in Puffendorf, *Law of Nature and Nations* (1749), Bk. VIII, ch. 6, sect. 8, n. 1.
[33] Anglo-Danish treaty of 1670, Dumont, VII, pt. 1, p. 132, art. 20 and passport.
[34] Anglo-Swedish treaty of 1661, *ibid.*, VI, pt. 2, p. 384, art. 12 and passport.

Presently Denmark resorted to measures of reprisal. The manner in which these measures were applied indicates that it was not the convention between England and Holland, but the great number of privateers fitted out by each belligerent, that caused the greatest impediment to neutral trade. These followed the routine practices of other wars, but as they were more numerous than formerly the effects of their activity were more keenly felt. French privateers appeared in the Northern seas and operated in Danish territorial waters.[38] Those of the Allies were equally active, but were probably less given to seeking their prey under the protection of the neutral coast, as they were supported by greater naval forces.

There is no rule by which to measure the relative degree of violation of treaty provisions and general principles of maritime law committed alike by belligerent privateers and by neutral traders. There is no means by which to

[35] Swedish-Dutch treaty of 1679, *ibid.*, VII, pt. 1, p. 432, art. 22.
[36] Franco-Swedish treaty of 1672, *ibid.*, p. 166, p. 432, art. 23.
[37] Jour. Chr. V, *loc. cit.*, entries for Aug., 1689.
[38] Danish instructions to the Stadholder of Norway, in Boye, *op. cit.*, p. 55, n. 1.

judge the merit of the contentions of each party in this conflict. The fact is that those who now remained at peace felt aggrieved. They believed their freedom of navigation to be unduly restricted and they took steps to protect their interests. In this they were perforce motivated by political considerations as well as by the desire to establish general principles of international law.

During the War of the League of Augsburg, and during every war thereafter in which they negotiated for the establishment of a league of armed neutrals, the policy followed by the Northern Powers was consistent in general principle, although in detail it varied greatly. Its key may be found in the Journal of Christian V of Denmark.[39]

The entries in the King's Journal for 1690 indicate that Denmark was carrying on simultaneously negotiations with not fewer than six of the chief states of Europe, the result of each effort being contingent upon the probable success of the others. The negotiations with England centered at first in the matter of supplying Danish troops for service in Ireland, later in the question of a defensive alliance. Those with Holland were concerned with the question of an alliance, at first only defensive, later even offensive. The conversations carried on conjointly with these Powers dealt with the question of commerce and navigation and with that of neutral trade with the belligerents. With France Denmark aimed to effect a treaty of neutrality and subsidy. At Stockholm the Danish ambassador bent his efforts to the task of renewing the treaty with Sweden of 1679, and, when that had been accomplished, to the establishment of an armed neutrality. The relationship of Denmark with Brandenburg and with the Empire was likewise a matter of diplomatic bargaining. During the year in which these negotiations were in progress the King was weighing the relative advantages for Denmark of peace and of war, and was directing his policy accordingly.[40]

[39] The value of the Journal lies not alone in its record of the events of each day, but in its revelation of the motives which guided the King in his policy toward other states.

The first tangible result of these negotiations was recorded in February. The Dano-Swedish treaty of 1679 was renewed for a period of five years. The immediate effect of the reëstablished alliance with Sweden was the adoption of a joint convoy system. Danish and Swedish warships were to escort neutral merchant vessels, but only between Scandinavian ports and other neutral places, or, at least in the case of Danish warships, to Scotland, whence the merchantmen might ply their way unescorted around the British Isles to their destination in France or beyond.[41] The commanders of the warships were enjoined not to allow belligerents to visit and search any vessel in the convoy. In this respect the Scandinavian rulers were following the example set by Queen Christina a generation earlier.

Encouraged by their treaty of 1690, both Denmark and Sweden assumed a bolder attitude in their relations with the belligerents. Denmark followed the suggestion made by Sweden in 1673 and adopted measures of reprisal, seizing Dutch ships in Danish harbors and territorial waters.[42] Her aim was to hold these as compensation to Danish subjects for losses inflicted upon them by Dutch

[40] Jour. Chr. V, *loc. cit.*, entries Jan. 9 to Feb. 10, 1690, *passim.*
[41] *Ibid.*, Dec., 1689, to March, 1690, *passim.*
[42] *Ibid.*, Dec. 12, 1690.

privateers. When the Dutch ambassador protested against the injustice of such strange action by a neutral, he was told that the ships would be freed immediately if the States-General would agree to repair the injury suffered by Danish merchants.[43] During the ensuing negotiations with Holland relative to neutral trade with France the King believed that his policy would prevail. In this he was encouraged by Louis XIV, and likewise by the King of Sweden, whose problems were identical with his own.[44]

The Armed Neutrality of 1691

The events of 1690 and 1691 led directly to the establishment of an armed neutrality and to the conclusion of a treaty to compose the differences between Denmark and the Allied Powers, Holland and England. After the Dutch ships were apprehended in December, negotiations were immediately initiated between Denmark and Holland.[45] The two countries sought to reach a compromise whereby the Dutch ships might be released, the matter of neutral trade with France placed on a satisfactory basis, and the question of alliances finally settled. To find a solution for these problems proved difficult. The Dutch made various proposals, offering first to allow forty-five Danish vessels to trade with France, and somewhat later to make a money payment as compensation to those Danish merchants whose ships had been seized. The progress of these negotiations seemed unsatisfactory, and Denmark turned again to Sweden,[46] concluding with that country a treaty of

[43] Jour. Chr. V, *loc. cit.*, entries Dec. 12, 19, 30, 1690.
[44] *Ibid. Cf.* the Franco-Danish treaty of 1691, in Boye, *op. cit.*, pp. 65–66.
[45] *Ibid.*, Dec. 12, 1690.
[46] *Ibid.*, Dec., 1690, to March, 1691, *passim.*

armed neutrality on March 10, 1691.[47] A few days later came her treaty of neutrality with France,[48] and in June the Treaty of Copenhagen, which composed the Danish difficulties with Holland and England.[49]

In the treaty establishing the Armed Neutrality of 1691 Denmark and Sweden agreed upon a method of action to be followed, separately and conjointly, in their relations with the belligerents. They were to coöperate in protecting their common interest. Freedom of navigation was to be maintained in conformity with the stipulations of their several treaties with other countries and with the law of nations. In the event the subjects of either party should suffer any inconvenience or damage from the visitation and seizure of their vessels by the belligerents, compensation was to be demanded, and if that demand should meet with refusal the contracting Powers were to resort to reprisals. The treaty provided for joint action in the event the pursuit of this policy of reprisals should lead to open hostility between one of the confederates and a belligerent. Each undertook to equip convoys of warships for the protection of the shipping of both countries, and likewise to assist the other in case such convoys should be attacked or molested.[50]

Such was the plan for concerted action adopted by the Armed Neutrality of 1691. It probably had but little effect upon the naval policy of the belligerents. France did not restrict the activity of her privateers, and the Allies, disregarding the convoys, continued to seize neutral vessels.

[47] See Boye, *op. cit.*, p. 64.
[48] *Ibid.*, pp. 65–66.
[49] Dumont, VII, pt. 2, p. 292.
[50] See Boye, *op. cit.*, p. 64. Further to protect neutral trade provision was made for fitting out warships for ordinary cruising.

Moreover, the sum of 135,000 Riksdalers which the Dutch had offered as compensation for the injuries suffered by Danish subjects was not paid. After two months of subsequent negotiations with Holland, Denmark accepted a payment of only 80,000 Riksdalers.[51]

The difficulties which disturbed the relations between Denmark and the Allied Powers were temporarily composed by the Treaty of Copenhagen.[52] By this agreement Denmark was to discontinue the practice of detaining as a measure of reprisal the ships and cargoes of those subjects of Holland and England who were trading with ports in the Baltic region or in Western Scandinavia. In the future she would resort to such reprisals only after the lapse of four months following a refusal by the belligerents to satisfy a formal demand for reparation. She agreed also to prevent French privateers from operating in her territorial waters. Article five of the treaty contained the significant stipulation that in order to eliminate unfair practices the Danish government was to take greater care to prevent fraud in the granting of naturalization papers and other documents to alien individuals who operated to the prejudice of the neutral trader. To facilitate trading between Denmark and France it was provided in article three that Danish vessels were not to carry enemy property or to engage in the coastal trade of France, but were to sail directly from their own ports to a designated place in the enemy country. Subject to these restrictions, Denmark was to enjoy the right to carry on trade with the enemy of the Allied Powers.

Neither the establishment of the Armed Neutrality of

[51] Jour. Chr. V, April 9, 11, 23, and May 22, 1691.
[52] Dumont, VII, pt. 2, pp. 292, 294.

1691, which proposed to employ military force, nor the Treaty of Copenhagen, however, could solve the problems arising from the irreconcilable interests of neutrals and belligerents. Belligerent privateers did not discontinue their activity; neutral merchantmen failed to observe the stipulations of treaties intended to exterminate collusive trade; [53] and the neutral governments sought to employ convoys,[54] although with no more success in that effort than in their attempt to prevent fraud among their own subjects. Notwithstanding the stipulations of her treaty with the Allied Powers, Denmark again proposed to employ her former method of reprisals. The better to achieve this end the Danish government presently instructed its minister at Stockholm to reopen negotiations for the coöperation of Sweden, which had been interrupted after the Treaty of Copenhagen.

The Armed Neutrality of 1693

That policy met with the approval of the Swedish government, and the negotiations resulted in the establishment, by the treaty of March 17, 1693,[55] of the second armed neutrality between Sweden and Denmark. The first article of the treaty contained certain singular provisions, which were to reappear in a modified form in the course of the following century. Notwithstanding the fact that the majority of commercial treaties contained stipulations recognizing the jurisdiction of the belligerent admiralty courts, the competency of such courts to adjudicate prize

[53] Marsden, II, pp. 148 ff.
[54] Boye, *op. cit.*, p. 72.
[55] Dumont, VII, pt. 2, p. 325.

cases was here denied, and the ambassadors of the treaty Powers were nominated to discharge that function. They were jointly to evaluate the damages which had been inflicted by belligerent agencies upon the subjects of Denmark and Sweden, and to present on the basis of that evaluation a demand for complete reparation in such cases as had already been adjudicated. They were also to require the unconditional release of ships and cargoes which were being detained pending trial in the prize courts. Articles two, three, and four were designed to force compliance with the neutral demand. In the event that satisfaction should not be immediately forthcoming, Denmark and Sweden were to seize from the subjects of the unyielding belligerent a sufficient number of ships to compensate the injury suffered by the neutral traders and to defray the expenses of the process of seizure. An embargo forbidding all commercial intercourse was to be applied to the nation against which measures of reprisal were taken.

The treaty contained other significant stipulations. It was agreed in article seven that vessels belonging to a belligerent which complied with the wishes of the neutrals should not be seized and sold in the harbors of either contracting party. Article eight made the charge that the Spanish naval policy had resulted in great injury to neutral commerce. In this case reparation was to be exacted, but since Spain had only a limited trade in Northern Europe the ordinary methods of reprisal were precluded. It was proposed therefore to search all approachable vessels for Spanish merchandise, even to the extent of searching those seized in reprisals against other nations. Also included were the provisions of the treaty of 1691

respecting the convoy system and the resort to military force under given circumstances.

The aim of the Armed Neutrality of 1693 failed of realization, as had that of 1691. The combined naval forces of England and Holland were too predominant to yield to the pressure of the neutrals. Toward the end of the War of the League of Augsburg Denmark reached a compromise with the Allies, by which in return for a relatively small sum of money she agreed to discontinue trading with France. When the war was terminated by the Treaty of Ryswick in 1697 the question of neutral trade with the belligerents was again in abeyance.

The armed neutralities of the seventeenth century were designed primarily to promote the commercial interest of the neutrals, although their avowed programs included a general reference to treaties and to the law of nations. Every one of them, including the league of 1613, proposed to establish freedom of navigation and commerce in accordance with the law of nations and with the provisions of the treaties which governed the relationship of each party with other nations. Yet no attempt was made to define the law or to find a common formula for the conflicting principles of the various treaties. There was only a summary statement that the treaties and the general law were being violated by the belligerents; there was no reference to the questionable practices of the neutral trader.

Such general assertions as these were carried over in the armed neutralities of the eighteenth century. In the programs set forth by these later leagues there were incorporated several pronouncements from the Dano-Swedish treaties of 1691 and 1693. Of these the most significant dealt with belligerent privateers, the matter of estab-

lishing a convoy system and the related question of visit and search, the competency of belligerent prize tribunals, and the delay and expense involved in protracted prize litigations. There was also the question of creating a united naval armament to enforce the program advocated by the league. These points served as the basis for the formula drawn up by A. P. Bernstorff in 1778 and later adopted by the league formed in 1780.[56]

Regulations During the Great Northern War

That the nations which united to form the armed neutralities were indifferent to questions of international law, except in so far as the enforcement of that law served to advance their immediate commercial interest, is indicated by the naval policy which each of them followed while at war. Close upon the dissolution of every armed neutrality, whether in the seventeenth century or in the eighteenth, followed the repudiation by its member states of the principles which they had advocated when as neutrals they were negotiating for a confederacy to protect their trade. Illustrations of this policy are afforded in the regulations issued by those same states when they assumed the status of belligerency.

The regulations of the Great Northern War are pertinent. Denmark and Sweden became embroiled in hostilities against each other in 1709, and each issued regulations for the guidance of its privateers and men-of-war. The Danish ordinance of 1710 [57] contained the rule that enemy

[56] See Holm, "Om Danmarks deltagelse i Forhandlingerne om en Vaebnet Neutralitet fra 1778–1780," in *Dansk Historisk Tidsskrift* (1865).

[57] See Boye, *op. cit.*, p. 77, n. 3.

property on board neutral ships should be good prize. This rule conformed to the provisions of the Anglo-Danish treaty of 1670, but was the converse of the principle contained in the Danish treaties with France and Holland, respectively. In its specific provisions, however, this ordinance imposed more severe penalties upon neutral shipping than those prescribed by the treaty with England. Article four provided that neutral ships were to be condemned as good prize under the following conditions of violation of good faith: (a) sailing for a port in Sweden or in a province under the control of Sweden, (b) sailing without regular passports and other required papers, (c) pursuing a course other than that provided for in the passport, (d) carrying merchandise not listed in the bills of lading, and (e) having a lading partly or wholly of contraband of war. In the enumeration of contraband goods in article five both naval stores and provisions were included. These regulations were not less severely restrictive upon neutral trade than were those enforced by Holland and England in the War of the League of Augsburg.[58]

The Swedish navigation ordinance of February, 1715,[59] was similar to the Danish. It granted prize commissions to foreigners, provided for adjudication of prizes in local tribunals, although the competency of belligerent tribunals had been denied in the Armed Neutrality Convention of 1693, and confiscated vessels which were not properly provided with passes, or which violated the specifications of such passes, and those which were bound to prohibited ports in the Baltic. Enemy property on board neutral

[58] *Cf.* English instructions against France of 1693, Marsden, II, pp. 414–419.

[59] Lamberty, *Mémoires pour servir à l'histoire du XVII^me siècle* (1724–1740), IX, p. 226. *Collectanea Maritima*, p. 167.

vessels was to be good prize to the captor, notwithstanding the opposite provisions of Sweden's treaties with France and Holland. Upon capture, all goods not covered by regular bills of lading and all vessels which positively deviated from the regular course to their given destination were to be declared forfeited. Finally, a vessel with more than one-fourth of its crew natives of the enemy country was likewise to be subject to condemnation.

The ending of the Great Northern War in 1721 marked the close of a characteristic cycle of armed neutralities, for during the thirty years preceding, the actions of Denmark and Sweden had stood as an example of the manner in which states as militant neutrals were inclined to unite for concerted action, and likewise of the method by which the same states as belligerents were wont to place restrictions upon certain classes of neutral trade. Not the advancement of principles of international law, but their immediate commercial interest, was their motive. In the various treaties of peace now concluded by the Northern Powers no reference was made to the questions raised by the members of the Armed Neutralities of 1691 and 1693, nor to the principles which the same nations had been seeking to enforce while engaged in the war just ended.

The Armed Neutrality of 1756

The middle decades of the eighteenth century witnessed the first of another series of the great naval wars of Europe, with France and England the chief participants. Between Denmark and Sweden there was in this period neither open hostility nor effective coöperation save for a brief time in 1756. The influence which France exerted

upon the policy of the Scandinavian Courts was of greater weight during this period than it had been during the War of the League of Augsburg.[60] Indeed, French ascendancy at Stockholm sufficed to inveigle Sweden into the war with Prussia in 1757. At Copenhagen French counsel was hardly less preëminent.[61] By a treaty of 1754 France agreed to pay Denmark a yearly subsidy of 200,000 Dalers, and each party promised to assist the other with military and naval forces whenever it should be attacked by a third Power.[62] Denmark was able to remain at peace, however, while Sweden became involved in the war. It was this situation which precluded any but a temporary concert between them in this period.

Denmark was able to maintain her neutrality in the Seven Years' War largely because J. H. E. Bernstorff, the Foreign Minister, persuaded Versailles that his country would be of greater service to France as a neutral. French statesmen readily concurred in that view and began to urge Denmark and Sweden to adopt concerted action for the protection of their trade and shipping, and, incidentally, of the transportation of military stores to France. The Courts of Copenhagen and Stockholm needed little urging. Indeed, they did not even await the commencement of hostilities before engaging in negotiations. By March the preliminaries were sufficiently advanced for Sweden to make proposals for a concert, and on July 12 a convention was signed at Stockholm establishing the Armed Neutrality of 1756.[63]

[60] Flassan, *Histoire général et raisonné de la diplomatie française* (1809), VI, p. 75.
[61] *Ibid.*, p. 113; Boye, *op. cit.*, pp. 105 f.
[62] *Danske Tractater, 1751–1800* (1882), p. 80.
[63] *Ibid.*

The divergence of policy of the two countries, except in the matter of navigation and trade, together with the military ambition of Sweden, operated to make this league innocuous. The views which each party advanced in the course of the negotiations had greater significance for subsequent developments than had the specific provisions of the convention itself.

Of the two Powers Sweden, leaning more heavily on the support of France, manifested the more militant attitude toward England. Forgetting her own severe regulations during the Great Northern War and in 1741,[64] she wished to insist upon the vindication of the principle that free ships should make free goods. In Denmark the cautious Bernstorff succeeded in convincing the government of Sweden that it would be unwise to insert that principle in the proposed treaty, although he did not contemplate its abandonment. It was his belief that "the two Powers should insist upon this principle against England and strive to obtain its recognition. If this principle should not be accepted the Danish government would be free to demand restitution from the English government or to remain inactive, as existing contingencies and the national interest should require." [65]

There were other important issues under discussion. Sweden desired that visit and search of neutral vessels should be limited to the ships' papers only, but no agreement was arrived at on that point. Nor were the negotiators in a position to declare that ships which sailed under convoy should be immune from visitation. In the matter of

[64] When she became involved in the war against Russia. *Cf.* Boethius, *Sveriges Traktater med Främmande Makter*, VIII, pt. 2, p. 322. See also the regulations of 1743, *ibid.*, p. 325.

[65] Asseburg, *Denkwürdigkeiten* (1848), p. 76.

contraband the contracting parties declared themselves prepared to be governed, not by the provisions of their own treaties, but by the classification in the Anglo-French commercial treaty signed at Utrecht in 1713 after the conclusion of the War of the Spanish Succession.

During the Seven Years' War the customary irregularities occurred. Some neutral traders engaged in collusive trade; some belligerent privateers exceeded the bounds set by their instructions. There followed the customary charges against the naval policy of the nations at war, more particularly against that of England.

The remonstrances of the Armed Neutrality of 1756 were presently reduced to insignificant proportions by the divergent interests of its two members. The league dissolved in 1757. In that year Sweden, influenced by French diplomacy, by her ambition for territory in Pomerania, and by her need to assuage domestic discontent, joined France in a war against Prussia. Denmark, interested mainly in plying her trade as the chief neutral carrier, and unwilling to impair the rich remuneration of commerce, refrained from adopting measures that might endanger her relations with England. War was foreign to her interest. In 1762, however, when the Crown of the Tsars was placed on the head of Peter III, who as Grand Duke of Holstein-Gottorp had claim to territory desired by Denmark, the Danish government became greatly interested in the results of the battles of Frederick the Great and in the naval victories of England. The critical position in which Denmark then found herself required that she should retain the friendship alike of Frederick II and George III.

Russia, destined to be a member of two later armed neutralities, became entangled in the Seven Years' War.

Her regulations of May, 1757,[66] imposed the most severe restrictions upon neutral shipping. Her subsequent maritime policy is illuminating. During the War for American Independence Russia remained neutral, and Catherine II, in her famous Declaration of 1780,[67] promulgated the liberal principles in regard to neutral trade which were first enunciated by A. P. Bernstorff in 1778.[68] These principles, it is said, the Tsarina hoped to impose upon the belligerents while Russia itself remained neutral. In 1793, however, when that country was a participant in the war against France, the government reverted to the severe restrictions of 1757.[69]

Influence of Economic Factors, 1756–1780

However unfavorable the impression given by the controversies between neutrals and belligerents, and by the negotiations for the Armed Neutrality of 1756, the Seven Years' War, like the other maritime wars of the eighteenth century, afforded the neutral merchants a welcome opportunity to better their economic position.[70] The naval wars diminished the belligerents' tonnage and sent freight

[66] Russia declared all Prussian ports blockaded, though the blockade was not made effective. Enemy property on board neutral ships was seized as good prize to the Russian captor. Boye, *op. cit.*, p. 109.

[67] For the Russian declaration of Feb. 28 (Mar. 10), 1780, see F. de Martens, *Recueil des traités conclus par la Russie avec les puissances étrangères*, IX, p. 307.

[68] Quoted by Holm in his "Forhandlungene om en Vaebnet Neutralitet," *loc. cit.*

[69] *Cf.* the Russian note to Sweden, July 30, 1793, in *Annual Register*, 1793, p. 175, and the Anglo-Russian treaty of Mar. 25, 1793, in G. F. von Martens, *Recueil de principaux traités* (2d ed.), V.

[70] *Cf.* the report of the Danish councillor Ryberg, for Oct. 30, 1770, in Nathanson, *Udförligere Oplysninger om Handel-og Finants-Vaesenet* (1802).

rates skyward.[71] Trade and shipping brought a steadily increasing stream of money into neutral countries, so that the condition of the average citizen was improved. With prosperity came means, not only for a higher standard of living, but also for a greater degree of culture. The commonalty began to share in the intellectual movement of the time and to support government reforms.[72] Habitually neutral states began to look forward to new maritime wars, not with dismay and apprehension, but with hope and anticipation of the fruits of trade and shipping which they might then snatch from the hands of the otherwise occupied belligerent nations.[73]

The Peace of Paris of 1763 removed the stimulus which through seven years had animated neutral commerce. In the Northern countries there followed a period of economic stagnation. Where there had been feverish activity there was now idleness; where prosperity had prevailed there was now poverty. The depression continued for a dozen years. Then the outbreak of the War for American Independence brought new animation and new prosperity.[74]

For England the results of the Seven Years' War established her maritime supremacy and made her the greatest of all colonial Powers. It was generally recognized in the Scandinavian countries, and in France, Holland, and

[71] Amneus, *La ville de Kristiania* (1841), p. 70; Bugge *et al.*, *Den Norske Sjöfarts Historie* (1923), pp. 528 f.; Odhner, *Sveriges Politiska Historia* (1885), II, pp. 121–122.

[72] Friis *et al.*, *Det Danske Folks Historie* (1903–1919), VI, p. 9.

[73] Report of Ryberg for Oct. 3, 1779, *loc. cit.*

[74] Nathanson in his *History of Danish Commerce* portrays the general nature of the depression and continues: "We now leave this period. It clearly did not forbode better times. . . . Then the clouds rolled suddenly away, and Denmark's commercial sky became clear. . . . In the brilliant commercial period of 1775 to 1784 the country and its people gathered their activities to an admirable degree. The nation was thereby enabled to obtain for the future a not inconsiderable rank among the great seafaring Powers."

Germany, that the power of England rested on the broad foundation of her commerce. The governments of these nations sedulously planned to break the supremacy of her trade, particularly with the colonies and in the Baltic, and to seize a part of it for their own nationals whenever a favorable opportunity should arrive.[75]

An aggressive mercantilism was prevalent in Copenhagen and Stockholm, and under its influence there was developed a skillfully planned policy of industrial and commercial expansion. By means of currency reform, tariff and quota systems, the extension of credit and large loans free of interest to private concerns, the establishment of monopolies, and various forms of encouragement to the shipping industry, each government sought to prepare its people for the opportunity of trade expansion which would come in the event of a renewal of the maritime war between France and England. In the calculations of Northern statesmen, therefore, the beginning of the conflict between England and her colonies in America was viewed with little dissatisfaction.[76] The maritime position of Denmark and Sweden would be improved; new markets would be available; trade routes closed to them in peace-time would be opened to their shipping. Renewed prosperity would follow the interbellum period of economic stagnation.[77]

It was common knowledge among the statesmen and rulers of Europe that neutral merchants engaged in war-

[75] *Cf.* the instructions to the French representatives: Havrincourt at Stockholm, 1759, La Houze and De Verac at Copenhagen, 1769 and 1775 respectively, and Durand and De Juigné at St. Petersburg, 1772 and 1775, respectively, in *Recueil des instructions* (from 1648 to 1789), in vols. 2 (Sweden), 9 (Russia), and 13 (Denmark).

[76] Report of Ryberg, Oct. 30, 1770, *loc. cit.*

[77] Letters of Bernstorff to Reventlou of Mar. 12 and July 13, 1776, in *Bernstorffske Papirer.* (Friis, ed. 1904.)

time trade were inclined to transgress even the liberal bounds set by their own governments. The Dutch traders were severely arraigned on this score. They were always greedy for gain, according to Guldberg, the Danish Minister of State, and supplied France and Spain with all materials required for the equipment of their fleets. The censure of Catherine II was not less severe; [78] and Frederick the Great declared that the trade in contraband of war was too attractive for the merchants of Holland, who would not forego their particular gain for the common good.[79] These censures were equally applicable to the merchants of other nations, who, to judge from the correspondence of Bernstorff, were no more scrupulous than those of Amsterdam. The most careful regulations failed to prevent illegal trade.[80]

There were certain aspects of the War for American Independence which occasioned apprehension in the Northern capitals. A close scrutiny of the economic horizon disclosed the fact that Great Britain afforded the most extensive market for the products of the Baltic region and was the only country with which Denmark had a favorable balance of trade.[81] British commission houses and British shipping constituted the most convenient channels for Russian foreign commerce. The reduction of England would result in the destruction of this market. Her maintenance as a great Power was thus essential to the welfare of the Northern countries.

[78] Catherine to Grimm, Feb. 18, 1778, in Sbornik, *Lettres de Catherine II à Grimm* (1878).

[79] Frederick to Thulemeier, Oct. 14, 1776, in *Politische correspondenz Friedrichs des Grossen* (1870—); see also letters 24,698, 25,086, 25,093, and others.

[80] Bernstorff to Reventlou, July 30, 1776, *loc. cit.*

[81] Bernstorff's Memorial to the King, March 17, 1780, in Holm, *Danmark-Norges Historie* (1906), V, pt. 1, chap. 15.

There was yet another angle from which to view the possible economic effect of the war in America. It was feared by the more far-seeing observers that the competition of the American colonies, if they should win their independence, would be more embarrassing to the commerce of the neutral states than was that of Great Britain. America, by reason of her location, her incomparable resources, and the stimulus which independence would give to her citizens, would be in position to undersell the products of Denmark and Sweden, and to some extent those of Russia.[82] American grain, timber, and fish might even exclude similar European products from the world market. The products of her mines would have a ruinous effect upon the iron and steel industry of Sweden. "What future may this field of Swedish commerce expect," wrote Ehrensvärd, "in the event the English colonies in America win their independence, since these, under the shelter and with the stimulus of liberty may carry similar undertakings to a height to which their country with its great advantages seems to entice them?" [83]

Political Factors

In the European diplomatic situation during the war for American Independence there was an element which impelled the Baltic states to refrain from any measure that would seriously endanger the position of England as a great European Power.[84] Fear of French domination set

[82] Bernstorff's Memorial to the King, *loc. cit.*

[83] Ehrensvärd, *Dagboksantekningar föra ved Gustaf IIIs Hof* (1878), II, p. 115.

[84] Guldberg's proposals for Denmark's foreign policy, Dec. 3, 1780, in Holm, *Dan.-Nor. Hist.*, V, pt. 1, chap. 16.

a line of demarcation beyond which aid given to France could not extend, and reduced the remonstrances of the neutral maritime Powers in the second half of the war to little more than mere demonstrations.

It was France and not England that since the advent of Richelieu had disturbed the composure of Europe. It was France that had intervened in the affairs of Germany and had aimed to profit by the weakness of the Empire.[85] Frederick the Great declared that it was the unchanging policy of France to "divide and rule" the Powers of Europe.[86] No responsible statesman of the period desired the reëstablishment of France in the dominant position which she had occupied in the age of Louis XIV, and there was none in the North who did not wish to see retained a fair equilibrium among the Great Powers. It was clearly realized that the unimpaired strength of Great Britain was essential to the maintenance of the balance of power in Europe.[87]

Out of the diplomatic situation and the current economic system was evolved the foreign policy of the Baltic states during this period. That policy led to the temporary cooperation of Denmark, Sweden, and Russia. The immediate rivalry among these states, however, and the exigencies of the domestic political problems of each served to modify the broad outlines of their common purpose.

The policy of Russia toward the other Baltic states was

[85] *Ibid.*

[86] *Pol. Corr.*, letters 25,050, 25,069.

[87] In his proposals for the foreign policy of Denmark (see n. 83 *supra*) Guldberg commented: "It will ever remain a maxim that Denmark must desire to see the preservation of England as a Great Power and that we can never wish for her downfall. The Bourbon Houses cannot establish their preponderance without disturbing the balance of power. No man can wish to see Louis XIV's flourishing period restored."

conditioned by the results of the Partition of Poland, the *coup d'état* in Sweden, and the Russian urge for territorial expansion in the South. From the Peace of Nystad in 1721 to the *coup d'état* of Gustavus III in 1772, Russia had joined with England at Stockholm and Copenhagen in an attempt to establish a "system of the North," in which one or if possible both of the Scandinavian states would form an alliance with the two greater Powers.[88] The aim of this policy was to create a balance against the French system of family alliances, and as far as Russia herself was concerned to prevent Sweden, the natural ally of Turkey and Poland, from attacking her on the north while her armies were concentrated elsewhere.

With the events of 1772 two of the chief reasons for Russo-English harmony in the Baltic disappeared. The Partition of Poland by lowering French prestige on the Continent removed the danger of the French system of alliances; the *coup d'état* at Stockholm eliminated foreign intervention in Swedish affairs and thereby destroyed Russian and English influence in Swedish party politics. England thereafter adopted a policy of non-interference in Sweden, and her coöperation with Russia ceased to be one of the major factors in the diplomacy of Northern Europe.[89]

The Partition of Poland resulted also in a gradual estrangement between Russia and Prussia, although their treaty of alliance did not lapse until the death of Panin in 1780. By that time there had occurred a new orientation

[88] Chance, *British Diplomatic Instructions,* III (Denmark), and V (Sweden), *passim.*

[89] *Ibid.,* V, for the letters of Suffolk to Goodricke, representative at Stockholm, of May 22, 29, June 16, 24, Aug. 4, 18, 21, Sept. 1, 8, Nov. 17, 1772, and those to De Visme at that place, of Nov. 11, 1774. *Cf.* Ehrensvärd, *op. cit.,* I, p. 149.

in Russian policy. During the War of the Bavarian Succession common diplomatic efforts had been made by Russia and France to preserve peace in Germany. French statesmen had earlier signified their willingness to abandon Poland in return for a commercial treaty with Russia and a share in the Russian foreign trade, until then monopolized by England.[90] By 1780, however, Russia was making common cause with Austria, and with Austrian support was designing the reëstablishment of the Greek Empire, possibly under the rule of a Russian prince.[91] To achieve this end she found it desirable to eliminate intervention on the part of the neighboring states in case war should break out with Turkey. In view of this interest it was determined that Swedish armies, backed by French gold, should not inconvenience Russia on the northern frontier. That fact largely explains the interest of Catherine II in the proposal made by A. P. Bernstorff in 1778 to establish a league of armed neutrals. By the requirements of such a league Swedish attention to the affairs of Russia would be dissipated.

In Sweden the embarrassment of local conditions was of great consequence. On August 19, 1772, Gustavus III effected a revolution which terminated the rule of the Estates and the so-called "age of freedom." The tradition of parliamentary government, however, was not destroyed. The nobles could not forget their former influence and resented the usurpation of power by the young monarch.[92] Their bitter opposition to the King had great weight in

[90] Instructions to De Juigne of May and Sept., 1775, in *Recueil des instructions,* vol. 9 (Russia). *Cf.* Catherine's letter to Grimm of Aug. 16, 1775, *loc. cit.*

[91] Jauffret, *Catherine II, son règne* (1860), I, pp. 203 f.

[92] Schinkel, *Minnen ur Sveriges Nyare Historia* (1885), I, p. 374.

the shaping of Sweden's foreign policy. Discontent obtained in the Council and in the army, in the press and among the deposed aristocracy, who entertained plans for regaining their power.[93]

The King was ill-equipped to win the confidence of the upper classes. Self-willed, uncompromising, and bent on going his own way without counting the cost, he learned early to dissemble his purposes. While these traits were raising a barrier between him and his older friends, he was surrounding himself with pedants and courtiers for companions. He was of a dramatic turn of mind, and lived in the imaginary life of the stage, whose heroes and fictitious situations he often confounded with the world he aimed to govern by statescraft. He envisaged Sweden elevated to the rank of a Great Power, and himself occupying the center of the scene, admired and envied by men of affairs and by the Paris salon. This vision he labored to make actual.[94]

Of the many states that were interested in the establishment of a centralized and more efficient government at Stockholm, Gustavus believed that Russia alone was bent upon intervention.[95] In order to avert such interference it became the chief aim of the King's foreign policy to win the Tsarina's approval and recognition of the new government.[96] To this end the negotiations for the establishment

[93] Schinkel, *Minnen ur Sveriges Nyare Historia,* I. *Cf.* Ehrensvärd, *op. cit.,* II, p. 31.

[94] In Heidenstam's *La fin d'une dynastie,* Erdman's *Gustaf III, Det förste Bladene i hans Historie,* Schuck's *Gustaf III, en Karakterstudie,* and Wahlstrom's *Gustavianske Studier* are found a portrayal of the King's character and purposes.

[95] *Cf.* Stavenow, *Den Gustavianske Tiden* (1925), p. 9; Geffroy, *Gustav III et la cour de France* (1867), I, p. 186; Instructions to D'Usson, Sept., 1774, in *Recueil des instructions,* 2 (Sweden).

[96] Catherine to Grimm, July 14, 1774, *loc. cit. Cf.* Bain, *Gustavus III* (1894), I, p. 205.

of an armed neutrality provided a favorable opportunity.

Two other forces, each born in him, as it were, and fostered by his training and early environment, combined to mold the foreign policy of Gustavus III. The one was his attachment to France, the other his hatred of Denmark.[97] More than a century of close political and cultural association had prepared Sweden to become a faithful client of France when the events of 1772 at home and in Poland made coöperation between them imperative. The generations-long rivalry between Sweden and Denmark was accentuated by the King's usurpation of the Swedish government.

While the change in government bound Sweden more closely to France, it nearly involved her in a war with Denmark. The latter had long had reason to fear an attack on Norway whenever Sweden should be arbitrarily governed by a strong and ambitious monarch. Both countries armed for war; Denmark looked to Russia for support, while Sweden appealed to France. Versailles sent Durand to St. Petersburg to dissuade Russia from aiding her ally, and applied diplomatic pressure at Copenhagen to induce Denmark to refrain from military measures and form an alliance with Sweden. In 1778 and 1779, when there was concerted diplomatic action between France and Russia, the tension between Denmark and Sweden was eased and their temporary coöperation again became possible.[98]

The ambition of Gustavus III was not circumscribed by the relatively limited aim of acquiring Norway. His terri-

[97] Wahlstrom, *op. cit.,* pp. 122 ff.; Schuck, *op. cit.,* p. 120; Heidenstam, *op. cit.,* p. 98.

[98] For Dano-Swedish relations see Holm, *Dan.-Nor. Hist.* V, pt. 1, chaps. 3, 4, 8, 13.

torial aspirations extended to the other side of the Atlantic, where he apparently hoped to establish a Swedish colony at the expense of Great Britian. To this end he proffered the services of a Swedish fleet to the Americans, and his own services as mediator in the forthcoming peace conference. He negotiated with France, sent a personal letter to George III, and requested the assistance of the Tsarina in his vain efforts to make his mediation acceptable.[99]

There was yet another strongly influential factor in the foreign policy of Gustavus III, the need of assuaging the domestic unrest. Depression in the iron industry, burdensome taxes, deficits, and governmental supervision over the nation's economic life engendered discontent. The King became apprehensive and sought to dissipate the impending domestic storms by engaging the nation's energy in problems of foreign affairs.[100]

The Danish situation was similar to that of Sweden. The Palace Revolution in 1772, which forced the banishment of the Queen, a sister of George III, served to estrange Denmark from England and to heighten her association with Russia, while at the same time it gave rise to opposing factions in the Danish government. There was subsequent friction in the Council; divergent views were held by leaders like Bernstroff and Guldberg; and discontent was rife among the various classes of the popu-

[99] *Cf.* Schinkel, *op. cit.*, II, pp. 198 ff.; Ehrensvärd, *op. cit.*, II, pp. 115 f.; Heidenstam, *op cit*, p. 140.

[100] The influence of the domestic situation upon the foreign policy did not escape the notice of contemporaries. Von Schinkel observes (*op. cit.*, p. 270): "In domestic matters events occurred in the course of 1779 which instilled in the King apprehension of the future and impressed the need . . . of engaging the national interest in foreign problems." For the anticipated effect of the armed neutrality see the letter of Jan. 1, 1781, by the Duchess of Sudermania to the Countess Piper, quoted in Heidenstam, *op. cit.*, p. 140.

lation. These purely domestic problems tended to influence Danish foreign policy.

As to the acquisition of territory, the ambition of Denmark was modest. Guldberg in 1780, as J. H. E. Bernstorff in an earlier day, regarded the securing of a small island in the West Indies [101] on which to plant sugar cane as a matter of importance to the welfare of the nation and worthy of great attention. It was believed that in return for coöperation in the formation of an armed neutrality Denmark might expect Russian aid to acquire this island. Russia would secure her *code maritime*, Denmark a new colonial possession.

Into the foreign policy of the Baltic states, built upon such a foundation, there was thrust anew the complicating force of French diplomacy. In March, 1778, France was at war with England. At the very beginning of hostilities she requested Sweden to create a neutral league as had been done in 1691, 1693, and 1756.[102] In strange contrast to this appeal she issued on June 24 an ordinance renewing the regulations of 1681 and 1704, which provided that neutral ships carrying enemy goods should be good prize together with their cargoes, and this notwithstanding her treaty stipulations containing the opposite principle.[103] The pursuance of an illiberal policy of this nature was, however, contrary to the interest of France. Through the services of neutral shipping alone could she hope to secure the importation of those commodities which she required in waging the war, if the British fleet should again sweep

[101] Krabben Eyland. Holm comments (*Dan.-Nor. Hist.*, V, p. 349): "The thought of achieving this object held Guldberg at this time in a remarkable passion."

[102] Odhner, *op. cit.*, I, p. 535.

[103] Lebeau, *Nouveau code des prises* (1799–1801), II, p. 299.

her own from the sea. Her policy, then, was perforce to encourage neutral shipping and to proclaim the inviolability of neutral rights.

The declaration which was issued on July 26 [104] was an essential preliminary to the execution of such a program, and it would seem that the ordinance of June was intended to increase the effect of that of July. The latter proclaimed that France would honor for a period of six months her treaty stipulations that free ships should make free goods. At the end of that time she would revert to the June regulations, unless the neutrals could induce England to adopt the same principle.

The French ordinance of July prompted the Northern states to endeavor to force England in her relations with them to abandon her treaty rights and accept the principle of "free ships, free goods." "If the Danish government yield on this point," declared Bernstorff, "France will undoubtedly place herself in the same relation to Denmark as England is, notwithstanding that in her treaties with Denmark she has accepted this principle." [105] Bernstorff's instructions to the minister at Stockholm, directing him to approach the Swedish government, give further illustration of the influence of the policy of France.

The French government persisted in reminding Stockholm of the advisability of concerted action by the Neutral Powers against Great Britain. Gustavus III and his Minister, Scheffer, were strongly inclined to listen to these propositions, for they were on the point of engaging in negotiations for a new subsidy treaty with France. These negotiations could not be postponed unless Sweden was

[104] Lebeau, *Nouveau code des prises*, II, p. 339.
[105] Holm, "Forhandlingerne om en Vaebnet Neutralitet," *loc. cit.*

prepared to forego her subsidies for the following year. That would be a sacrifice which the country was not prepared to make, particularly since inimical remonstrances against England would not be hazardous.

Bernstorff's Note of September, 1778

Such was the posture of affairs when American privateers interfered with and threatened to disrupt Russian trade from Archangel, which was at that time controlled by foreign merchants, chiefly British. Catherine II, who seems to have regarded the Americans and their cause with indifference,[106] decided to adopt a policy that would terminate these depredations on Russian commerce. She turned for assistance to her ally. In a note of August, 1778, she summoned Denmark to unite her maritime forces with those of Russia for the protection of their commerce in their adjoining territorial waters in the Arctic. It was suggested that Denmark should indicate the means which she considered most effective for the attainment of this object.[107]

The protection of merchantmen in the Arctic was of no consequence to Denmark, whose trade was concentrated in the capital and a few of the towns of Southern Norway. Moreover, the Russian proposal seemed designed primarily for the protection of British shipping, a reduction of which would be to the advantage of the neutral merchants. Since Bernstorff was eager for joint action with Russia, however, his tack became that of inducing the Tsarina to accept a

[106] *Cf.* her letters to Grimm, Feb. 2, Mar. 4, 1778, and July 24, 1780, *loc. cit.*
[107] Holm, *op. cit.*

program more comprehensive in scope and more advantageous to the neutral trader than that which she had herself outlined. This he essayed to accomplish in his note of September 28, 1778.[108]

The plan of Bernstorff was significant, not only in that it sought to extend the sphere of common action, but also in that its propositions, based upon issues involved in previous controversies between neutrals and belligerents, were later adopted as the program of the Armed Neutrality of 1780. The language of the five points of the Declaration of the Tsarina of Russia regarding the principles of armed neutrality, which she addressed to the Courts of London, Versailles, and Madrid, on February 28 (O. S.), was virtually identical with that of Bernstorff's note.

The exchange of notes between Russia and Denmark initiated negotiations which, after being continued for a period of two years, resulted in the establishment of the Armed Neutrality of 1780. The history of the last phase of these negotiations has been frequently related in all the principal languages of modern Europe, and has become generally familiar to students of maritime law and of eigtheenth-century diplomatic history. The program, with its five propositions, which the league adopted, more clearly drawn up than those of earlier associations of neutral states, is equally familiar.

The history of the Armed Neutrality of 1780 [109] is much like that of the earlier leagues. The principles which it enunciated as governing the relationship of neutrals and

[108] Holm, *op. cit.*

[109] See The Armed Neutralities of 1780 and 1800. A collection of official documents, preceded by the views of representative publicists. Edited by James Brown Scott, Director, Division of International Law, Carnegie Endowment for International Peace. New York, Oxford University Press, 1918.

belligerents were abandoned by every one of its members when they became involved in war. Although it singled out the chief points of dispute which disturbed that relationship, none of the reforms which it advocated were destined to be effected in the eighteenth century.

THE END

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