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The Doctrine of Continuous Voyages

THE DOCTRINE OF CONTINUOUS VOYAGES.

It is a well-settled principle of Anglo-Saxon jurisprudence that the law will not permit a thing to be done indirectly which cannot legally be done directly. The application of this proposition to International Law has given rise to what is known as the doctrine of continuous voyages.

Originating in the decisions of English prize courts, the principle was chiefly applied and developed in the admiralty courts of Great Britain and the United States until it became a recognized part of International Law in governing the rights of neutrals to trade with belligerents in time of war. The application of the doctrine throughout its history has caused bitter controversy between England and the United States, the two nations which have been most instrumental in securing a place for it in the laws of nations.

Origin and early history.

The principle seems to have been first applied in 1761 in two cases before the English Lords of Appeal, The Africa and the St. Croix, Burrell 228, 229. During the Seven Years War, which was then going on, English subjects were forbidden to trade with the French. Attempts on the part of English captains to do this indirectly by connecting with French ships at neutral ports were held to violate the rule and subject the ships to condemnation. (Woolsey: Some Early Cases on the Doctrine of Continuous Voyages. 4 Am. Jour. Int. L. 823, 844.)

It was not till the close of the eighteenth century, however, that the doctrine really became well defined in cases arising out of the "Rule of 1756." Up to that date each European nation had retained the exclusive right of trading with its own colonies. During the Seven Years War the English navy drove French commerce from the seas, practically isolating France from her colonies. France attempted to obviate this by granting colonial trade rights to the Dutch, but the English declared in the "Rule of 1756" that neutrals in time of war could not enjoy a trade from which they were barred in time of peace and proceeded to seize and condemn Dutch ships plying between France and her colonies on the ground that they were virtually French ships. (4 Am. Jour. Int. L. 835.)

Upon the breaking out of the Napoleonic Wars England again

declared this rule in force and denied the right of neutrals to trade between France and Spain and their colonies. Neutral governments, including that of the United States, protested vigorously, but unavailingly that the Rule of 1756 was no longer in effect. To evade the operation of the rule American ships would make voyages from the French West Indies to American ports and thence to France, claiming that these were two distinct voyages and therefore legal, since England could not prevent trade between France and neutral countries so long as the rules against contraband and blockade were not violated. But the English courts held that in cases in which the stop at the intermediate port was merely a subterfuge the voyage was to be considered continuous between France and her colonies, subjecting guilty vessels to condemnation. The determination of the bona fides of the stop at the neutral port raised questions of evidence and it was at first held by Sir William Scott that proof of landing the goods and payment of duties at the American ports was sufficient to establish two distinct and lawful voyages. (The Polly, 2 C. Rob. 361.) American shippers now adopted the policy of paying duties in American ports on all such voyages and the English courts were soon forced to change the law. In 1806 Sir William Grant held that the landing of goods and payment of duties was not conclusive of good faith, that there must be an honest intention to bring them into the common stock of the neutral port, The William, 5 C. Rob. 395.

Blockade and Contraband.

Being founded on recognized principles of justice, the doctrine was destined to outlive the circumstances under which it was first applied and to play an important part in later wars. The next branch of International Law to which it was applied was the subject of contraband. This application of the doctrine seems to have been foretold during the first period of its history in Sir William Grant's reference in his opinion in The William, supra, to an earlier case, The Eagle, and some writers claim to have found dicta recognizing it in cases decided as early as 1761, (4 Am. Jour. Int. L. 832.) The first noteworthy application of the rule to contraband occurred in 1855 during the Crimean War. A Dutch ship, the Frau Howina, was captured en route from Lisbon to Hamburg, carrying saltpeter which was in fact destined to Russia. The cargo was condemned by a French prize court, applying the doctrine of continuous voyages, which had previously been looked on with disfavor by continental jurists.

Such was the state of the law when the American Civil War broke out in 1861. The doctrine was now to receive more vigorous application than perhaps ever before.

President Lincoln immediately ordered a blockade of all southern ports, so that neutral vessels attempting to carry war supplies to the Confederacy would incur penalties for both carrying contraband and running the blockade. English merchants desiring to trade with the Confederates and to minimize the dangers of suffering the penalties referred to, made the port of Nassau in the Bahama Islands off the coast of Florida the center of a thriving commerce as a point of transshipment to the southern ports. The chances of capture of the blockade runners on the short voyage from Nassau were comparatively slight, while the English claimed that their increased commerce between England and Nassau was entirely legitimate and entitled to exemption from interference.

In 1863 the British steamer Dolphin bound for Nassau was captured by a Union cruiser and claimed as a prize. It carried rifles and sabers billed for Nassau but there was evidence that the real destination of vessel and cargo was a Confederate port and both were condemned in the United States District Court, The Dolphin, 7 Fed. Cas. 868.

The first case involving the doctrine which came before the United States Supreme Court was The Bermuda, 3 Wall. 514. The vessel was a British ship carrying munitions of war and much mail for Confederate ports, though it was ostensibly bound for Nassau. Both ship and cargo were condemned, the court applying the doctrine of continuous voyages formulated by the English courts sixty years before. It was held that neutral trade from one neutral port to another is entitled to protection only when the cargo is intended to become part of the common stock of the neutral port. "Successive voyages connected by a common plan form a plural unit" and the vessel is liable to condemnation if the owner knows the actual destination of the goods. The court also based their decision on evidence of an intent on the part of the ship to run the blockade.

Another celebrated case of this period was The Peterhof, 5 Wallace 28. The ship was carrying supplies for the Confederate army from England to Matamoras, Mexico, a port just across the Rio Grande from Texas, which was sharing Nassau's commercial prominence for like reasons. The ship was released on the ground that a neutral port could not be legally blockaded, but the con-

traband portion of its cargo was condemned on the finding that its real destination was the Confederate camps across the river.

The most famous and most severely criticised decision of this series was the case of The Springbok, 5 Wallace 1. The ship was captured was proved to have been bound in good faith for Nassau. Most of the cargo was either absolute or conditional contraband, but this fact seems not to have been known to the owners of the vessel. The nature of the freight was not shown by the bills of lading, which were "to order." It was proved that the cargo was part of a stock from which two previously condemned prizes had been loaded, and the whole evidence satisfied the court that the real destination of the freight was not Nassau but some southern port. The cargo was accordingly condemned, but the ship itself was released. The ratio decidendi seems mainly to have been that the real destination of the cargo was some blockaded port.

These American decisions aroused a storm of protest in England. In an insurance case arising out of the capture of the Peterhof, Hobbs vs. Henning, 17 C. B. n. s. 791, the English Court of Common Pleas held "that goods that are contraband of war in the course of transport from a neutral port to a neutral port in a neutral ship are not, by the law of nations liable to seizure by the cruiser of a belligerent state even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captor." The British government, however, refused to make any official protest to the United States, though a recent writer speaks of its attitude as "acquiescence rather than approval." (Garner: International Law in the European War, 9 Am. Jour. Int. L. 372.) The International Commission which passed upon claims of England and the United States arising out of the Civil War unanimously dismissed all those resulting from the condemnation of the Peterhof, the Bermuda, the Dolphin and allowed a small claim for the detention of the vessel itself in The Springbok case.

The decisions have been severely criticised by English writers on International Law, including Twiss, Phillimore, Baker, and Creasy. American authorities have also not been unanimous in their approval of the principles laid down by the Supreme Court in arriving at their decisions. Most of the criticism has been directed against The Springbok and particularly the extension of the doctrine to blockade, which the American judges were accused of confusing with rules relating to contraband. Mr. Lester H. Woolsey says in a note to a paper in the fourth volume of the American Journal of

International Law at page 830 that "among all the English and American cases examined one has not been found in which the doctrine was directly and exclusively applied to a purely blockade case." The case of The Pearl, 5 Wallace 574, was one in which the captured vessel "carried no cargo except ten bales of seamen's jackets and cloth" and the opinion makes no further allusion to the character or destination of the cargo. The vessel was condemned because the court were "not satisfied that her voyage was to terminate at Nassau" but were "satisfied on the contrary that she was destined either immediately after touching at that port, or as soon as practicable after needed repairs, for one of the ports of the blockaded coasts." Intended breach of blockade was one of the grounds of the decision of The Bermuda, supra, and seems to have been the main basis for the court's holding in The Springbok, supra. The Court says in the latter case: "But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband but for the purpose of ascertaining its real destination; for we repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade." The foregoing cases seem to be definite authorities supporting the proposition that the doctrine applies to blockade. In view of the fact that under the British and American rule a ship may be captured on any stage of an intended voyage to a blockaded port the application of the doctrine of continuous voyages to this class of cases appears to be logical and equitable, provided the evidence of guilty intention is sufficient.

The Springbok decision was a departure, however, in holding that the guilt of the cargo rather than that of the vessel is controlling, for previously it had been universally held that penalties for breach of blockade attached to goods only through the wrongful act of the vessel. Fault was also found with the rules of evidence followed by the American courts, Dr. Baty characterizing the procedure of our tribunals as a "roving inquiry into all sorts of presumptions while the voyage is yet in its initial stage." The language referred to the practice of the American courts in inquiring into facts other than those disclosed by the ship's papers.

Later History of the Doctrine.

The doctrine survived despite the attacks of its English opponents and in due time was to find favor even in their eyes. In 1885

France invoked the doctrine in seizing neutral vessels carrying contraband to Hong Kong which was really destined for the Chinese government, with which France was at war. England protested earnestly against this action. During the Italo-Abyssinian War in 1895 the doctrine was applied by Italy to the Dutch steamer Doelwjyk which was carrying munitions intended for Abyssinia. The cargo was to be unloaded at the neutral port of Djibouti and thence transported overland to the ultimate destination. The case was thus similar to The Peterhof, supra, and the decision followed the rule of that case. (Ruys vs. Royal Exch. Assur. Co., 2 Com. Cas. 201.)

Great Britain found it convenient to recognize the doctrine as applied to contraband for the first time during the Boer War in 1899. She seized German ships bound for the neutral port of Lorenzo Marquez on the ground that their cargoes of contraband were in fact destined for the Boers. The ships were finally released, however, upon the protest of the German government.

The rules governing the Japanese navy during the Russo-Japanese War recognized the doctrine as applied to contraband and, according to Professor Charles Noble Gregory, also to blockade. (Gregory: The Doctrine of Continuous Voyages, 24 Harvard Law Review 178). No cases arose for its application during that war.

The principle of continuous voyages was taken up at the London Naval Conference in 1909, and several rules concerning it are to be found in the Declaration of London adopted by that body. By Article 30 "absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land." Article 33 says that "Conditional contraband is liable to capture if shown to be destined for the use of the armed forces or of a government department of the enemy state," but by article 35 only "when found on board a vessel bound for territory belonging to or occupied by the enemy or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port," subject to the exception contained in article 36, when "the enemy country has no seaboard." Article 19 is as follows: "Whatever may be the ulterior destination of a vessel or her cargo, she cannot be captured for breach of blockade if, at the moment, she is on her way to a non-blockaded port." From these quotations it will be seen that the Declaration intended to abolish the doctrine so far as blockade is concerned, but recognized it as of full force in cases of

absolute contraband. In respect to conditional contraband it was to be applied only where the belligerent has no sea coast.

The provisions of the Declaration of London relating to continuous voyages, says Lawrence at page 716 of his "Principles of International Law," "form the grave of a great controversy. In them it received the usual sepulture, a great compromise." "Not dead but sleeping" would have been an appropriate epitaph for the tomb. Upon the outbreak of the present European War, Great Britain rudely disinterred and revived the controversy. In an Order in Council of October 29, 1914, the Declaration of London was declared to be in effect except that "conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order' or if the papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy and it shall lie upon the owner of the goods to prove that their destination was innocent." The same Order made numerous and important additions to the list of absolute contraband included in the Declaration of London, besides practically abolishing all distinction between absolute and conditional contraband so far as the doctrine of continuous voyages is concerned. In defense of this English writers on International Law argue that Germany is practically in the position of having no seaboard and that therefore conditional contraband is to be put on the same footing as absolute because the German ports are closed (Bentwich: International Law as Applied by England in the War, American Journal of International Law, January, 1915). The same writer also attacks the distinction between absolute and conditional contraband in the Declaration of London as illogical and unsatisfactory. The American government protested against the rules laid down in the Order of Council of October 29, 1914, and the reply of Great Britain cited the American Civil War cases as substantiating her present position. The British prize courts applied the rules of the Order previously referred to in the cases of The Kim, The Alfred Nobel, The Bjornsterjne Bjornson, and The Fridland, (1915) P. 215, decided in July, 1915. The ships carried mainly American meat products consigned "to order" at Copenhagen and were seized and condemned by the court on the ground that Germany was the place of ultimate consumption of the goods.

The rules laid down by England are being criticised by American authorities on International Law fully as severely as the doctrine enunciated by our Supreme Court during the Civil War was

attacked by English writers. Dr. Edwin M. Borchard in a note to an article in the American Journal of International Law for January, 1915, at page 140 points out that the British rule as to the burden of proof in cases of conditional contraband is contrary to all the previous holdings on the subject and wholly inconsistent with the position taken by England in the past. The same criticism is made by Professor J. W. Garner (Garner: International Law in the European War, 9 Am. Jour. Int. L. 372.) The latter writer declares that England is putting her own interpretation on the Declaration of London in considering Germany a country without a sea board. He also points out that the circumstances under which the American cases arose were different from those existing in this war, in that Nassau had never been of any commercial importance previous to the war whereas Denmark has been carrying on a trade of its own with Germany all along and much of the goods shipped from this country become part of the "common stock" of the country even though they may eventually find their way to Germany. Furthermore the fact of the consignment being "to order" was by the American courts regarded merely as a suspicious circumstance. Under the English rule that in itself is a presumption of guilt.

The history of the doctrine of continuous voyages discloses the fact that most of the controversies connected with it have related to the situation to which it should be applied and the rules of evidence followed in finding the facts calling for its application. The protests of the United States against the English application of it in the early part of the nineteenth century were really against the enforcement of the Rule of 1756. The American Civil War cases were criticised chiefly because they departed from certain presumptions deducible from the ships' papers theretofore considered conclusive and introduced new rules which some authorities feared would be abused in practice. The application of the doctrine to blockades was opposed because it was an innovation and might lead to the virtual "blockade of neutral ports by interpretation." At the present time the controversy again relates mainly to the evidentiary questions and whether it shall be applied to conditional contraband. The inherent justice of the doctrine as an abstract legal proposition has firmly established it in international law. The efforts of jurists of the future should be directed toward preventing its abuse by laying down just and proper rules of evidence for its application.

H. H.