Some Questions of International Law Arising from the Russo-Japanese War, Pt. VII

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IN the last issue of *The Green Bag* it was stated that the most important questions arising from the seizure of neutral vessels by Russian cruisers—viz., those connected with the great subject of contraband—would be reserved for a separate discussion in our next paper. This pledge we shall now attempt to fulfil.

The Russo-Japanese war promises to mark an important epoch in the history of neutral rights and obligations, more particularly in definitely establishing the rights of neutral commerce in respect to articles *ancipitis usus* (double or dual use), and in extending the duties of neutral Governments in respect to the use of neutral ports by belligerent armed vessels.¹

On February 10, 1904, Japan published the following list of contraband articles which are divided into two classes corresponding to the English and American division into absolute and conditional contraband:—(1.) "Military weapons, ammunition, explosives, and materials including lead, saltpetre, sulphur, etc., and machinery for making them, uniforms, naval and military, military accoutrements, armour-plated machinery and materials for construction or equipment of ships of war, and all other goods which, though not coming under this list, are intended solely for use in war. Above-mentioned articles will be regarded as contraband of war when passing through or destined for enemy's army, navy or territory. (2.) Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, coins, gold and silver bullion, and materials for construction of telegraphs, telephones and railways. Above-mentioned articles will be regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy."²

It will be seen from the above list that Japan recognizes the English and American doctrine of Conditional and Occasional Contraband, so vigorously and (so it seems

¹This subject will be discussed in the next issue of *The Green Bag*.

²For this list which, so far as I am aware, has not been reprinted by any American newspaper, see London *Times* (weekly ed.) for February 26, 1904. Cf. list published in Appendix VII. of Takahashi's *Cases on International Law During the Chino-Japanese War*. See also lists found in the *Manual of Naval Prize Law* (p. 20), drawn up by Professor Holland of Oxford in 1888 for the use of the British Admiralty, and Art. 19 of the *Instructions to Blockading Vessels and Cruisers*, issued by the United States Government on June 20, 1898. (See Appendix III. in Snow's *International Law*. The list given in the *Instructions* has also been incorporated into Stockton's *Naval War Code*.) These lists, which are those of the leading modern maritime nations who have the power to enforce their decrees, may be considered as the most authoritative. One looks in vain for agreement or consistency in treaties and amongst the authorities or publicists; but it is certainly fortunate that the leading maritime nations of the world (excepting France and Germany, perhaps), are in substantial agreement in regard to the question as to what articles may be dealt with as contraband of war. France can scarcely be cited any longer as favoring the restriction of contraband to arms and ammunition since her attempt to make rice absolute contraband in 1885. In 1870 Germany remonstrated strongly with the English Government for permitting the export of coal to France.
Russia, on the other hand, published on February 28, 1904, an extensive list of contraband in which the distinction between articles shown that they are destined to be used in an existing war, and that they are carried to one of the belligerents with the intention of rendering him aid. (For criticism of the doctrine of the intent of the owner as applied to contraband, see Kleen, Contrebande de guerre, pp. 37-43.)

Heffer (§160) admits the existence of articles of occasional or conditional contraband "in treaties and in the special regulations of several countries," and adds that "a belligerent can only interfere with them when neutral trade, in conveying them to the enemy, affords to the latter a succour of a manifestly hostile nature." The Russian De Martens (Traité, III., p. 351), who defines contraband as "objects which a neutral vessel is attempting to deliver (cherche à faire entrer) upon the territory of one of the belligerent States" (which objects, he declares, may always be seized), admits that "those (objects) which are not of direct service in war may also be seized in exceptional cases according to the character and destination of the cargo and, in general, under certain determinate circumstances." Kleen (Contrebande de guerre, pp. 19 and 29) would limit the seizure and confiscation of articles as contraband of war to "munitions of war properly so called, i.e., objects expressly made for war or immediately and specially serviceable for warlike use in their actual state," and to "things which enter into the composition of such objects, if it be sufficient to re-unite them or to place them into juxtaposition without any other labor, transformation, or improvement."

It will thus be seen that all of the Continental publicists cited above, with the exception of Haueneville and Kleen (the latter of whom seems to be the only thoroughly logical and consistent opponent of the doctrine of conditional (or occasional contraband), practically concede the principle underlying the British and American contention, viz., that articles of dual or double use may, under certain circumstances (e.g., if destined for military use), be seized and confiscated as contraband of war. Their criticism seems in reality to be directed against some of the ways in which the doctrine has been applied by English and American prize courts rather than against the principle or doctrine in itself.

It should be noted that the Institute of International Law, in its session at Vienna in 1896, attempted to abolish what it called relative and accidental contraband as applied to articles anecphitis now, and limited contraband of war to (1) arms of every kind, (2) munitions of war and explosives, (3) military material such as objects of equipment, uniforms, gun-carriages, etc., (4) vessels equipped for war, (5) instruments especially made for the immediate manufacture of munitions of war. But the belligerent is permitted, at the risk of having to pay indemnity, to preempt or sequester objects which, taken on their way to an enemy port, may serve equally for warlike or pacific usage. See Annaire, XVI., p. 205.
ticles absolutely and conditionally contraband was apparently ignored. This list was as follows:

1. Small arms of every kind, and guns, mounted or in sections, as well as armour plates.
2. Ammunition for fire-arms, such as projectiles, shell-fuses, bullets, priming, cartridges, cartridge-cases, powder, saltpetre, sulphur.
3. Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes.
4. Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoon, bridge trestles, barbed wire, harness, etc.
5. Articles of military equipment and clothing, such as bandoliers, cartridge-boxes, knap-sacks, straps, cuirasses, entrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, etc.
6. Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy.
7. Boilers and every kind of naval machinery, mounted or unmounted.
8. Every kind of fuel, such as coal, naphtha, alcohol and other similar materials.
9. Articles and material for the installation of telegraphs, telephones, or for the construction of railroads.
10. Generally, everything intended for warfare by sea or land, as well as rice, provisions and horses, beasts of burden and others which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.¹

¹This version, which differs somewhat from that published in the American newspapers, is the one given by T. J. Lawrence in his recent work, War and Neutrality in the Far East, pp. 152-53.

The meaning of the words others and enemy in article 10 are ambiguous. As Secretary Hay says in his note of August 30, 1904, which contains the protest of the United States against the decision of the Russian prize court at Vladivostok in the case of the Arabia, to Mr. McCormick, our ambassador at St. Petersburgh:

"The ambiguity of meaning which characterizes the language of this clause, lending itself to a double interpretation, left its real intention doubtful. The vagueness of the language, used in so important a matter, where a just regard for the rights of neutral commerce required that it should be clear and explicit, could not fail to excite inquiry among American shippers, who, left in doubt as to the significance attributed by His Imperial Majesty's Government to the word 'enemy'—uncertain as to whether it meant 'enemy government or forces' or 'enemy ports or territory'—have been compelled to refuse the shipment of goods of any character to Japanese ports. The very obscurity of the terms used seemed to contain a destructive menace, even to legitimate American commerce.

"In the interpretation of clause 5 of article 10, and having regard to the traditional attitude of His Imperial Majesty's Government, as well as to the established rule of International Law, with respect to goods which a belligerent may or may not treat as contraband of war, it seemed to the Government of the United States incredible that the word autres (others), or the word ennemi (enemy), could be intended to include as contraband of war foodstuffs, fuel, cotton and all other articles destined to Japanese ports, irrespective of the question whether they were intended for the support of a non-combatant population or for the use of the military or naval forces. In its circular of June 10 last, communicated by you to the Russian Government, the department interpreted the word enemy in a mitigated sense, as well as in accordanc with the enlightened and humane principles of International Law, and, therefore, it treated the word enemy, as used in the context, as meaning 'enemy government or forces,' and not the 'enemy ports or territory.'

"But if a benign interpretation was placed on the language used, it is because such an interpretation was due to the Russian Government, between whom and the United States a most valued and unbroken friendship has always existed, and it was no less due to the commerce of the latter, inasmuch as the broad interpretation of the language used would imply a total inhibition of legitimate commerce between Japan and the United States, which it would be impossible for the latter to acquiesce in.

"Whatever doubt could exist as to the meaning of the Imperial Order has been apparently re-
To this list raw cotton was added by Imperial Order on April 21, 1904.

In the publication of this extensive list of articles (all of which she seems to have regarded as absolutely contraband) and still more in her subsequent conduct, Russia not only showed that she intended to ignore the doctrine of Conditional or Occasional Contraband, but she included in her list of things absolutely contraband many articles of ancipitis usus, such as coal, rice, horses, provisions, telegraph and railway material, etc. These have always hitherto been regarded either as not contraband at all, or, if so, as subject to preemption or confiscation only in certain contingencies or under certain circumstances, e. g., when destined for a blockaded port, a place besieged, or when obviously intended for, or liable to fall into the possession of, the army or navy of the enemy. Russia will thus be seen to have gone farther than any belligerent has ever gone, at least since the time of the Napoleonic wars, in the direction of a real or threatened attack upon the rights and interests of neutral commerce. "The Russian Government, which more than a century ago was the foremost champion of the freedom of neutral commerce, put forth for, we believe, the first time in the history of civilized warfare the amazing pretension that all such goods should be considered contraband regardless of destination or circumstances."³

The publication of this list drew forth some severe criticism on the part of the English and American press, and what appears to have been an informal or semi-official protest on the part of our State Department at Washington, but it was not before the month of June that the American and British Governments took formal action. The British Government appears to have entered its first formal protest against Russia's inclusion of rice and other foodstuffs in her list of contraband early in June. On June 10, 1904, Secretary Hay sent the following circular (which we reproduce in full because of its importance and because it serves to set forth the American position on the subject of contraband, together with the main arguments with which this view has been supported by one of our greatest statesmen) to American Ambassadors in Europe:

Department of State,
Washington, D. C., June 10, 1904.

To the Ambassadors of the United States in Europe:

Gentlemen: It appears from public documents that coal, naphtha, alcohol and other fuel have been declared contraband of war by the Russian Government. These

³"In regard to the Russian declaration of foodstuffs as contraband, it is said at the State Department that the destination of such goods must determine their character. If they are intended for either army they are contraband and subject to seizure. If they are intended for the use of civilians, except in the case of besieged towns, they must not be seized, or if seized, they must be paid for." See New York Times for March 1, 1904.

²See e. g., St. Petersburg dispatch of June 12, in New York Times.

¹This circular was not, however, made public before August 9, 1904. The British protest, which has not been published, so far as I am aware, is stated by the Associated Press to have been along the same lines as the American Circular. But the British protest appears to have been directed mainly against the inclusion of foodstuffs as contraband, whereas Secretary Hay confines himself mainly to coal and cotton. For his reasons, see his note of August 30, 1904.
articles enter into general consumption in the arts of peace, to which they are vitally necessary. They are usually treated, not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as "conditional contraband," that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may be rather classed with provisions and foodstuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military or naval forces of the enemy.

In the war between the United States and Spain the Navy Department General Orders No. 492, issued June 20, 1898, declared, in Article 19, as follows: "The term contraband of war comprehends only articles having a belligerent destination." Among articles absolutely contraband it declared ordnance, machine guns and other articles of military or naval warfare. It declared as conditional contraband "coal, when destined for a naval station, a port of call or a ship or ships of the enemy." It likewise declared provisions to be conditionally contraband "when destined for the enemy's ship or ships, for a place that is besieged."

The above rules as to articles absolutely or conditionally contraband of war were adopted in the naval war code, promulgated by the Navy Department June 27, 1900. While it appears that the document mentioned that rice, foodstuffs, horses, beasts of burden, and other animals which may be used in time of war are declared to be contraband of war only when they are transported for account of or destined to the enemy, yet all kinds of fuel, such as coal, naphtha, alcohol, are classified along with arms, ammunition and other articles intended for warfare on land or sea.

The test in determining whether articles ancipitis usus are contraband of war is their destination for military uses of a belligerent. Mr. Dana, in his notes to Wheaton's "International Law," says:

"The chief circumstance of inquiry, would naturally be the port of destination. If that, is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which a military expedition is fitted out—the presumption of military use would be raised, more or less strongly, according to circumstances."

In the wars of 1859 and 1870 coal was declared by France not to be contraband. During the latter war Great Britain held that the character of coal depended upon its destination, and refused to permit vessels to sail with it to the Spanish fleet in the North Sea. Where coal or other fuel is shipped to a port of a belligerent, with no presumption against its specific use, to condemn it as absolutely contraband would seem to be an extreme measure.

Mr. Hall, "International Law," says:

"During the West African conference in 1884 Russia took occasion to dissent vigorously from the inclusion of coal among articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention or instrument whatever, which would imply its recognition as such."

We are also informed that it is intended to treat raw cotton as a contraband of war. While it is true raw cotton could be made into clothing for the military uses of a belligerent, a military use for the supply of the army or garrison might possibly be made of foodstuffs of every description which might be shipped from neutral ports to the non-blockaded ports of a belligerent. The principle under consideration might, therefore, be extended so as to apply to every article
of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

Coal or other fuel and cotton are applied for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent States of all articles which could be finally converted to military uses. Such an extension of the principle by treating coal and all other fuel and raw cotton as absolutely contraband of war simply because they are shipped by a neutral to a non-blockaded port of a belligerent would not appear to be in accord with the reasonable and lawful rights of a neutral commerce. I am, your obedient servant,

John Hay.

Fortunately for Russia and the neutral nations, the Russians had no opportunity of making a practical application of their views on the subject of contraband until after the capture of several neutral vessels in the Pacific by the Vladivostok squadron during the months of June and July, 1904. The first case which aroused controversy was that of the British collier Allanton which was captured in the straits of Korea on her return voyage from a Japanese port, while conveying Japanese commercial (anthracite) coal from Japan to Singapore. One of the grounds on which the vessel was condemned was that she had carried contraband (Welsh) coal to Japan on her outward voyage, i.e., the Allanton appears to have been condemned for a past, not a present offense. The British Government refused to interfere at the time on the ground that, inasmuch as an appeal to the Admiralty court at St. Petersburg had been allowed, the case was still sub judice.

If the facts alleged by those interested in the fate of the Allanton are correct, there can be no question but that Russia has been guilty of a serious violation of the law of contraband in condemning the vessel for an offence supposed to have been committed on her outward voyage. As Lord Stowell said in the case of the Imina "the articles must be taken in delicto, in the actual prosecution of the voyage to an enemy's port."

On the Allanton case, see especially letter of W. R. Rea, the owner of the Allanton, in the London Times (weekly ed.) for September 2, 1904, and the letter from the British Foreign Office to Mr. Stanley Mitcalfe in the London Times (weekly) for August 26, 1904. Some of the grounds given by the Russians for the condemnation of the vessel were very trivial, as, e.g., that she had a Japanese cabin boy on board, that the official log-book had not been entered up properly, etc. A more serious charge was that her papers were irregular. The Allanton has since (October 29, 1904) been released by the Admiralty Court of St. Peters burg.

The comment of the British and American newspapers (including those of the political opponents of the Administration) upon the position taken by Secretary Hay in this circular appears to have been uniformly favorable. I have been unable to detect a single dissenting voice amidst the general chorus of approval.

As has been noted in a previous paper, the neutral colliers seized and detained as prizes in the Red Sea during the second week of the war were released in response to an order of the Czar's on the ground that these captures had been made before the formal declaration of coal as contraband of war. The later Red Sea seizures were decided on other grounds than that of their alleged carriage of contraband. See The Green Bag for October, 1904.
Under the present understanding of the law of nations you cannot generally take the proceeds on the return journey.\(^1\)

The most important cases bearing on the subject of contraband which have so far\(^2\) arisen during the present war are those of the **Knight Commander**,\(^3\) the **Arabia**, and the **Calchas**—all of which are cases of prizes captured by the Vladivostok squadron in the latter part of July, 1904.

The **Knight Commander** was a British steamer with a general cargo including flour and railway material from New York consigned to various Eastern ports, *viz.*, Manila, Shanghai and Yokohama. She was sunk and afterwards condemned by a Russian prize court. The questions involved in her destruction as a neutral prize have been discussed in a previous paper.\(^4\) Our conclusion was that there existed, under the circumstances, no justification for her destruction, even if she carried contraband. The question of apology and indemnity for the destruction of the vessel is one which primarily concerns the British Government, but the American owners of the cargo would in any case seem to be entitled to compensation or restitution even in the case of such portion of her cargo as consisted of contraband, inasmuch as it was illegally destroyed before condemnation by a properly constituted prize court.\(^5\)

The cases of the **Arabia** and the **Calchas** may conveniently be considered in connection with each other. The **Arabia** was a German vessel with a cargo composed largely of American flour and railway material (steel rails) consigned to Hong Kong\(^6\) and Japanese ports. There appears

\(^1\) The rule is different in the case of an attempted breach of blockade, in which case the outward and return voyages are regarded as parts of one transaction and the offence clings to the blockade runner during the return voyage. See Lord Stowell's decision in the case of the *Juffres Maria Shroeder*, 3 Rob. 153. But in the case of contraband the return voyage is regarded as a separate and, therefore, innocent expedition. In the case of the *Nancy* (3 Rob. 127), Lord Stowell held that the return voyage will not be regarded as a separate and innocent expedition if the "outward and homeward voyages are but parts of one transaction, conducted by the same persons and planned from the beginning as one adventure, and if on the outward voyage contraband goods and fraudulent papers are carried." Cited by Lawrence, *Principles*, p. 616. But, as Lawrence says, "it is somewhat doubtful whether this view would be acted upon at the present time. Continental publicists condemn it as an undue extension of belligerent rights, and the British Admiralty Manual contents itself with the statement that a commander should detain a vessel he meets on her return voyage with such a record as we have described behind her." See Holland's *Manual*, pp. 23-24.

\(^2\) October 5, 1904.

\(^3\) The German steamer *Thea*, which was sunk by the Vladivostok fleet at about the same time as the **Knight Commander**, is omitted because no facts have come to light which would make a discussion of this case profitable, or even possible. No question appears to have been raised regarding the legality of the capture of the **Chellenham** early in June. It was said to have been caught in the act of conveying railway sleepers to Korea.

\(^4\) See *The Green Bag* for October, 1904.

\(^5\) It was reported at the trial that a letter book, which was found in the captain's cabin, contained copies of correspondence, proving that the cargo (probably the railway material) on board the **Knight Commander** was really destined for Chechmolo. In that case, its confiscation as contraband of war by a prize court would have been entirely justifiable. See *London Times* (weekly ed.) for August 12, 1904.

\(^6\) The **Arabia** appears, at the time of her seizure, to have been on her way to the neutral port of Hong Kong, but this fact would by no means save her cargo from condemnation if it could be shown that its real or ultimate destination was a belligerent one. The doctrine of continuous voyage has, however, no applicability to this case, and, strangely enough, no case calling for its application seems thus far (October 5, 1904,) to have arisen. The doctrine is undoubtedly sound in principle, although liable to great abuse in practice.

The doctrine of continuous voyage was first applied to contraband by a French prize court (in the case of the *Vrou Houwina*) during the Crimean War in 1855, but it did not attract general attention until the extension and publicity given to the doctrine by the decisions of the Supreme Court of the United States (in the cases of *Peterhoff*, etc.), at the close of the Civil War. The doctrine in question was approved by the Italian Council of Prizes in 1896 (in the case of the *Dudla*), and was sanctioned by the Institute of International Law at its session in Venice the same year. The attempt of England to enforce the doctrine (in the cases of the *Bundesrathe*, etc.) during the Boer War in 1900 failed, however, owing to the determined opposition of Germany. On
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to have been no evidence that either the flour or the railway material was intended for the use of the Japanese Government. The cargo was shipped in the ordinary course of trade from Portland, Oregon, and was consigned to private individuals (merchants) in Yokohama.

The Russian prize court at Vladivostok, which gave its decision in the latter part of July, condemned such portion of the cargo (flour and railway material) of the Arabia as had been consigned to Japanese ports; but the vessel together with the remainder of the cargo (which consisted of flour consigned to Hong Kong and which included more than one-half of its bulk and weight) was released.

The Calchas was a British steamer with a cargo of flour, raw cotton, lumber and machinery shipped from Tacoma and consigned to Yokohama, Kobe, Hong Kong and Europe. As in the case of the Arabia, it is claimed by the owners of the cargo that the commodities shipped to Japanese ports were consigned to private individuals and that they were in no wise intended for the consumption of the Japanese army or navy. The decision of the local Russian prize court at Vladivostok was the same as in the case of the Arabia. The vessel together with that part of the cargo consigned to neutral ports was released, but that portion of the cargo which had been consigned to Japanese ports was condemned.

The only attempted justification of these decisions is the following semi-official statement by a high Russian official to the Associated Press:

“Foodstuff consigned to an enemy’s port in sufficient quantity to create the presumption that it is intended for the use of the Government’s military or naval forces is the decision of the prize court was not rendered before September 13.

The Calchas was, however, detained at Vladivostok until October 28, i.e., a month and a half after she should have been released, on the plea of the Russian Crown Advocate that she had carried mail matter from the United States to Japan containing information of special value to the enemy addressed to Japanese officials. This fact was not made public until October 9, when it was learned that several of the Pacific mail steamship lines had notified the Postmaster-General at Washington that they would hereafter refuse to carry United States mail addressed to Japan. It was subsequently learned that the mail bags of the Calchas had been opened by Russian officials and that the contents of four registered mail sacks had not only been opened, but removed. The bags were then resealed and forwarded to Japan after considerable delay. Among the letters lost are said to have been some diplomatic communications (which are privileged) from the Japanese Minister at Washington. It was also reported on October 14 that a pouch containing private or domestic mail for the United States cruiser Cincinnati, then at Nagasaki, Japan, had been opened, subsequently resealed, and then sent on to its destination.

We are not informed as to the action taken by our State Department at Washington with regard to this matter, but if the facts have been correctly stated, there can be no doubt but that Russia has been guilty of a clear violation of the International Postal Union treaty, as well as of International Law. However far the belligerent right of search of neutral mail steamers and confiscation of noxious mail matter may extend, it cannot possibly be made to justify the detention of a mail steamer under such circumstances. The law bearing on this subject has already been discussed in a previous article of this series. See The Green Bag for October, 1904.

In both cases an appeal has been taken to the higher Admiralty Court at St. Petersburg, which may be expected to reverse the decisions of the local court in view of the recent concessions, in principle, made by the Russian Government to Great Britain and the United States.
prima facie contraband and sufficient to warrant holding it for the decision of a prize court. Even if consigned to private firms, the burden of proof that it is not intended for the Government rests upon the consignor and consignee. If it can be proved that it is intended for non-combatants it will not be confiscated. Small consignments of foodstuff in mixed cargoes will be considered presumptively to be regular trade shipments and will not be seized as contraband."

On August 16 the British Government addressed a strongly-worded protest to the Russian Government against the Russian view of contraband, as also against the sinking of neutral merchantmen by Russian warships. In respect to contraband, Great Britain pointed out the distinction between conditioned and absolute contraband, and "with regard to foodstuffs consigned to a belligerents' port," it was maintained that "proof is necessary that the goods are intended for the belligerent's naval or military forces before they can be considered as contraband."  

On August 18, 1904 the United States Government protested vigorously against the confiscation of American flour and railway material on board the Arabia. Secretary Hay, after remarking that the "judgment of confiscation appears to be founded on the mere fact that the goods in question were bound for Japanese ports and addressed to various commercial houses in said ports," observed that "in view of its well-known attitude, it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war."

After calling attention to the ambiguity of the Russian Imperial Order of February 28, in respect to the word "enemy," Mr. Hay thus explained the attitude of the United States in respect to telegraphic, telephonic and railway material:

"With respect to articles and material for telegraphic and telephonic installations, unnecessary hardship is imposed by treating them all as contraband of war—even those articles which are evidently and unquestionably intended for merely domestic or industrial uses. With respect to railway materials, the judgment of the court appears to proceed in plain violation of the terms of the imperial order, according to which they are to be deemed to be contraband of war only if intended for the construction of railways. The United States government regrets that it could not concede that telegraphic, telephonic and railway materials are confiscable simply because destined to the open commercial ports of a belligerent."

This great master of International Law and Diplomacy then proceeds to furnish an explanation of the nature of contraband which we may accept as authoritative:

"When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule—no deviation from the criterion—for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely, warlike nature, use and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband"
of war if destined to enemy territory; but articles which, like coal, cotton and provisions, though ordinarily innocent, are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

"This substantive principle of the law of nations can not be overridden by a technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature; and it cannot be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise, all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.

"The established principle of discrimination between contraband and non-contraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness and destination has been adopted by the common consent of civilized nations, after centuries of struggle, in which each belligerent made indiscriminate warfare upon all commerce of all neutral States with the people of the other belligerent, and which led to reprisals as the mildest available remedy."

The logical results of the new Russian doctrine are thus summarized:

"If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by his Imperial Majesty's Government is acquiesced in, it means, if carried into full execution, the complete destruction of all neutral commerce with the non-combatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principle of the declaration of Paris set forth in the imperial order of February 29 last, that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and non-contraband goods; and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State." And he closes with the following protest on the part of the United States:

"You will express to Count Lamsdorff the deep regret and grave concern with which the government of the United States has received his unqualified communication of the decision of the prize court; you will make earnest protest against it and say that the government of the United States regrets its complete inability to recognize the principle of that decision, and still less to acquiesce in it as a policy. I have the honor to be, sir, your obedient servant,

"JOHN HAY."

In her reply of September 16 to the British protest on the subject of contraband, Russia is reported as having informed the British Government that the Russian Government had "agreed to view as of a conditionally contraband character foodstuffs and fuel," and that supplementary instructions had been issued to the Russian naval commanders and prize courts, calling attention to the misinterpretation which had been placed upon the (Russian) prize regula-

7The Hay note or protest of August 30, 1904, which will take rank as one of the best and most authoritative utterances on the law of contraband, has, so far as I am aware, been published in full by only one American newspaper—the Washington Star, September 22, 1904. For an excellent summary, see the New York Sun for September 21, 1904.

8There appears to be some doubt as to whether the Russian reply is specific or satisfactory in respect to fuel. The question of the contraband character of coal was not directly raised by the Russian prize court decisions.
It is admitted that "shipments in the ordinary course of trade to private persons or firms, even at an enemy's port, may be considered prima facie not contraband," but upon this point a distinct reservation is made. "The simple fact of consignment to private persons does not preclude the possibility that the articles are ultimately destined for belligerent forces, and Russia insists that it be not necessarily regarded as conclusive evidence of the innocent character of the goods." This reservation is entirely proper. But Russia admits that in such cases the burden of proof rests upon the captor. This is a capital point.

The answer of Russia to the American protest was received on September 19 and is said to follow generally the lines of her reply to Great Britain. Count Lamsdorff stated that instructions had been sent to the prize courts and naval commanders supplementing and explaining the regulations respecting contraband of war originally issued. The conditional contraband character of articles of dual use is admitted in the new instructions. If articles of dual use are addressed to private individuals in Japan they will not be subject to seizure and confiscation unless private individuals are shown to be agents or contractors of the military or naval authorities of Japan.

It will thus be seen that Russia has apparently accepted in principle the contention of the American and British Governments that articles ancipitis usus are only subject to confiscation when consigned to places under siege, blockaded ports, or when clearly destined for the military or naval forces of one of the belligerents, and that they are not subject to seizure and confiscation merely because they are consigned to a belligerent port, at least in respect to provisions. The decisions of the Russian prize court at Vladivostok will probably be reversed by the Admiralty Court at St. Petersburg, at least, in respect to the confiscation of flour, in the cases of the Arabia and the Calchas, and we have a right to expect that the conduct of Russian naval commanders and prize courts will be more circumspect in the future.

1 New York Times for September 17, 1904. This communication was made verbally by Count Lamsdorff to the British Ambassador Hardinge at St. Petersburg. It will not involve, it is said, any public amendment of the Russian contraband and prize regulations, but it implies a new official interpretation of these regulations. As such it is binding upon Russian prize courts and naval commanders. Russia thus "saves her face" by not making a public surrender of her former position.

2 New York Times for September 20, 1904. Nothing seems to have been said by Russia regarding machinery and railway material.