

THE "CONTINUOUS VOYAGE" DOCTRINE DURING THE CIVIL WAR, AND NOW

Mr. Atherly-Jones, in his *Commerce in War*,¹ says that what the courts of the United States did, during the Civil War, was not to apply the principle of a continuous voyage (which had been originally asserted in support of national monopolies of colonial trade), to the carriage of contraband goods, still less to blockades; but to depart from the old rules of evidence.

Undoubtedly, the English prize courts, at the beginning of the nineteenth century, showed themselves slow to condemn, as prize, on conjectural evidence, a ship whose papers were regular and showed a clearance for a neutral port, where their honesty was vouched for by those on board of her. In such case they required, as a rule, strong and clear proof that her contract of carriage to that port was not in fact to end with her arrival there, but that she had a hidden purpose to play a part in a scheme to go further, or to forward the cargo to the territory of the belligerent in some other way. A ship, or her cargo, as the rule was familiarly stated, was only to be condemned on proof "out of her own mouth." It can only be proper to condemn a ship, when it was proper to arrest her; and the right of search, it was held, should justly be limited to what is, in its nature, the best evidence.

It does not seem to the writer that the position of Mr. Atherly-Jones is sustained by an examination of the line of American decisions to which he refers. What they do show is an unnecessary commingling of the subjects of contraband and blockade.²

Chief Justice Chase, who speaks for the court in most of the cases in question, never assumed to disregard the accredited rules of evidence in Anglo-American prize courts. In one suit, indeed, the Supreme Court upheld quite an irregular "invocation" by the captor of evidence

¹ Page 255.

² See Professor Holland's criticisms in *Takahashi's Cases on International Law During the Chino-Japanese War*, xxi.

beyond what came from the ship itself; but they did so on the ground, not that the procedure of the District Court was right, but that it had worked no injustice. In the opinion it was also asserted that "the clearest good faith may very reasonably be required of those engaged in alleged neutral commerce with a port constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war." But the Chief Justice was able to refer to official correspondence on the part of the British Government which fairly justified this assertion.³ If Nassau was admittedly such a port, the good faith of the voyage was necessarily open to grave question. The *Springbok*, if trading there with an ulterior purpose to furnish contraband goods to the enemy, could not justly complain if her object was very critically investigated. *Dolus circumto non purgatur*. Fraud is seldom openly practiced, and seldom confessed. It hides its head. Its existence is never presumed. It can often be brought out only by inference from facts which are somewhat remote. A considerable latitude in proof of fraud is therefore allowed in all courts, but especially in those of admiralty.⁴

Dr. Thomas Baty, in discussing the Declaration of London, has thus characterized the American use of the doctrine of the continuous voyage:

Nothing surprises one more than to hear the doctrine of the continuous voyage called an "English" doctrine. In Stowell's hands it was English, but harmless. He meant that a ship which was obviously going to a particular port, and had as obviously carried her cargo from another, should be held to have carried it from one to the other, despite intervening calls. That was a perfectly plain and simple matter. What we are now asked to allow, is to admit, after the fashion of Chief Justice Chase, a roving inquiry into all sorts of presumptions while the voyage is yet in its initial stage. That is not English, not satisfactory, and not inexpensive. Judge Nelson—whose years on the bench were twenty to Chase's one, and who was afterwards one of the *Alabama* Commissioners—condemned the idea when it was first enunciated. Hall quotes His Honour as saying: "The feeling of the country was deep and strong against England, and the Judges, as individual citizens, were no exception to that feeling. Besides, the Court was not then familiar with the

³ The *Springbok*, 3 Wall. 1, 20, 22.

⁴ *Hoxie v. Home Insurance Co.*, 32 Conn. 21, 37; Letter of Sir William Scott and Sir John Nicoll of September 10, 1794, to John Jay, Minister of the United States to England, appendix to Chitty, *Law of Nations*, 302.

law of blockade.” Judge Nelson adds that the *Springbok* case was decided (as does not appear in Wallace’s Reports) on the casting vote of the Chief Justice.⁵

The phrase “roving inquiry into all sorts of presumptions” is certainly an extravagant statement of the rulings of the Supreme Court in any of the cases arising out of the Civil War, in which two voyages were held to be in effect one. Mr. Justice Nelson’s indiscreet declaration in a private letter to William Beach Lawrence, that the court were not, when the case of the *Springbok* was decided, familiar with the law of blockade, was no doubt true. Many years had then elapsed since the United States had been engaged in a maritime war; but it is worth remembering that one prize case had quite recently been determined by the Supreme Court in which this very doctrine of the continuous voyage was stated and affirmed,⁶ and that a third of those who were then on the bench sat also to decide the fate of the *Springbok*. It might be noted also that Mr. Justice Nelson did not dissent, in either of the cases named, from the opinion or the judgment.

It can hardly be denied, however, that in several opinions, in Civil War prize cases, there is an apparent confusion between the consequence of carrying contraband and the consequence of trying to run a blockade.

In the case of *The Peterhoff*, this statement is made:

We know of but two exceptions to the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or siege; and the second that there must be no conveyance of contraband to either belligerent.

This is clear, and it is true. But on the same page it is said of an earlier opinion:

The *Bermuda*⁷ and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality either directly or by substitution of another vessel, for a blockaded port. The *Peterhoff* was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the *Bermuda*, the cargo destined primarily for Nassau could not reach its

⁵ Reports of the International Law Association, XXVI, 118.

⁶ *Jecker v. Montgomery*, 13 How. 498; 18 How. 110, 114.

⁷ 3 Wall. 514.

ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all.⁸

Do not such expressions denote a misapprehension of the law of blockade?

A ship may be seized for trying to run a blockade, whatever her nationality, whatever her cargo, whatever be the character of her papers. To support the condemnation of the *Bermuda*, it was enough to show that she was virtually and knowingly carrying contraband goods to an enemy's port. It was not essential to show that it was also a blockaded port.

Prize law treats a ship as a moral person. What she carries partakes her character, and may infect it. The cargo is the cause of the voyage. If the ownership of ship and cargo be the same, a forfeiture of the cargo of a neutral vessel for breach of blockade, or if it be carrying contraband goods, her sailing for any enemy's port, forfeits also the ship. She is condemned because she is guilty of unneutral conduct. If she has tried to run a blockade, whatever be her cargo, she has likewise attempted to evade a legal duty. If there were no intention of evasion, she must be freed.

What duty is it, the breach or intended breach of which entails such a penalty?

A duty which a government will enforce is something which we are at fault if we do not perform. It is something owed to a power higher than we. It is something owed by virtue of law, and of a law to which we are amenable.

No ship has two masters. She is accountable to but one power—her own sovereign—so long as she remains within his territorial waters. But if she puts out to sea, she impliedly accepts such liabilities as may be imposed upon her by the general rules of maritime law. Her own sovereign consents to this by letting her sail.

International law is a part of maritime law. It is that part which treats the ship as a moral person. It recognizes certain rights as appertaining, during the course of a war, to each of the belligerent Powers,

⁸ 5 Wall. 28, 56.

and reciprocal duties in respect to those over whom such rights may extend. It recognizes a right of blockade. It recognizes a right to seize contraband goods on the high seas, destined to the enemy's country through any port, blockaded or unblockaded.

If a neutral ship comes within the power of a belligerent, which asserts that she is endeavoring to frustrate its efforts to keep supplies from its enemy, it can carry her before its prize courts, to ascertain whether her owners have not forfeited their property in her. The ground of such a forfeiture is her attempt to violate its belligerent rights, and her being caught red-handed while making the attempt.⁹ This is an offence against the law of nations, but it is seldom reached for punishment unless the ship is seized before actually reaching her point of destination. The forfeiture is, in the main, a preventive remedy. It is but an imperfect offence, the attempt to commit which is to be punished swiftly, if at all; certainly not later than the return voyage.

The doctrine of the continuous voyage is practically concerned only with cargoes of contraband goods, bound—directly or indirectly—to the country of an enemy of the captor. Theoretically, it may include a ship not carrying contraband, but intending to run a blockade either in ballast or with non-contraband goods. Such an intention has been viewed as a fault of the ship for which she may be seized anywhere on the high seas at the very beginning of her voyage.¹⁰

The Declaration of London (Art. 17) lays down something new, so far as American law is concerned, when it declares that the seizure of neutral vessels for violation of blockade may be made only within the radius of action of the ships of war assigned to maintain an effective blockade.

The *Springbok*, sailing from London to Nassau, laden with contraband, was seized on the high seas, about a hundred and fifty miles from her ostensible port of destination. Her cargo was declared good prize because, said the Chief Justice, "contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade." The opinion sums up the situation thus:

Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo

⁹ See *The Imina*, 3 C. Rob. 167.

¹⁰ *The Adula*, 176 U. S. 361, 370.

intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.¹¹

But suppose there had been no blockade. Would the *Springbok* have acted in good faith, as a neutral subject, had she planned just such a continuous voyage, carrying contraband?

In a carefully prepared article published in the Journal of this Society in 1910,¹² Mr. L. H. Woolsey states that he had found no English or American case in which the doctrine of the continuous voyage was directly and exclusively applied as a determining factor to a pure blockade case.

The Declaration of London was so framed as to exclude it in such cases altogether. Article 19 roundly declares that "whatever may be the ulterior destination of the vessel or of her cargo, the evidence of violation of blockade is not sufficiently conclusive to authorize the seizure of the vessel if she is at the time bound toward an unblockaded port."

Articles 17 and 19 were, when adopted, understood to be a concession by the United States in a compromise by which also (Articles 34 and 35) the seizure of conditional contraband under a claim of a continuous voyage was made a subject of close regulation.¹³ By Article 30 the American doctrine as to transportation by land, in the last stage of transit, so far as absolute contraband is concerned, and by Article 37 that respecting the place of capture as to all contraband, were sustained. Both strike the mind of the ordinary man with favor, and any judicial doctrine which has common sense to recommend it, is likely to stand the test of time.

The failure of the belligerents to ratify the Declaration of London nullified any obligation on our part on account of its ratification by our Government in 1912; and the modifications, subject to which each of them has since accepted it, were, of course, inconsistent with its provision (Article 65) that it forms "an indivisible whole." It certainly, however,

¹¹ The *Springbok*, 3 Wall. 1, 26, 27.

¹² Vol. IV, 829, note.

¹³ Stockton, "International Naval Conference of London", this Journal, III, 604, 608.

serves to show that at a time when no war was pending or apparently impending, the great Powers were at one in supporting the doctrine of the continuous voyage, as respects absolute contraband, to its full American extent.

Great Britain's failure to ratify it was probably dictated by a judicious self-interest.

The American dispatch to our Ambassador at London, of December 26, 1914, speaks of Great Britain as "usually the champion of the freedom of the seas." The historical student finds some difficulty in recognizing the truth of this description. Whatever the phrase "freedom of the seas" may mean, it is, in principle, opposed to the apparent interest of the greatest naval Power in the world. It necessarily imports freedom in some degree from interference with neutral trade, and England has certainly never shown any settled policy of abstaining from such interference.

The United States now find their commerce with belligerents in much the same situation in which England found hers, during our Civil War, and Chief Justice Chase's views are now insisted on by the British prize courts.

On November 7, 1914, our State Department notified the British Ambassador that our Government was of opinion that a neutral ship could not be properly seized on the ground that she was really carrying contraband to the enemy, unless this appeared from the evidence found on the ship and "not upon circumstances ascertained from external sources." The British Foreign Office, in its reply (of February 10, 1915) did not fail to point out the case of the *Bermuda*, and that the general position of both governments in the past was in affirmance of the conclusions there reached by our Supreme Court.

It must be admitted that it is a fair question of law whether the range of evidence to support a condemnation of goods as being conditional contraband may not have been widened by the thorough co-ordination or consolidation of both elements, civil and military, of the German Empire. All Germany,—not her soldiery alone,—was really mobilized at the first outbreak of hostilities, and all are in effect fed from the same spoon or by the same rule.

The Order in Council issued by Great Britain on March 15, 1915,

presses the doctrine of a continuous voyage so far that our Government (in its dispatch to our Ambassador at London, of March 30, 1915) has characterized its terms as "a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace." We therefore intimated that some *modus vivendi* should be arranged, conformably to what we preferred to regard as the spirit of the Order, whereby voyages by American merchantmen to neutral ports would not be interfered with, when it is known that they do not carry goods which are contraband of war, or goods destined to or proceeding from ports within the belligerent territory affected. Something of this nature has been in fact since achieved, in respect to shipments in the course of trade with Holland, through the interposition of the "Netherlands Oversea Trust" to guaranty the *bona fides* of the voyage; and the proceedings in the English prize courts have been regulated with a professed desire to avoid unnecessary interference with American shipping. Delays, of course, have occurred, and are likely in these and all other prize causes of importance to be prolonged by appeals to the Privy Council; but any such demand as that of the Chicago packers, in the matter of the meats seizures, that our Government insist at this time on a diplomatic rather than a judicial settlement of cases in admiralty, is opposed to our whole policy from the beginning of our national history. By that we have always, in dealing with countries having similar institutions to our own and courts which have won general confidence as real tribunals for the administration of justice, been ready to wait until those courts have spoken their last word, before our Executive Department finds fault with their Government for its course of action.

One thing is clear. The adoption *ad referendum* of the Declaration of London by substantially all the maritime Powers, and the prize case decisions thus far rendered in the present wars, as well as the general course of diplomatic correspondence, have given new strength to the doctrine of the continuous voyage as the American courts applied it to the events of the Civil War. It has now, in principle, the explicit sanction of the greatest naval Powers of Europe, by virtue of their incorporation of it in their Prize Codes or instructions, as revised under circumstances calling the closest attention to the doctrine in all its

bearings.¹⁴ It has recovered from the shock of the early assaults upon it of many European and some American jurists, and is now all the stronger for them. Where such authorities as Francis Wharton, writing in a semi-official character in his *International Law Digest*, and the members of the maritime prize commission of the *Institut de Droit International*,¹⁵ and the *Institut* itself,¹⁶ attack a doctrine vigorously, and after thirty years it is plain that they have failed to convince the world, it is no bad proof that they were wrong and the world is right.

SIMEON E. BALDWIN.

¹⁴ See the German Imperial *Prisenordnung*, as revised in 1915, Art. 39.

¹⁵ See Moore, *Int. Law Digest*, VIII, 731.

¹⁶ In 1882, though it came to a different conclusion in 1896.