first commission to revise the rules of arbitral procedure. Many improvements of the Convention of 1899 were due to his suggestions. In 1908–9 he represented Italy in the London Naval Conference.

As far back as 1893 he assisted the Marquis Visconti-Venosta in the Bering Sea arbitration, and he served as arbiter in the arbitration between France and Germany, known as the Casa Blanca case, in 1908; in 1912 he was likewise arbiter in the Canevaro dispute between Italy and Peru, and more recently, in 1913, he acted as arbiter in the cases of the *Carthage*, the *Manouba* and the *Tavignano*, decided by tribunals of the Permanent Court of The Hague.

For many years Mr. Fusinato was a member of the Institute of International Law. He was likewise a member of the curatorium of the Academy of International Law recently founded at The Hague, and which would have been opened in October of the past year if war had not unfortunately broken out in Europe.

It is difficult for the writer of this brief notice, associated as he was with Mr. Fusinato on many occasions, to refrain from a word of personal and affectionate regard. It is perhaps best, however, to voice only the regret of publicists generally at the loss of one whose services had already reflected distinction upon his country, and from whom even greater services were reasonably to have been expected.

## CONTRABAND OF WAR

In a circular issued by the Department of State on October 15, 1914, the question of neutrality and trade in contraband is dealt with for the benefit of the public.[1] The circular points out the difference between the sale by individuals and the sale by a neutral government to a belligerent, correctly stating that "generally speaking, a citizen of the United States can sell to a belligerent government, or its agent, any article of commerce which he pleases, whereas the sale by the United States would be an unneutral act." It then states that "a neutral government is not compelled by international law, by treaty, or by statute, to prevent" the sale of articles exclusively used for warlike purposes, such as arms, explosives, etc., or food-stuffs, clothing, etc., which may be used either by the non-combatants or by the armies in the field, but attention is called to the fact that articles of this kind "are considered contraband and are, outside the territorial jurisdiction of the neutral nation, subject

[1] The circular is printed in full in the SUPPLEMENT, page 124.

to seizure by an enemy of the purchasing government. An exception to unlimited sale, pointed out in the circular, is the prohibition contained in the neutrality laws of the United States, against the outfitting or furnishing of vessels in American ports, or of military expeditions on American soil in aid of a belligerent.

While these passages are correct as far as they go, they require a brief explanation, supplemented by a reference to the doctrine of continuous voyage.

It is usual to divide contraband into three classes. This was very briefly and skilfully done in the leading case of the *Peterhof* (5 Wallace 28), decided by the Supreme Court in 1866. Speaking for the Court, Chief Justice Chase said:

> The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade.

The desire of the neutral is to continue its trade as far as possible uninterrupted by the war. It is the aim of the belligerent to prevent trade of all kinds from reaching the enemy, as supplies received from the outside tend to, and often do, prolong the war. The neutral, therefore, tries to restrict the list of contraband within the narrowest limits, whereas the belligerent seeks to enlarge the list. Hence, disputes ordinarily arise between neutrals and belligerents, even although both claim to be acting in good faith.

The first class specified by the Chief Justice constitutes what is called absolute contraband; the second is generally termed conditional contraband. Articles of absolute contraband are presumed to be meant for the enemy forces if they are destined to the enemy country, because, as they can only be used for a hostile purpose, it is supposed that they are in reality meant for the armed and naval forces of the enemy. Articles of conditional contraband, that is to say articles which may be

used for a peaceable purpose as well as for a warlike purpose, are not presumed to be meant for the enemy by the mere fact that they are destined to the enemy country. Something more is required, and to make them contraband and subject to seizure it is necessary that they be destined not merely for the enemy country but to the armed forces, whether military or naval, to a port of naval or military equipment, to the enemy government, or to a person or persons properly to be considered as the agent of the government. They are contraband or not contraband, conditioned upon specific destination; hence the name.

It is believed, however, that the time-honored distinction drawn between the two classes is more specious than real, for at the present day articles useful to the army or navy may, if landed at an ordinary port, be easily and speedily transported by railroads to the army and navy. This was not the case when the distinction was pointed out by Grotius in his treatise on rights and duties in war and peace, published in 1625. It is, however, today a fact, and international law, to be adequate, must take note of facts.

Again, in a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organized so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field.

It is true, as pointed out in the circular, that the neutral subject or citizen is free to trade in articles of contraband, but this freedom is to be understood in the sense that trade in contraband is not prohibited by municipal law. It is not meant that such trade is absolutely free under international law, otherwise the belligerent would not have the right to intercept and to confiscate the articles of contraband before they reach their destination. The meaning is—and it is so stated in the circular—that the neutral government is not obliged to prevent its citizens or subjects from trading, but that it is the enemy's duty to prevent the articles reaching their destination. "If the enemy of the purchasing nation happens for the time to be unable to do this, that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale." In view of this fact it is

perhaps better to say that, in the absence of a municipal statute forbidding trade in articles of contraband, international law permits the belligerent to capture and confiscate such articles. This is tantamount to saying that such trade is permitted by international law, subject to capture.

The question arises, where may the articles be captured? and Anglo-American practice answers, the moment they have left the neutral jurisdiction en route to the enemy country, in the case of absolute contraband, or to the port of equipment or agent of the enemy in the enemy country in the case of conditional contraband.

The penalty for the carriage of contraband was formerly confiscation of the ship and the cargo, but this rule has been relaxed where good faith has been found. The articles of contraband are confiscated, the vessel is punished by loss of freight, and the innocent portions of the cargo released. Portions of the cargo otherwise innocent, but belonging to the owner of the vessel or to the owners of contraband, share its fate by the doctrine of infection.

But, as pointed out in the *Bermuda* (3 Wallace, 514, 556), "The rule requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting." It should be said, in this connection, that the offense is deposited with the cargo; that is to say, the vessel is not liable to seizure after having landed its cargo at the port of destination, but good faith is also required in this transaction, and Anglo-American practice subjects the vessel to capture after leaving the port of deposit if fraud or false papers have been resorted to. (Carrington *v.* Merchants' Insurance Co., 8 Peters, 518.) And, as said in the case of the *Bermuda*, "mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation."

So far it has been assumed that a neutral ship carries articles of contraband belonging to a neutral owner to an enemy port. It frequently happens, however, that a neutral vessel carries articles of contraband to a neutral port merely to enable the articles to be safely transported from the neutral port to a port of the enemy. Under these circumstances Anglo-American practice regards the voyage as continuous in law, although broken in fact, that the ostensible is not the real or ultimate destination, and, looking at the facts as they are and the intent of the shipper as found by circumstances, considers the voyage as in reality one from a neutral to a belligerent port, notwithstanding the fact that

a neutral country is interposed. In the case of the *Bermuda*, above cited, Chief Justice Chase thus stated the rule: "The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene," citing Jecker *v.* Montgomery, 18 Howard, 114, decided by the same court in 1855, in reference to shipments to Mexican ports during the war of this country with Mexico.

In the same case, Chief Justice Chase held that a vessel which, with the consent of the owner, is employed in the conveyance of contraband to belligerents in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed in the last stage if the employment is such as to make either so liable.

Concerning the rule of continuity in respect to cargo, the Chief Justice continued:

> At first, Sir William Scott held that the landing and warehousing of the goods and the payment of the duties on importation was a sufficient test of the termination of the original voyage; and that a subsequent exportation of them to a belligerent port was lawful (*The Polly*, 2 Robinson, 369). But in a later case, in an elaborate judgment (*The William*, 5 Id. 395; 1 Kent's Commentaries, 84, note), Sir William Grant reviewed all the cases, and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.

Where several ships are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent, the Chief Justice, speaking for the court, laid down the rule as follows:

> The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship cannot be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage, must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description

with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.[2]

In connection with the doctrine of continuous voyage, it may be said that a popular impression exists that under English law and practice the vessel cannot be captured before it reaches a neutral port, but only after it had left it on its way to the enemy. Thus, the late Mr. Hall said, in referring to the leading case of *The William* (5 C. Rob. 385), "In this and in like cases the English courts condemn the property; but they were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colorable importation to the enemy country." [3] This may be so; but if in reality the voyage be continuous it would seem to be permissible to seize the cargo before it reached the neutral port, provided the intent could be shown to continue the voyage from the neutral port to the enemy port. An equally distinguished American publicist, Professor John Bassett Moore, says, in commenting upon this subject, that "he [Hall] does not state, however, any case in which it was held by an English court that the performance of the process of 'colorable importation' was a prerequisite to condemnation." [4] It appears that belligerents can, according to Anglo-American practice, intercept articles of absolute contraband, and articles of conditional contraband if they have the destination which permits their capture according to international law; and that, to speak merely of the practice of Great Britain and the United States, absolute and conditional contraband can be captured before they reach a neutral port if the circumstances show that they are ultimately destined to the enemy. It is not therefore correct, according to American practice, to say that trade is free and unrestricted between two neutral ports. The following language of Chief Justice Chase, in the case of the *Bermuda*, is in point:

It is asserted by counsel that a British merchant, as a neutral, had, during the late civil war, a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American government.

If by trade between neutral ports is meant real trade, in the course of which goods

[2] 3 Wallace, 553–555.

[3] Hall, International Law, 6th ed., p. 668.

[4] VII Moore, International Law Digest, 727.

conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it.[5]

In the case of the *Springbok* (5 Wallace, 1), decided in 1865, the court had before it the question of ultimate destination. The *Springbok*, a British, and therefore a neutral, vessel left London in 1862 and was captured in 1863 while making for the British harbor of Nassau which lay near the southern coast of the United States and was, during the Civil War, used as a port of call and of transshipment for cargoes intended for the Confederacy, whose ports were then blockaded by the United States. The court held that the cargo, contraband in nature and ostensibly intended for a neutral port, was, from the circumstances, in reality destined to a Confederate port, and proved the ulterior destination from the character of the cargo and by the fact that its owners had shipped it to order, not to specific consignees in Nassau. Said the court:

That some other destination than Nassau was intended may be inferred, from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been made to any one at Nassau. It must also be taken as a negation that any such sale was intended to be made there; for had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.

The British claimants of the cargo took exception to the holding of the Supreme Court regarding consignment to order or assigns, but the British Government declared such a ruling to be in accord with British precedent and as justified by the circumstances. The case was, however, submitted under Article 13 of the Treaty of Washington of May 8, 1871, to the International Commission, composed of an American, a British, and an Italian member, and was unanimously confirmed by that body.[6]

The *Springbok* involved blockade. The *Peterhof*, on the contrary,

[5] *The Bermuda*, 3 Wallace, 514, 551–552.

[6] VII Moore's International Law Digest, 723–725.

was a case of contraband from which the question of blockade invoked by counsel was carefully excluded by the court. This was also a British ship carrying contraband from the neutral port of London to the neutral port of Matamoras. It was captured by an American war vessel in 1863 near the island of St. Thomas, many miles from the mouth of the Rio Grande, upon which city the Mexican city of Matamoras lies. The court found that the voyage of the vessel really ended at Matamoras, and that it was not connected with the ultimate transshipment of the contraband cargo from Matamoras across the Rio Grande to Brownsville, Texas, at that time under control of the Confederate forces. The vessel was therefore released. The contraband portion of the cargo, however, was condemned, because, from the circumstances, the court believed that the contraband was to fall into the hands of the Confederates and, by the doctrine of infection, the innocent portion of the cargo belonging to the owner of the contraband portion was likewise condemned. The British Government refused to protest the decision, and, as in the case of the *Springbok*, so in the case of the *Peterhof*, the claims of British owners were submitted to the international commission and were unanimously disallowed.

It thus appears that by American practice, concurred in by Great Britain and affirmed by the awards of an arbitral tribunal, cargoes addressed to order or assigns in a neutral port may be condemned, and that cargoes addressed to a neutral port, intended to reach the enemy by internal communication, may likewise be condemned. The neutral, trading in contraband with a neutral port, runs the risk of losing the contraband cargo if, in the judgment of the captor, the circumstances surrounding the trade justify the belief that the articles of contraband are intended ultimately to find their way to the hands of the enemy, either by transshipment upon the seas or by internal communication.

There is, unfortunately, no agreement of the nations as to the articles to be considered contraband, and it is the practice of belligerents to declare the articles which they consider as absolute and conditional contraband. The London Naval Conference agreed upon lists of absolute and conditional contraband,[7] and also agreed upon a list of articles which were not to be considered contraband of war.[8] In the course of the war Great Britain, France and Russia have modified the lists of contraband

[7] Articles 22 and 24 of the Declaration of London. SUPPLEMENT, Vol. III, pp. 196, 198. See editorial in this JOURNAL, page 199 on the status of the Declaration.

[8] Article 28, SUPPLEMENT, Vol. III, p. 200.

in identical terms,[9] thus showing that they are allies in law as well as in fact, and Germany has likewise exercised the right of a sovereign nation to modify its list, although, so far as known, it adheres to the list of absolute contraband contained in Article 22 of the Declaration of London, and has only made some additions to the categories of conditional contraband enumerated in Article 24 of the Declaration. The latest list of the allies in the possession of the Journal as it goes to press is contained in the Order in Council dated December 23, 1914. This Order [10] is as follows:

BRITISH AND FRENCH CONTRABAND LIST—BY THE KING—A PROCLAMATION REVISING THE LIST OF ARTICLES TO BE TREATED AS CONTRABAND OF WAR—GEORGE R. I.

(A contraband list the same as the British Government's list has been issued by the French Government)

Whereas on the 4th day of August, 1914, we did issue our royal proclamation specifying the articles which it was our intention to treat as contraband of war during the war between us and the German Emperor; and

Whereas on the 12th day of August, 1914, we did by our royal proclamation of that date extend our proclamation aforementioned to the war between us and the Emperor of Austria, King of Hungary; and

Whereas on the 21st day of September, 1914, we did by our royal proclamation of that date make certain additions to the list of articles to be treated as contraband of war; and

Whereas on the 29th day of October, 1914, we did by our royal proclamation of that date withdraw the said lists of contraband and substitute therefor the lists contained in the schedules to the said proclamation; and

Whereas it is expedient to make certain alterations in and additions to the said lists: Now, therefore,

We do hereby declare, by and with the advice of our privy council, that the lists of contraband contained in the schedules to our royal proclamation of the 29th day of October aforementioned are hereby withdrawn, and that in lieu thereof during the continuance of the war or until we do give further public notice the articles enumerated in Schedule I hereto will be treated as absolute contraband and the articles enumerated in Schedule II hereto will be treated as conditional contraband.

SCHEDULE I

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

2. Projectiles, charges, and cartridges of all kinds and their distinctive component parts.

[9] For a discussion of these modifications, see article in this JOURNAL, page 17, by Norman Bentwich, entitled "International Law as applied by England in the War."

[10] Reprinted from the Congressional Record, Jan. 13, 1915, page 1540.

3. Powder and explosives specially prepared for use in war.

4. Ingredients of explosives, viz., nitric acid, sulphuric acid, glycerine, acetone, calcium acetate, and all other metallic acetates; sulphur, potassium nitrate, the fractions of the distillation products of coal tar between benzol and cresol, inclusive; aniline, methylaniline, dimethylaniline, ammonium perchlorate, sodium perchlorate, sodium chlorate, barium chlorate, ammonium nitrate, cyanamide, potassium chlorate, calcium nitrate, mercury.

5. Resinous products, camphor, and turpentine (oil and spirit).

6. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

7. Range finders and their distinctive component parts.

8. Clothing and equipment of a distinctively military character.

9. Saddle, draft, and pack animals suitable for use in war.

10. All kinds of harness of a distinctively military character.

11. Articles of camp equipment and their distinctive component parts.

12. Armor plates.

13. Ferro alloys, including ferrotungsten, ferromolybdenum, ferromanganese, ferrovanadium, ferrochrome.

14. The following metals: Tungsten, molybdenum, vanadium, nickel, selenium, cobalt, hematite pig iron, manganese.

15. The following ores: Wolframite, scheelite, molybdenite, manganese ore, nickel ore, chrome ore, hematite iron ore, zinc ore, lead ore, bauxite.

16. Aluminium, alumina, and salts of aluminium.

17. Antimony, together with the sulphides and oxides of antimony.

18. Copper, unwrought and part wrought, and copper wire.

19. Lead, pig, sheet, or pipe.

20. Barbed wire and implements for fixing and cutting the same.

21. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

22. Submarine sound signaling apparatus.

23. Aeroplanes, airships, balloons, and air craft of all kinds, and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and air craft.

24. Motor vehicles of all kinds and their component parts.

25. Tires for motor vehicles and for cycles, together with articles or materials especially adapted for use in the manufacture or repair of tires.

26. Rubber, including raw, waste, and reclaimed rubber, and goods made wholly of rubber.

27. Iron pyrites.

28. Mineral oils and motor spirit, except lubricating oils.

29. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.

## Schedule II

1. Foodstuffs.

2. Forage and feeding stuffs for animals.

3. Clothing, fabrics for clothing, and boots and shoes suitable for use in war.

4. Gold and silver in coin or bullion; paper money.

5. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.

6. Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.

7. Railway materials, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.

8. Fuel, other than mineral oils. Lubricants.

9. Powder and explosives not specially prepared for use in war.

10. Horseshoes and shoeing materials.

11. Harness and saddlery.

12. Hides of all kinds, dry or wet; pigskins, raw or dressed; leather undressed or dressed, suitable for saddlery, harness, or military boots.

13. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

Given at our court at Buckingham Palace this 23d day of December, A. D. 1914, and in the fifth year of our reign.

God save the King.

It is not necessary to give the German list, as it conforms to the Declaration of London as regards absolute contraband, and makes but the following additions to the list of conditional contraband: "Copper, unwrought, and pig lead in blocks, sheet or pipes. All rough or unworked lumber (except lignum vitæ, Palisander, ebony and similar valuable woods). Cylinder tar, sulphur, crude or refined and sulphuric acid."