This article was downloaded by: [ECU Libraries]

On: 23 April 2015, At: 18:32

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954

Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK

Royal United Services Institution. Journal

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rusi19>

Recent Changes in the Rights and Duties of Belligerents & Neutrals According to International Law

J. MacDonell Esq., C.B., LL.D.

Published online: 11 Sep 2009.

To cite this article: J. MacDonell Esq., C.B., LL.D. (1898) Recent Changes in the Rights and Duties of Belligerents & Neutrals According to International Law, Royal United Services Institution. Journal, 42:245, 787-811, DOI:

[10.1080/03071849809417387](https://doi.org/10.1080/03071849809417387)

To link to this article: <http://dx.doi.org/10.1080/03071849809417387>

PLEASE SCROLL DOWN FOR ARTICLE

Taylor & Francis makes every effort to ensure the accuracy of all the information (the "Content") contained in the publications on our platform. However, Taylor & Francis, our agents, and our licensors make no representations or warranties whatsoever as to the accuracy, completeness, or suitability for any purpose of the Content. Any opinions and views expressed in this publication are the opinions and views of the authors, and are not the views of or endorsed by Taylor & Francis. The accuracy of the Content should not be relied upon and should be independently verified with primary sources of information. Taylor and Francis shall not be liable for any losses, actions, claims, proceedings, demands, costs, expenses, damages, and other liabilities whatsoever or howsoever caused arising directly or indirectly in connection with, in relation to or arising out of the use of the Content.

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden. Terms & Conditions of access and use can be found at <http://www.tandfonline.com/page/terms-and-conditions>

RECENT CHANGES IN THE RIGHTS AND
DUTIES OF BELLIGERENTS & NEUTRALS
ACCORDING TO INTERNATIONAL LAW.

LECTURE No. 1.

By J. MACDONELL, Esq., C.B., LL.D., &c.,
Master of the Supreme Court.

Thursday, May 19th, 1898.

Sir R. GIFFEN, K.C.B., in the Chair.

WHEN I arranged with your Secretary some six weeks ago to lecture on the rights and duties of neutrals and belligerents, I did not anticipate that the subject would have the living interest which it now possesses, that war between two great States would have broken out, would be running its course, and would have solved problems which I had intended discussing, and raised others of which I had then no thought. I shall not attempt to discuss all the many interesting questions of international law raised by the events of the last month. Far less shall I seek to cover the entire field of belligerents' and neutrals' rights and duties—a subject on which whole libraries have been written. My intention is much less ambitious; it is merely to point out some recent changes in parts of international law, and to investigate the present direction of opinion. Studying the character of these recent changes, we may perhaps be able to form a surmise as to the future.

International law, as you are aware, consists of a collection of usages, practices, traditions, rules, and conventions, never fixed, though endeavours are constantly being made to stereotype this collection. Never was this state of transition more marked, never were changes more rapid and frequent, than at present. International law is not a mere store-house of rules coming down from a far-off past; it is a living and growing law; some parts of it once important are in process of decay; in other parts is

life and the promise of it. International law has no recognised organ or mouthpiece—no Parliament or Congress to declare or amend its measures. Yet it advances—sometimes rapidly; never more rapidly than to-day. By few expounders of international law is sufficient notice taken of this element of change. And so there is an international law known to soldiers, diplomatists, and men of affairs, and another partly obsolete but still taught in books.

I do not merely refer to writers who crudely jumble together in fine confusion precedents drawn from antiquity and the events of yesterday, from Elizabeth's reign and Victoria's, and who wander, to use Professor Cairnes's expression, "through the mazes of exploded systems and obsolete ideas." I allude to a venial and more common failing. Even expositors who were excellent in their generation and who wrote with a nice sense of proportion, cease in a few years to be in touch with the opinions and facts moulding international law. No modern writer is held in greater esteem than Wheaton; but many passages in the first edition of his work, published in 1836, have as little relation to the ideas of our time as many of the dicta of Vattel or Puffendorf. Few writers take sufficient account of the declining authority of many precedents, the adoption of new standards of conduct, the appearance of new interests and forces, and what I may term a displacement of social values. Many of the best of those treaties are written for a world which is not ours; a circumstance which discredits international law in the eyes of men of the world who, as diplomatists, or in position of military or naval command, seek its guidance. I am glad to bring before this assembly this subject, chiefly because I am persuaded that, if international law is to retain, or, to be more exact, to regain its old authority, it must take into counsel more than it has done the soldier, the seaman, and the diplomatist. There has been a little too much spinning of cobwebs of the library, because the expositors of international law have not sufficiently collaborated with its administrators.

One consequence of this state of change is the fact that jurists and writers on international law are not prepared as they once were with confident answers to questions often arising and calling for prompt decisions; doubts prevail as to the validity of rules once deemed fundamental; text-books speak with uncertain voice as to matters of the first moment; and there is a state of revolt against many old precedents.

Three or four great recent changes in international law may be noted. All of them have affected the rights and duties of neutrals and belligerents.

The first of these changes has no doubt lessened its authority of international law. The older writers on the subject had a standard to which they appealed in all their difficulties. They asked themselves what the "law of nature" dictated to men engaged in warfare or diplomacy; and for them the answer given by this oracle, which was never dumb, was final. It is true that this "law of nature" was sometimes a thin disguise for the passions of the hour. Often it sanctioned the worst abuses. A sort of ventriloquism was practised; learned men seemed to project their voices

some distance from themselves, and their voices came back to them as the utterances of the "law of nature." At best the "law of nature" was only the shadow of men's own conscience which imagination lengthened and magnified into a superior being, ever accompanying and guiding them. Often the phrase designated a school of philosophical thought dominant in the eighteenth century; of the same family as the philosophy of the economists of last century. But, whatever its real nature, this "law of nature" lent authority to international law.¹

Nearly a hundred years ago, at no great distance from this place, Sir James Mackintosh delivered a course of lectures still remembered, on the Law of Nations; and it is interesting to note the confidence with which he speaks of the power of this "law of nature"—"a supreme, invariable, and uncontrollable rule of conduct to all men"—to settle all disputes. The imperfections and ambiguity of the utterances of this oracle were long concealed from those who consulted it in a reverent and obedient spirit. To-day we have no such guides. All jurists have their doubts as to either the reality of the law of nature, or the possibility of ascertaining its precepts. This change has somewhat diminished for the moment the influence of international law, which can no longer claim to be a system of law of higher authority and antiquity than any form of municipal law.

A minor change has been attended by a similar result. The early writers on international law turned in all their difficulties to the rules of Roman law, a system then almost universally accepted as the type of perfect law. If an apt analogy were found in the Digest, its authority in regard to the law of prize, or booty, or modes of acquisition or the right of possession, occupation, or conquest was not questioned, except by someone who fancied that he had found in the same storehouse of wisdom another analogy still apter. In Grotius and Bynkershoeck—the latter probably by far the more acute mind ever directed to the science—this proneness to identify the law of nations with the law of Rome is most marked; it still characterises some writers. On the whole, this influence was beneficial. True, Roman law contained no large principles directly applicable to public questions; as to these it was meagre and imperfect; it was the law of a people to whom war was the normal order of things, who were too powerful to take note of anything in the world except themselves and their enemies, who had no clear conception of neutrality, and for whom slavery was the foundation-stone of society. But Roman private law was useful in giving form to vague ideas; the efforts of the jurists of last century to put many doctrines in the guise of the language of the Digest, was conducive to precision. The principles to be found in the Institutes and the Digest as to the sea being among the things common to mankind, were favourable to freedom of navigation. They furnished arms for Grotius in arguing for a *Mare Liberum*.

¹ This is not the place in which to examine the philosophical ideas of the founders of international law. But I may here refer to Robert Zimmermann's brochure "Das Rechtsprinzip bei Leibnitz," as particularly instructive on this point.

They helped to settle the principle that "the ocean is the public road of the universe."¹

All this is changed. Roman law is no longer studied as it once was; and the students of it would not claim for it the ascendancy which it once possessed in public and private affairs. To-day those most conversant with Roman law are most aware of its limitations, and most struck by the incompatibility of many of its doctrines with the requirements of modern civilisation.

These two changes have had one consequence, which I, as a lawyer, note with regret, but to which I cannot shut my eyes. The influence of the jurist and of purely legal considerations in the development of international law and especially as to the usages of war is distinctly less than it was. The old formulæ do not help to solve the new problems arising in international law; for example, such a question as that raised by the case of the "Huascar." Questions of disputed boundaries are settled by diplomatists with reference less to legal doctrines as to occupation than to the watershed and physical characteristics of the country. Once it was discovered that the "law of nature" was either a shadowy abstraction, or, in the words of Lord Somers, "a wild uncertainty," and that it was the passing opinion of the civilised world on international questions, that Roman law had no right to speak as the voice of reason and conscience as to the problems of peace and war, the jurist lost for a time some part of his influence. He spoke as others, not as having authority; he was no longer the depository of the sacred oracles; and he might be disregarded by diplomatists and commanders without sinning against the light. I shall be pardoned if I state that this is by no means a clear gain to the world. It is the fashion nowadays, especially among representatives of the school known in Germany as "military realism"—a school of writers of whom I shall have something to say—to disparage the labours of jurists in this field. I venture to think that their influence has been greatly beneficent. If war is more humane than it was, if some cruel practices have been weeded out or discredited, it is largely due to the teaching of jurists who have striven to carry law into the very heart of disorder, and to find a basis of reason for the impulses of humanity. Stowell, Marshall, Kent, Lushington, Portalis, and Kingsdown, were the voices of the educated conscience of their times, and they laboured not in vain to elevate the actual usages of war into accordance with higher ideals. No one can be familiar with the great historical controversies of last century and this as to neutral and belligerent rights without feeling that the influence of jurists made for peace, humanity, and civilisation. If I am not mistaken, we may discern from time to time in modern diplomacy some evil effects of the decline—temporary, it is probable—in the influence of the expositors of international law. Public questions are discussed with a certain cynical avowal of the principle that might makes right, that "blood and iron" count for much more than the

¹ Jenkinson's "Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations," p. vi.

law of nations, that the line of conduct of one State to another is to be determined by their relative military and naval strength, and that all other considerations are vain sentiments.

Time does not permit me to specify all the recent changes in international law. I can allude only to one or two. In all the early text-writers the doctrine of the equality of States, irrespective of strength, was laid down. But this phrase was used along with language of a very different character. With more or less instability since the Peace of Westphalia, and certainly since the Treaty of Vienna there had prevailed a conception of a normal political order in Europe, which it was criminal to disturb. Statesmen professed to act—even if they did not in truth always act—in accordance with a certain *droit public européen*, of which the chief maxims were these: that peace is the normal condition of things; that States are independent of each other and in all respects equal; and that no State has the right to interfere in the affairs of another unless its security is affected. To these rules and maxims what may be termed the official writers appealed with confidence that they would not be questioned. Could we say as much to-day? Could we have said as much any time during the last twenty years?

Often during the last fifty years has the principle of nationality come into collision with some of these maxims—*les maximes essentielles et incontestées du droit public européen*.¹ The political aspirations of several races—Italians, Germans, Hungarians, and others—proved irreconcilable with the order of things which diplomacy had established. Nowadays the doctrine of the equality of States is pronounced to be virtually obsolete. A fiction in one sense that doctrine always was; Switzerland did not count for so much as France. The doctrine is in fact part of an obsolete system of political philosophy; according to Wolff and his populariser, Vattel, each nation lived in a state of nature, each nation was entitled to the same rights, just as all men, whatever their stature, are entitled to the same rights. The doctrine slurred over difficulties as to what communities are independent States. But it emphasised the fact that international law was a collection of rules applicable to all complete or sovereign States; and that just as private law assumes equality between the individuals under its sway, so must international law assume the equality of States. It was another way of saying that they were independent. According to the theory of the balance of power, or what Kinglake terms the “great usage,” there was an inner circle of States with larger authority than those outside it. The formation of these political unions has shaken the doctrine of the Equality of States, the foundation-stone of the international law of Grotius and Vattel. The sharp line of distinction drawn by earlier writers between Christian and non-Christian communities no longer exists. The older writers on international law speak of it as expressing solely the usages of Christian States. Lord Stowell was accustomed to refer to communities outside that circle or pale, much as Lord Coke, about two centuries before, spoke of Turks as heathens—much as the Greeks about twenty centuries earlier spoke of

¹ Guizot's “*Mémoires*,” vol. 4, p. 5.

barbarians. In this respect a change has taken place. Turkey has been formally admitted into the group of European Powers since 1856. Persia and Siam are in much closer relation to us than they were. Japan, with her rapid assimilation of Western civilisation, and with the abolition of consular jurisdiction, has taken her place among the communities within the region of international law. Instead of a concert of nations based on a common religious system, there is one based on a common civilisation.

That change is not all for the good. It has produced a new form of intolerance. It has apparently sanctioned the exclusion of non-civilised communities from the purview of international law. It has encouraged the idea that the advance of civilisation condones all things; and it has sanctioned an attitude towards uncivilised races akin to that assumed by Jew to Gentile, Greek to Barbarian. A new chapter in international law—a chapter which will recognise and define the duties of civilised communities to uncivilised or savage races—will, perhaps at no distant date, be written. Some lines of it are already penned. The Berlin and Brussels Conferences, in spite of the meagre results attained, gave the promise of better things.

I should not have completed the list of important changes—I am not sure that I should not have omitted the most important of them—if I did not refer to what had been called the spirit of "military realism," a spirit which finds eloquent expression in much of the best military literature of Germany, for example, in the writings of Clausewitz and von Harmann; a spirit of distrust and antagonism to the intrusion of law into regions in which the soldier is and must be, it is said, a law unto himself; a belief that not the law of nations but military necessity must determine what is lawful and what is not in warfare.

Much of this long preface may seem to be remote from the question of recent changes in the rights and duties of neutrals and belligerents. But I believe the above considerations will help us to distinguish the living international law from that which, though still to be found in books, is dead, or dying, and enable us to see more clearly the present trend of opinion.

In dealing with the chief recent changes which have taken place in international law, I take as the starting-point the close of the war with Russia, which was, in fact, the beginning of a new era in the laws of war. For the sake of convenience, I have divided the topics of discussion into two classes: those chiefly affecting war at sea; those affecting war on land.

In 1856, the great Powers issued the Declaration of Paris, of which we have heard much lately. The history of the Declaration is still shrouded in some mystery. Neither Lord Clarendon nor Lord Cowley, the diplomatists most directly concerned, gave a full account of the negotiations; the only detailed statement is one published by M. Drouyn de Lhuys, who was French Foreign Minister at the time.¹ According to that statement—and it was borne out by the remarks which

¹ See appendix to report of Neutralisation Commission.

fell from Lord Clarendon—the Declaration would have been made by the bulk of civilised States, whether we had acceded to it or not. The Emperor, Napoleon III., had then many humanitarian ideas in his mind ; one of the *idées Napoléoniennes* was the mitigation of the evils of maritime war, an idea, prominent we know, in his uncle's memoirs.

The first principle which the Declaration of Paris enunciated was : "Privateering is abolished." When privateering began I do not know.¹ Martens, in his *Essay on Privateering*, traces it back to the end of the fourteenth or the beginning of the sixteenth century. It is not long since even the subjects of neutral States sought and obtained from belligerents letters of marque, enabling them to capture vessels of countries with which their own was at peace. In our wars with France and America, letters of marque were issued freely by all belligerents ; and there is no doubt that these privateers committed great depredations on our mercantile marine :—

"In the last great war, 1793-1815, our Admiralty issued 10,000 letters of marque, yet despite that vast addition to our naval strength, we lost close on 10,000 merchant-vessels, and we captured but 1,000 of the enemy's privateers."—Norman's "*Corsairs of France*," p. vii.

"In the space of 40 years, 4,345 prizes were sold by the Admiralty Court at Dunkirk for the sum of £6,327,000 ; 34,750 prisoners during that period were detained for various terms in that town. In the single year 1751, 251 English prizes were carried into Dunkirk."—*Ibid.*, p. 21.

"It appears that from the commencement of the war with France in July, 1776, to the following May, that is a period of ten months, the value of the prizes taken by Liverpool ships alone amounted to £1,025,600."—Laughton's "*Studies in Naval History*," p. 205.

Many restrictions were placed on the owners and captains of privateers with a view to prevent certain abuses to which they were prone. By the ordinances of most States, the owners were required to enter into bonds for their good behaviour. According to English usages, privateers were required not to hoist any jack, pennant, or ensign usually borne by King's ships. In spite of the precautions to ensure the good conduct of privateers, they acquired a bad reputation. The officers and men were bound by no rules of professional honour. The officers of the Navy found fault with them ; they were accused of being more eager for plunder than for fighting ; and they rarely, if ever, affected the results of any war. It is well known that Nelson and Codrington condemned the conduct of these "lawless libertines" as nothing short of piracy.² In the American Civil War, the South had thought of issuing

¹ See as to origin of privateering Pasquale Fiore, 2, 336 ; Shephard's "*Capture of Private Property at Sea*," p. 67. Martens (*Essay on Privateering*, p. 1) defines privateering as "the expedition of private individuals during war, who, being provided with a special permission from one of the belligerent Powers, fit out at their own expense one or more vessels with the principal design of attacking the enemy, and preventing neutral subjects or friends from carrying on with the enemy a commerce regarded as illicit."

² See Professor Laughton's "*Studies in Naval History*" as to privateers. He cites, p. 196, the remark of Nelson, "The conduct of all privateers is, as far as I have seen, so near piracy that I only wonder any civilised nation can allow them."

the abandonment of the right to seize enemy's goods in neutral bottoms seems exceedingly obscure; and if I put forward certain conclusions, it is with distrust as to any solution of a problem depending on several uncertain elements. In the first place, it is not clear that we could have prevented a general affirmation by the civilised world of the principle "free ships make free goods." It is not clear, that we could have maintained our ancient principle without provoking the hostility of neutral nations, and it is still less clear that we could now rescind what we did in 1856, and freely exercise in 1898 against the whole world invidious rights which the victories of Nelson enabled England to assert in 1806. Captain Mahan's words on the point are not without value :—

"In her secure and haughty sway of the seas, England imposed a yoke on neutrals which will never again be borne; and the principle that the flag covers the goods is forever secure."—"The Influence of Sea Power on History," p. 84.

Neutrals count for more than they did when our fleets enforced the doctrine "enemies' ships make enemies' goods." The belligerent must take account of their feelings and convenience to a degree unknown in the Napoleonic wars, if there is not to be another "armed neutrality" more formidable than the armed neutrality of 1780 and 1800. It is significant that at the beginning of the present war English and German shipowners resented the idea of their ships being stopped and overhauled in search of belligerents' goods. Suppose that England being at war with Germany, our cruisers insisted on overhauling every American or French liner in search of German goods, and brought mail-steamers into Dover, Southampton, or Portsmouth in order to examine the cargo and ship's papers, and to open the mail bags. Would not such a course lead to complications?¹ No doubt the immunity from capture of goods in neutral bottoms would operate as a premium or a preferential duty in their favour; but what would be its amount? How far it would cause a transfer of our ships to foreign flags is doubtful. The laws of several countries put impediments in the way of such transfers. The results of the captures by the "Alabama" and her consorts are, it is said, no certain guide to the experience of future maritime wars; the "Alabama" captured sailing-vessels taking definite trade routes; cruisers in the future may not have the same luck in regard to steamers able to take any routes and make any detours they please.

To those who speak of the Declaration of Paris as a surrender made *per incuriam* and who dread a wholesale transfer of British mercantile marine to neutral flags, Professor Westlake² points out that this opinion

¹ The point may be put in the words of the late Field-Marshal Burgoyne ("Life and Correspondence," 2, 503):—"Suppose a fine merchantman (belonging to a neutral State) such as we have navigating from Europe to India and Australia, with a moderate usual armament, to be met at sea by a small man-of-war of a belligerent, of really very inferior force, is that going to allow itself to be detained and searched or perhaps taken possession of as a prize by a dwarf? The doctrine of the Solicitor-General would imply yes. But it is contrary to human nature to suppose that such a law would be submitted to."

² Westlake's "International Law," p. 250.

does not take "sufficient account of the immense aggregate of the prices which would have to be paid for wholesale *bonâ-fide* transfers of British ships, an aggregate far exceeding what neutral buyers could supply on short notice; or the fact that transfers which were not *bonâ-fide* would not be valid against a belligerent; and of the necessary consequence from these two premises, namely, that an enemy would bring in the transferred ships wholesale for inquiry by their Prize Courts into the circumstances of the transfer. A great rush to transfer would be followed by the discovery that war rates of insurance were heavy even under the neutral flag."

I speak with diffidence on this subject, and I admit that there might be naval wars in which it would be prudent to revert to the old rule. While we are neutrals, however—and we generally are such—the principle "free ships make free goods" is to our advantage; and probably we must accept it, for better or worse, as a permanent part of maritime law.¹

No doubt the present state of things is anomalous. I agree with those who, like that unwearied advocate of reform in maritime law, the late Mr. Danson, hold that private property other than contraband ought to be secure from capture at sea—at all events, that the practice as to capture at sea should be assimilated to the practice on land.

For all concerned, but especially for England, which stands to lose most, it would probably have been well if the offer held out last century by Jefferson and Franklin, and repeated by the United States in 1856 and 1870, to exempt such property from capture, had been accepted.

Consider the extent of our commerce. I do not propose to trouble you with figures or diagrams. You all know Nelson's Column; note the figure on the top; that will roughly represent the total value of exports and imports at the time when the great Admiral lived and fought. The total length of the Column itself will represent the recent value of our exports and imports. Of the increase in our shipping, and of the share of the shipping of the world which we held at the beginning of the century, it is impossible to speak with confidence; there are no trustworthy statistics as to the earlier date, and comparisons are deceptive. But you may picture the total tonnage of the world by the total length of the Column, and about one-half of that represents British tonnage.

It is important to bear in mind that the capture of private property at sea does not seem to have appreciably affected the result of any great war. Trafalgar, the battles of the Baltic and the Nile, the campaign in Russia, the Peninsular War and Waterloo, were decisive—not the captures of French schooners or Spanish galleons. They enriched and

¹A shipowner of great sagacity and experience, writing to me of the transfers of British ships which would take place in the event of our being at war, remarks: "The transfer would not, I think, be permanent. It would still be British capital which would work the business, and its control would be secured, in some way, say by mortgages. . . . When we had cleared the seas of the enemy's cruisers, and still more when the war was over, we should be back in our position of being the principal carriers by sea."

demoralised a few owners of privateers; they ruined individuals here and there; wars ran their course, while privateers burned, sank, and destroyed. There is, too, something incongruous and undignified in the accounts which we have had lately of the fleet of a great Power "bailing up" or "sticking up" small schooners or brigs laden with molasses or pottery. Further, the liability to capture private property is to be regretted, because it is out of harmony with the practice observed in modern times in civilised warfare on land. No one has put more impressively than Napoleon the antithesis between the two modes of warfare—no one has insisted more emphatically—on the fact that the methods of mediæval times, which did not spare the non-combatants, still linger at sea. Cobden often expressed the same idea, but not with the directness, felicity, fervour, or authority of Napoleon;¹ whether he acted on his own maxims is beside the point:—

"Le droit des gens, dans les siècles de barbarie, était le même sur terre que sur mer. Les individus des nations ennemies étaient faits prisonniers, soit qu'ils eussent été pris les armes à la main, soit qu'ils fussent des simples habitants; et ils ne sortaient d'échange qu'en payant une rançon. Les propriétés mobilières, et même foncières, étaient confisquées, en tout ou en partie. La civilisation s'est fait sentir rapidement et a entièrement changé le droit des gens dans la guerre de terre; sans avoir le même effet dans celle de mer. De sorte que, comme s'il y avait deux raisons et deux justices, les choses sont réglées par deux droits différens. Le droit des gens, dans la guerre de terre, n'entraîne plus le dépouillement des particuliers ni un changement dans l'état des personnes. La guerre n'a action que sur le gouvernement. Ainsi les propriétés ne changent pas de mains, les magasins de marchandises restent intacts, les personnes restent libres. Sont seulement considérés comme prisonniers de guerre les individus pris les armes à la main, et faisant partie de corps militaire. Ce changement a beaucoup diminué les maux de la guerre. Il a rendu la conquête d'une nation plus facile, la guerre moins sanglante et moins désastreuse. Une province conquise prête serment, et, si le vainqueur l'exige, donne des otages, rend les armes, les contributions se perçoivent au profit du vainqueur, qui, s'il le juge nécessaire, établit une contribution extraordinaire, soit pour pourvoir à l'entretien de son armée, soit pour s'indemniser lui-même des dépenses que lui a causées la guerre. Mais cette contribution n'a aucun rapport avec la valeur des marchandises en magasin; c'est seulement une augmentation proportionnelle plus ou moins forte de la contribution ordinaire. Rarement cette contribution équivaut à une année de celles que perçoit le prince, et elle est imposée sur l'universalité de l'état; de sorte qu'elle n'entraîne jamais la ruine d'aucun particulier.

Le droit des gens qui régit la guerre maritime est resté dans toute sa barbarie. Les propriétés des particuliers sont confisquées; les individus non-combattants sont faits prisonniers. Lorsque deux nations sont en guerre, tous les bâtiments de l'une ou de l'autre, naviguant sur les mers, ou existant dans les ports, sont susceptibles d'être confisqués, et les individus à bord de ces bâtiments sont faits prisonniers de guerre. Ainsi, par une contradiction évidente, un bâtiment anglais (dans l'hypothèse d'une guerre entre la France et l'Angleterre) qui se trouvera dans le port de Nantes, par exemple, au moment de la déclaration de guerre, sera confisqué; les hommes à bord seront prisonniers de guerre, quoique non-combattants et simples citoyens; tandis qu'un magasin de marchandises anglaises, appartenant à des Anglais dans la même ville, ne sera ni séquestré ni confisqué, et que les négociants anglais voyageant en France ne seront point prisonniers de

¹ "Mémoires pour servir, etc." Vol. 2, p. 92.

guerre, et recevront leur itinéraire et les passeports nécessaires pour quitter le territoire. Un bâtiment, naviguant et saisi par un vaisseau français, sera confisqué, quoique sa cargaison appartienne à des particuliers ; les individus trouvés à bord de ce bâtiment seront prisonniers de guerre, quoique non-combattants ; et un convoi de cent charettes de marchandises, appartenant à des Anglais, et traversant la France, au moment de la rupture entre les deux puissances, ne sera pas saisi. Dans la guerre de terre, les propriétés même territoriales que possèdent des sujets étrangers, ne sont point soumises à confiscation."

It is possible that this passage exaggerates the contrast between the two modes of warfare ; the statements as to the immunity of property on land are of the nature of counsels of perfection.¹ But a real contrast exists.

In stating the objections to the difference between the treatment of private property on land and that of similar property on sea, one cannot lose sight of the fact that exemption from capture on sea is probably for a long time to come out of the question. Such exemption would be in war to the supreme advantage of England, which stands to lose so much. It would therefore be to the disadvantage of our opponents. We cannot hope that other nations knowing our weak spot will relinquish this right.

The Declaration of Paris did not deal with contraband of war. As to this in recent years, neither here nor elsewhere has there been any distinct change. There still prevail two distinct policies on the subject—on the one hand, the Continental system, according to which a definite list of articles is declared contraband ; on the other hand, the English and American policy, which recognises as contraband of war a fluctuating class of articles known as conditionally contraband, and liable to seizure according to their destination. The indefiniteness of the latter policy causes shippers and merchants much inconvenience, and the tendency of some of the latest decisions has been to increase the difficulty of merchants. They had a tolerably clear guide then when they knew that a destination to a belligerent port was of the very essence of contraband. Coal conveyed in a neutral vessel to a neutral port could not be contraband in a war between France and Germany, even if it probably would be conveyed overland to a French or German port, and there put on board a belligerent cruiser. In view of a series of decisions of the American Prize Courts during the Civil War, the question is no longer so simple as it once was. Developing doctrines put forward by Lord Stowell at a time when he was expounding the law of nations much to the disadvantage of neutrals, the American Courts laid it down that cargo on its voyage to a neutral port might be seized on that voyage if it was intended to tranship the cargo at such neutral port for a belligerent port. "If the ulterior destination (of the cargo) is the known inducement to the partial voyage, and the ship

¹ Contrast the above passage with Clausewitz's description of Napoleon's methods. "On War." Book 5, c. 14. The best historical account of the right of capture is "Bluntschli's "Das Beuterecht im Krieg."

The late Lord Iddesleigh once remarked that the best reason held for maritime plunder was that given by Sir James Mackintosh, viz., that plunder by sea was more out of sight and caused less indignation than plunder by land, but that this reason was a bad one.

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 conveyance." Pushing the doctrine of "ulterior destination" a step further, the Supreme Court sanctioned in the case of the "Peterhoff"¹ the seizure of a cargo on a voyage from London to Matamoros, a neutral port, on the Mexican side of the Rio Grande, on the ground that part of the cargo, artillery harness, artillery boots, etc., was to be conveyed overland to Wilmington or Charleston in the Confederate States. "It is true," remarked the Court, "that even these goods, if really intended for sale in the market of Matamoros, would be free of liability, for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock of trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity."

It must be conceded that but for the theory of continuous voyages blockades may be easily evaded in these days of developed railway communication. None the less is a new chain on neutral commerce forged by those decisions. Not a cargo of goods of any possible use to an army or fleet can safely be shipped to Jamaica or other islands adjoining Cuba if the doctrine of "continuous voyages" be rigorously acted upon. We may however, perhaps, in this war, hear little of that doctrine.² A characteristic of the naval operations in this war, so far, has been a desire to study the interests of neutrals, and not to press too far the claims of belligerents.

No Prize Courts have in recent years sat in this country; and there have been no examples of their decisions. When they go to work we shall see them applying doctrines and principles of a startling character and highly unfavourable to neutrals; doctrines and principles formed, and "standing interrogatories" drawn up, at a time when belligerents were a law unto themselves. To name one anomaly, the Prize Courts are accustomed to act on certain rules as to the ownership of ships and property, which cut the knot of many difficulties but do not exactly solve them. One such is that goods *in transitu* on the ocean are presumed to belong to the consignee; another is that property is presumed to remain in the same hands from the time it is shipped until delivery, and that transfers of property during the voyage are not recognised. The object of these rules was clear; they are wholly at variance with the facts of modern commerce. The ground of the doctrine was explained by the Prize Council in *Sorenson v. The Queen* (11 Moore, P. CC., p. 146):—

"The difficulty of detecting frauds if mere paper transfers are held sufficient is so great that the Courts have laid it down as a general rule that such transfers without actual delivery shall be insufficient."

¹ 72 U.S. 23. See Hobbs and Hennerly 17 C.B. 791.

² See the case of the "Doelwijk" during the Italian-Abyssinian War, *Revue de Droit International*, 1897, p. 66. It now appears (June 30th) that complaints are being made that Jamaica is being used as a basis of supplies for the Spanish troops in Cuba.—*Times*, June 30th, 1898.

Even in the days of Lord Stowell the most that could be said for the above rules was that they did not always work injustice; to-day they would be too rough to be tolerated. In a single parcel of goods, half-a-dozen interests may be concerned. If a vessel carries a general cargo it would puzzle the most experienced lawyer to say in whom was the ownership of all the goods, or the most acute economist to say on whom the loss would fall.

That the Prize Court should be always the Court of the belligerent State; that the nation which has seized the property of neutrals, or is interested in condemning it, should give a decision binding their property and rights; that neutrals should have no voice in the matter—that also is an anomaly, but one too deeply rooted to be removed in our time.

A word may here be said as to a point on which confusion prevails. Members of Parliament lately asked the Government again and again whether they intended to prohibit the exportation of contraband. The Crown has power under the Customs Act, 1879,¹ to prohibit the exportation of certain kinds of contraband, a power which it rarely exercises, and only in the event of the interest of the State being concerned. An armed vessel may be contraband, and as such punishable, and the fitting of it out may also be an infringement of the Foreign Enlistment Act. But speaking generally, there is no power to prohibit the exportation of contraband; the risk of capture is the only penalty.

Neutrality, according to modern international law, is not merely doing in war what a State does in peace. Neutrality involves distinctive duties. It is curious to note how late the true conception of neutrality appears, how imperfect it is in its inception, how slowly it matures. The Romans had no idea of neutrality; they might enter into offensive or defensive alliances with other States; they did not understand a state of indifference or neutrality. In the Middle Ages it was common for the subjects of States at peace with one another to take service with one belligerent or with both. Scholars have discovered here and there traces of the idea; but the notion was rudimentary. It strikes one as strange that an enlightened reformer such as Sir James Mackintosh should have opposed the first Foreign Enlistment Act as an infringement of the rights of the neutral. Even in modern definitions of neutrality it was assumed that neutral nations should continue to do in time of peace what they had done in war.² In his incisive way Napoleon observes:—“*L'État de guerre*

¹ The Customs and Inland Revenue Act, 1879, s. 8 (42 and 43 Vict. c. 21), allows the prohibition, by order in council, of the exportation of arms, ammunition, gunpowder, military stores, etc.

² The great seamen of Elizabeth's reign, the Drakes, Hawkins, etc., did very much as they pleased towards Spanish ships and possessions even in time of peace. So long as the actual territory of a State was not violated no act of war was necessarily committed. Under cover of reprisal, the commerce of a friendly State might be harried, to almost any extent without a final breach of the peace, and Elizabeth seems to have favoured the doctrine that Colonies beyond the seas were in the same category as a mercantile marine.—Corbett's “*Tudor Seamen*,” vol. 1., p. 122.

ne peut avoir aucune influence sur les neutres ; ils doivent donc faire, en guerre, ce qu'ils peuvent faire pendant la paix." Napoleon did not conceive that war imposed new duties on neutrals, and that they might not be free to do certain things, lawful and customary in time of peace. To the United States, and primarily its great citizens Jefferson and Franklin, is due the first departure from the old idea and the recognition of the modern. The American Foreign Enlistment Act of 1794, prohibited the enlisting of soldiers in the United States. It also prohibited the fitting out of expeditions against friendly States. The difficulty then felt, and not yet solved, was, how to reconcile this policy with the undoubted right of private traders to sell arms and munitions of war to belligerents, subject to the risk of confiscation as contraband ; a right which Congress was not inclined to abandon ; which the United States asserted against France in 1796 ; a right which England, in answer to the remonstrances of Russia, refused to surrender or impair in 1870. "Our citizens," said Mr. Jefferson, in an oft-cited passage, "have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their calling, the only means perhaps of their existence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected." And so, in pursuance of this policy, the sale of munitions of war was permitted ; and the American Courts held that the sale of a fully-equipped cruiser to a belligerent was not necessarily an offence against the Foreign Enlistment Act.

The English Act of 1819 was formed on the lines of the American Act ; and when our Courts came to apply it to the vessels built in this country for the Confederate Government, they took the same view of the law as the American Courts. In the famous "*Alexandra*" case tried in 1862 ("*Attorney-General v. Sillem*") Mr. Pollock, C.B., held "that it was no offence to build for and sell and to deliver to one of the belligerents a fully-armed ship." The Act was not framed to make any difference between ships-of-war and guns, ammunition, and other implements of war, but to prevent our shores from being made the points of departure of hostile expeditions, commissioned and equipped to commit hostilities against a belligerent not at war with us." Baron Bramwell took the same view : "The section prohibits that equipment only which is itself such that by means of it the vessel can commit hostilities, and no equipment which gives no means of attack and defence is within section 7." A ship may sail from a port ready to receive on board warlike equipment ; that equipment may leave in another vessel, and be transferred to her as soon as the neutral limit is passed, or at some not remote port, as thus the spirit of international law may be violated, and the letter and spirit of the municipal Act evaded," p. 542). In other words, you build on the Clyde a ship suited to be a cruiser ; you arm her, not on the Clyde, but by arrangement at Dunkirk ; you commit no offence even if you, the builder, knew the design of your customer. I cannot say that the law was put on a perfectly rational and intelligible basis, but it was much altered, and the device which I have described was defeated by the Foreign Enlistment Act, 1870,

which made our neutrality law more rigorous than that of any other country. I will not attempt to discuss in detail this complicated and obscure measure. It is enough to say that it makes penal and visits with fine or imprisonment a larger number of ill-defined offences ; for example, the building or agreeing to build any vessel, despatching, causing or allowing to be despatched any vessel with intent or knowledge, or reasonable ground for believing that the same shall be employed in the naval or military service of a foreign State at war with another State, friendly to England. So wide is the scope of the Act that it includes the manufacturing a submarine cable intended to be used for military purposes ; the helping to tow a prize into the port of a belligerent, and, I am inclined to think, the supply of coal to a belligerent vessel beyond what is allowed by the courtesy and usages of nations. Adding to the number of guns or changing those on board or adding to the equipment—a comprehensive term as defined by the Act—is punishable in like manner. Contrary to the spirit of our criminal law, the presumption of innocence is reversed ; the burthen is laid on the accused to prove that which the prosecution must, in the ordinary course of English law, establish.

This Act, as we all know, was the outcome of the complaints of the United States Government as to the defects of our neutrality law, in allowing the escape of the “Alabama.” The sequel of the controversy is curious. The English Act of 1819 (59 Geo. 3, c. 69) was based on the American Statute of 1818, but was, in several respects, more stringent. An eminent American lawyer, Mr. Bemis, has enumerated no fewer than ten points in which the English Statute of 1819 is more rigorous than that of the United States. As I have already explained, the Statute of 1870 still further increased the stringency of English law. But no change of any kind was made in the United States Statute. The consequence is that many things punishable here are not so according to American law, and, indeed, I might add, under most other legal systems also. The fitting out of a vessel under circumstances similar to those under which the “Alabama” was fitted out, would not be an offence under American law ; it would certainly be punishable under the present English law. The essence of the offence, according to the American Statute, is an intent formed in the neutral State to fit out, arm, etc. ; the knowledge or belief on the part of the builder that the vessel which he constructs will be used against a friendly Power will not suffice for a conviction ; such belief makes him no more a criminal than is a gunsmith who sells a pistol with good reason for believing that it will be used unlawfully. It is otherwise according to the more rigorous English law ; reasonable ground of belief is the gist of the offence. The English Act includes under “military service” military telegraphy. The American Statute does not expressly or by implication include anything of this sort. The more severe standard may be the right standard, but it is remarkable that we should voluntarily take on our shoulders, for the benefit of others, burthens which they do not choose to bear.

Our magnanimity—I can scarcely say our prudence—goes further. As you are all aware, our Government undertook, by the Treaty of

Washington of 1871, to observe in the future three rules then formulated, and to bring them to the notice of other countries. We are required to "use due diligence to prevent the fitting out, arming or equipping within its jurisdiction any vessel which it (England or the United States) has reasonable grounds to believe is intended to cruise or carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use." Secondly: "Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies of arms, or the recruitment of men." Thirdly: "To exercise due diligence in its own ports and waters, and, as to all persons, within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

No other nation has adopted these rules. Many jurists treat them as unreasonably onerous to neutrals.¹ But the proclamation of neutrality of last month, unlike the proclamations issued in the Russo-Turkish and Japan and China wars, recited these rules and enjoined all subjects to obey them. I am inclined to think that the Act of 1870 and the rules of 1871, properly understood, do not go beyond what is reasonable; the theory that one State can never be responsible for the conduct of its subjects to another State, cannot be maintained; neutrality which does not conform to the three rules fairly understood, may be very offensive. But it is more heroic than prudent to admit the existence of these duties without insisting on or asking for reciprocity, or giving some explanation of the sense in which we understand them.

The only occasion on which these rules were construed—at the Geneva Arbitration—they received an interpretation which every English lawyer repudiates; an interpretation which would make neutrality as burdensome as war itself. Is it not rash to bind ourselves to a form of words which arbitrators will probably, in the future as in the past, interpret to our disadvantage? The preamble of the Declaration of Paris states "that maritime law in time of war has long been the subject of deplorable disputes; that the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts." Such differences and disputes are more likely to be multiplied than diminished by promulgating rules which will receive as many meanings as there are interests concerned.

In recent wars in which maritime operations have been carried on on a large scale, the chief controversies have turned on the duties of neutrals to belligerents. Perhaps at no distant date the other side of the question, belligerents' duties to neutrals, and "the high privileges" of the latter, to use Lord Stowell's ironical phrase, will be studied more than they have been, at all events in this country, the traditions of which have been in favour

¹ See *Revue de Droit International*, 1897, p. 189.

of magnifying the rights of belligerents. It is well known that the late Lord Kingsdown, on whom fell during the Crimean War the chief burthen of deciding on appeal prize cases, was of opinion that Lord Stowell had pressed too strongly the rights of belligerents; and Lord Kingsdown sought to moderate those doctrines. The events of the last few weeks suggest several desirable modifications in the interest of neutrals. A neutral must be prepared to put up with many inconveniences from operations conducive to the termination of a war. He cannot fairly murmur, for example, if contraband intended for the use of one belligerent be captured by the other belligerent. But it is plain—and the events of the last few weeks remind one of the fact—that the present usages of war permit of acts which may profoundly injure the neutral without perhaps greatly aiding the belligerents or conducing to the close of hostilities. Recalling the effect on the price of wheat here and elsewhere, the far-spreading consequences of the rise caused by vague alarms of capture, conceive what would follow from a blockade, maintained even for a few weeks, of the chief American ports. Suppose that in a war between Germany and Russia, the ports of the latter were sealed, and that no wheat from Russia were procurable at a time when harvests in America and other countries usually supplying us with wheat were bad, would all neutrals consent to starve in order that the ring might be kept for the combatants and the game of war be played out in the good old way? Would not such a strict assertion of the laws of war by belligerents become unendurable by neutrals? For the common benefit of civilisation, the maintenance and use of certain machinery, plant, and services are necessary. Such, for example, is the free passage at all times to the ships of all nations through an interoceanic canal such as the Suez Canal, which has accordingly been neutralised. The working plant of the modern civilised world includes many other things, notably mail-steamers and telegraph cables; and as to these a serious conflict between the interests of neutrals and belligerents seems imminent. A mail-steamer conveying part of the correspondence of a whole continent meets with the cruiser of a belligerent. Is she to be stopped, taken into a port of the belligerent, her cargo rummaged, some of it confiscated, her mail-bags broken open and the letters examined? All that is within the rights of the belligerents as laid down in books; and a weak neutral would no doubt put up with such acts. A strong neutral might make their repetition a *casus belli*.

The treatment of submarine cables in time of war is a still more difficult and important question, and one as to which international law has so far failed to give any clear guidance. No one can say with confidence what will be its development as to this point. In earlier wars questions arose as to the transmission of information, particularly in the form of despatches from belligerents by means of vessels of neutrals. The incidents which Lord Stowell had to discuss in our conflicts with France were such as these: despatches sent from a belligerent Government in a neutral vessel from a hostile port to a consul of the enemy resident in the neutral country; despatches from an agent of the enemy

found on board a neutral vessel going from a neutral port to a port of the enemy; despatches on board a neutral vessel from the governor of a colony of the belligerent to the government of the mother country.¹ All such despatches were viewed by our Prize Courts as contraband of the worst kind, their carriage "an act of the most noxious and hostile nature."²

These decisions throw scanty light on the problems which now confront us. In the event of a war between France and Germany, messages directing military operations in some of the colonies of the former country must be conveyed through neutral territories. Would the neutral permitting or assisting in the transmission of such messages or despatches be blamable? In view of certain authorities, such conduct would be unneutral and unfriendly. And yet what is the alternative? Is the neutral to act as censor and transmit this message and withhold that? It is alleged that in the French colony of Martinique, messages apprising the Americans of the arrival of the Spanish fleet were detained by the French authorities; and that complaints on this score have been made by the United States Government. Would such conduct be deemed a breach of neutrality? How is a neutral State to satisfy both belligerents—not to allow its territory to be used as a means of carrying out or directing military operations, and yet not pursue an unfriendly policy?³ There is, too, the question of the cutting of submarine cables by belligerents. An international convention was entered into at Paris on March 14th, 1884, for the protection of telegraphic communication by means of submarine cables. But Article 15 of the Congress expressly states that the Convention is not to interfere with belligerents' rights. Probably effectual safety against the danger here referred to is to be found in the multiplication of lines of communication. But pending extensive developments of telegraphic enterprise, it is hard to contemplate calmly the possibility of England being cut off from India or some of her Colonies, not by her enemies, but by a State professing to be friendly to her in order to injure some other State. I am not now referring to the probability that in time of war our adversary would endeavour to sever our communication with India and our Colonies. Mr. Charles Bright, the well-known engineer, in his recently-published book on submarine telegraphs, points out that:—"In the event of a great war between this country and another naval Power or Powers, it is quite conceivable that more than one of our Mediterranean cables (if no others) might be ruthlessly cut by the enemy, or our communications with Egypt, India, and other Eastern and Australasian possessions entirely broken off." The same authority adds:—"The present lines to India and Australia are as

¹ See *The Madison*, Edwards 225; *The Rapid*, Edwards 228; *The Atalanta*, 6 Rob., Ad. 440.

² See remarks of Lord Stowell in *The Atalanta*, p. 455.

³ There is a further contingency worth considering. The vessels of a subject of State A repeatedly cut a cable which is of great importance to B, a belligerent, engaged in war with C. What is the responsibility of A? This question arose in the Italian-Abyssinian War.—*Revue de Droit International*, 1896, p. 606.

follows:—*a*, Lisbon, Gibraltar, Malta, Egypt, and the Red Sea; *b*, France, Italy, Greece, Egypt, and the Red Sea; *c*, Germany, Austria, Turkey, Russia, and the Pacific Coast; *d*, Lisbon and the West and East Coast of Africa. All these routes pass through foreign countries, and could at once be interrupted in time of war."

Such a risk is one to be faced if we go to war. The peril which I suggest will arise when we are at peace. The reasoning to be found in the books on the subject of intercepting information likely to be useful to an enemy is not applicable to modern methods of communication. In the case of the "*Caroline*," Lord Stowell laid down the broad principle: "It is the right of the belligerent to intercept and cut off all communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which is one of the declared objects of the ambition of the enemy (France) to preserve"; an excellent principle, if in injuring a belligerent no great harm be done to an innocent neutral; a questionable principle if in carrying it out an innocent neutral State is grievously wounded.

I do not venture to offer a complete solution of a difficult problem; perhaps none is possible. But it seems to me that in any satisfactory convention should be an article binding the signatories not to cut or injure cables connecting countries with their colonies or dependencies.

That the strict enforcement of belligerents' rights, as laid down in text-books, would be here ruinous to neutrals; that the new international law slowly disengaging itself from precedents and traditions must here as elsewhere take greater notice of the interests of neutrals,—that is the reflection with which I end.

Major-General J. B. STERLING :—The lecturer has given us a lecture so full of meat that it requires most careful consideration and digestion; and in the limited time that is allowed, I think wisely, by the rules of our Institution, it is well for an individual speaker to touch on only one point in the hope of receiving further elucidation on a very difficult matter, and, it may be, a very serious one. The lecturer said that belligerents up to date have considered the interests of neutrals. Now I am not responsible for the statement that has appeared in the papers, which may or may not be true—but it is certainly possibly true—that the submarine cable between St. Vincent and St. Lucia, two English colonies, has been cut by one of the belligerents, probably the Spaniards. The point is deserving the most anxious consideration. If that is allowable by international law there is no possible reason that the Atlantic cables from Valencia to Halifax should not be cut by the same Power. There is no difference of position between that and the cables from Gibraltar to Malta. I entirely leave apart the question of cables that touch other people's ground. Of course, the most difficult nut to crack is the question of Marseilles, where there are sixteen cables running out, all belonging to different nations, interlacing one with another; and one of the people employed in the actual repairing of those cables told me he frequently did not know which he had got hold of. But there is the case that between two English colonies, merely for a tactical or strategical advantage, to prevent the passage of one of the fleets past our colonies being signalled, the British cable between two of our colonies, neither end touching on territory of one of the belligerents' colonies, has been, according to the statement, cut. I think it would be most valuable if our lecturer, who has considered so many portions of the subject-matter of

this discussion, later on in his answering remarks, would give us some elucidation on this, which is a most grave and important question.

H. F. WYATT, Esq. :—In the extremely interesting paper with which we have been favoured this afternoon, there is one particular point to which I would venture to draw attention. The lecturer spoke of the Declaration of Paris as having taken place under somewhat mysterious circumstances. Certainly that is true; but in order to understand the new departure which the Declaration of Paris presented, I think he should have gone back two years. He should have gone back from May, 1856, to the evening of the 28th March, 1854, for upon that evening was published a supplement to the *Official Gazette*, in which was inserted an announcement by the Government that neutral ships would cover enemy's goods. That announcement, which was styled an Order in Council, did not have appended to it the usual words at the end, "By order of the Queen," and being styled an Order in Council it was styled what it was not, for there was no meeting of the Privy Council between the 8th March and the 29th March. So that the origin of the suspension of the right of capturing an enemy's goods in neutral ships by England is shrouded truly in the deepest possible obscurity. It is a vital point in English history at the present time, it is a point which remains uncleared up, and which will be cleared up by some future historian; but I hope that for all our sakes it will be cleared up soon. We all know that up to the 28th March, 1854, it was deemed by England an essential part of its equipment in war that it should have the right to seize enemy's goods in neutral ships. We know, as Mr. Macdonell pointed out, that we fought a great war in 1801 in order to ensure the permanence of that right, that we fought the armed neutrality league, and that we bombarded Copenhagen. It is very noticeable that by the exercise of this right we brought Russia to her knees in that campaign (of 1801) without any actual attack on the Russian fleet. The attack on the Russian fleet which Nelson wanted to make at Revel and at Kronstadt was not necessary. Russia was brought to her knees without it, because her commerce ceased. Coming to the present moment, we have to bear in mind that Mr. Chamberlain has recently said—and foreign papers have taken notice of the declaration—that if we had fought Russia about China we should have had no weapon by which to bring her to her knees. I venture to suggest to you that we had a weapon, and that the weapon was that the use of which was suspended by us in 1854 and abandoned by us in 1856; and that had we recently gone to war with Russia, and had we power to exercise this right of searching for Russian commerce in neutral bottoms, we could bring Russia to her knees in six months—we could checkmate her designs in Asia, we could defend the frontiers of India, and make ourselves, and not the Russians, predominant in China. At any rate, the lessons of our history distinctly teach this. As against that, Mr. Macdonell observed that we should lose very much by insisting upon the right we previously fought for, that we should lose the power of importing goods freely into this country during war, and we should lose the power of importing food. Well, but consider, how should we import the food from the foreign countries? We could import it only by giving up the carrying trade ourselves.¹ We cannot afford to give up the carrying trade ourselves. Commerce is the vast part of the means by which this country earns its living; and it is a gigantic change to contemplate, that we should allow the whole carrying trade—including, that is to say, the carrying both of the goods coming into this country and the goods going from this country—to pass from us in time of war. In the second place, the goods taken from this country could not be carried in foreign ships, for the simple reason that foreign ships to carry them do not exist. Our mercantile tonnage amounts to more than half the mercantile tonnage of the world. The

¹ Since, by the hypothesis, our commerce would be carried on under neutral flags.—H. F. W.

other aggregate shipping of the world would be insufficient to go on maintaining the trade it does now and to do our own carrying trade as well. The expedient of simply passing English ships under foreign flags the lecturer showed to be impossible, owing to the fact that such transfers would not be looked upon as legal by foreign States. So that we come to this position, that the *quid pro quo* for which we are giving up this right of capture does not exist, that we are giving it up for a chimera; there is nothing substantial which we get in return. We could not afford to give up our carrying trade, and it would be impossible for us to do so in the actual event of war; but we are giving up a weapon by which in former wars we were able to take full advantage of in our maritime strength. It is objected that it is contrary to natural law to make war upon private property, but really the exercise of the right of capture is simply upon these lines—that you prevent the neutral from extending his trade to your detriment. You do not interfere with the ordinary or natural trade of the neutral, but you prevent him from extending the ordinary limits of his commerce in a manner which would be detrimental to you. Throughout our history, with the single exception of the Treaty of Whitehall, made on August 12th, 1689, we always construed our rights in that fashion. We merely want to prevent the neutral Power from extending his carrying trade, and so helping our adversary, the rival belligerent. This point is one of supreme importance to this country, in fact, it governs probably the whole future of the British Empire. If we do not make use of that right we are doomed to defeat in Asia at the hands of Russia; if we do make use of it, in all probability Russia is doomed to defeat at our hands. It was Mr. Richard Cobden who saw the full effect of the exercise of the right of capture by ourselves. He said, "It is clear that Nature herself has doomed Russia to a condition of abject and prostrate subjection to the will of the maritime Powers." That is a strong expression of the conditions, but it seems to have been borne out by the effect of our war in 1801, and at any rate, it has to be borne in mind that this right of capture was given up in a most mysterious and unauthorised manner in 1854. It was suspended against the representations of a deputation of British merchants at the time who waited at the Foreign Office, and were told by Lord Clarendon that the ministers recognised the force of their arguments, but that they felt they must give up the right because of the hostility of Prussia to its exercise. Finally it was abandoned, or temporarily abandoned—I hope only temporarily—in 1856, without authority of any kind ever being produced. The Queen has, from that date to this, *persistently refused to sign the Declaration of Paris*. It has never been ratified by Parliament, and it remains a monstrous exercise of authority by men, Lord Clarendon and Lord Cowley, who were empowered to do one thing and did another.

Mr. F. W. RAIKES, Q.C., LL.D.:—One has heard a great deal about the difficulties and about what has happened with regard to the Treaty of Paris. It seems to me, if I may venture to say so, that what has been the misfortune of this country in this case, and what is likely to be the misfortune of this country in another case which I will presently allude to, is that we are in the unfortunate position of halting between two opinions. This country, the greatest naval Power on the face of the earth, was justified in endeavouring to enforce maritime law with its utmost strictness; this country, as the greatest mercantile Power on the face of the earth, is most keenly interested in the ocean being free to merchant-ships at all times. Therefore, on the other hand, you have what we may call the military and naval part wishing to preserve the laws of war in their strictness as they were in 1756; while, on the other hand, you have the mercantile community wishing to adopt the plan which the Americans wished to adopt in 1856, which, if it had been adopted, would have placed merchant-vessels under an arrangement, not exactly the same as the Treaty of Paris, by which property would have been as free from capture at sea as it is on shore. Between those two we have given up the one which was useful to us as a great naval Power, and we have not got the other which would be useful to us as a great mercantile Power. Now, Sir, in

more recent times, and since the war with Russia, coal has become the factor of the very utmost importance in naval warfare. Hitherto, until to-day, the worst wars which have been fought have been land wars. Whether the American civil wars or those between Austria and Prussia, Germany and France, Russia and Turkey, Turkey and Greece, they have been fought by countries with a long land frontier, and all the great operations of war have been carried out on land. Therefore, when a belligerent man-of-war has come into a British port, this is what happened: a belligerent man-of-war is not a very pleasant neighbour, and one would like to get rid of her as soon as one can, and it was thought, and agreed, among the nations generally, that the fairest and best way was to say to every belligerent man-of-war which came into your ports, when you were a neutral, "We will give you just enough coal to take you to your nearest port, and nothing more." The rule worked fairly well; the ports of the country were not very far from where they got their coal, and they only got enough coal to go home, so that they could not pursue any operations of war on their way—they had to go straight. That was fair to both sides. But, unfortunately, that which was very fair in land wars has been adopted as a precedent and is now being put in force in a maritime war in a way which I venture to think is in the immediate present most detrimental to this country—most detrimental to every neutral. If, indeed, we were the only nation on the face of the earth except the belligerents, we might well afford to let them fight out their battles between themselves, and when we said, "We will only let you have coal enough to go home with," it would be only coal enough for them to go home with, and the ships which got it would have to go home, even if they had to cross the Atlantic. But we are not the only nation in the world, and it seems to me that the result of giving a ship enough coal to take it home when there are other nations who also have ports, is to enable a ship to obtain coals to carry on the operations of war. Without the coals they can do nothing; with coals they can do everything—it makes the whole difference to them. With regard to the action of the American fleet in Manila Harbour, which one must look at certainly as being a very considerable achievement, if it is followed up, as it is likely to be, by the destruction of Manila itself, that must necessarily mean a very grave injury to neutral property, to British property, and property belonging to other neutrals in Manila. I do not suppose there is a sea-coast port on the whole face of the earth where, if it were bombarded, injury would not be done to British property and to all neutral property. And we supply the means of doing it by giving the ships enough coal to take them home. If Admiral Dewey's fleet had not been able to take coal in at Hong-Kong they would never have ventured to go to Manila at all; they could not have gone there with empty bunkers. What is more, although having once coaled at Hong-Kong they cannot get any more coal in a British settlement for three months, yet Hong-Kong is not the only place out there. There is Saigon, belonging to France; Macao, belonging to Portugal; Batavia, belonging to Holland; Formosa, now in the hands of the Japanese; and the whole coast of China itself—half-a-dozen different places, and yet every one of those different nations adopts the same rule as we are doing. After an engagement you have only to go into another place, fill up your coal bunkers again—enough to take you home across the Atlantic to San Francisco, and, instead of going there, pursue the operations of war for another three months; and then you can run the gauntlet all round the places again, and so you go on. The result of that is that the further away you are from your base the better for you. You have nothing to do but to send the coals out to meet you in some neutral port, fill up your bunkers there, and take care that you do not go into the same port again, and you can carry on the operations of war *ad libitum*. You are doing it by the action of neutrals who are injuring their own property and their own rights by putting the enemy's ships in the position of being able to bombard the towns and destroy neutral property which they find there. I say that

is a very dangerous condition of things, and it would be a far better thing—and I do not see that there is any principle to prevent it—if there was an agreement amongst all neutral nations—and of course in almost every case the majority of nations are neutral, and therefore are the people to decide the question—that in no case would they give a belligerent ship one single ounce of coal when they entered their ports unless it was enough to boil the kettle and cook for the men. But what is the fact? You say, “We cannot allow you to take ammunition, powder, or anything to pursue warlike operations,” and yet you give them the thing without which all their powder and shot and everything else would be absolutely useless—you give them the one thing needful to enable them to carry on the war; and what must be the result? The result must be injurious to every neutral who has property scattered about all over the world, and more injurious to England than to any other country, because her property is more widely scattered and diffused all over the world. Where a similar state of things exists on land what happens? On the 1st February, 1871, General Bourbaki's army could not keep their ground. They had to cross the frontier and go into Switzerland, and before the Swiss would give them a meal they required them to lay down their arms and be useless for the rest of the war. What is the difference in principle between that case and that of a belligerent ship which cannot keep the sea because she has no means of moving, and where she has to go into a port of a neutral? But instead of saying, “No, we won't give you coal; we will allow you to go out again, but we will not give you coal,” we practically say “Here is your coal, take it and proceed with your operations, but go somewhere else next time, and do not come again to an English port.” It seems to me that in principle there is no difference at all. The only thing was that in former days of course what the belligerent ship wanted when she came into a port was provisions, she wanted something to feed her people with, and she was in hard straits. She wanted food, and that we gave them, and away they went with it. And so the principle arose that they were treated somewhat differently from troops coming on to the land of a neutral. But when it comes to giving them something which is the most important of all things for their warlike operations, it seems to me that the true neutrality is to be fair to each side alike, and say, “No, as far as we are concerned neither of you shall have one single ounce of coal if you come into a British port.”

Mr. J. MACDONELL, in reply, said:—I have very little to say in reply to the observations which have fallen from the gentlemen who have addressed the meeting. There have been various classes of speakers. There have been “neutrals,” and “benevolent neutrals,” and “armed neutrals,” but I do not think that in the discussion there has been any belligerent; so that really I have little to say in answer to the criticisms which have been made upon the observations which I have addressed to you. With respect to the point made by the first speaker, I agree with him that it is at the present moment a critical and momentous question. I should not like here to endeavour to propound any definite and detailed scheme with respect to an alteration of the Convention of 1855, but I do think that Article XV. is based on a misconception. It seems to me that Article XV. is very much like what would be the state of things if two persons engaged in a quarrel said to a neighbour, “It is necessary, in order that we should fight this quarrel out, that we should burn down your house.” The third person might very fairly say, “I am not interested in your quarrel; I object to my house being burned down; and if you do what you say I shall resent it, and take part in the quarrel.” Article XV. has, it seems to me, been evidently prepared by persons—and it was pardonable to prepare it in that spirit in 1855—who had not present to them the dangers which we now find are real and living. The second gentleman who addressed the meeting said that a cloud of mystery hung over the Declaration of Paris of 1856. That is to a certain extent true, but I might call his attention to the interesting memorandum to be found in the appendix to the Neutralisation

Commission Report, where he will find some clue to the motives which led to the promulgation of the principles of the Declaration of Paris of 1856. In my own view, the real key is to be found in certain ideas which Napoleon III. at that time had very much at heart. I fail to see clearly the validity of the criticisms which he made upon Article II. of the Declaration of Paris. He stated that, in his view, had we adhered to the ancient principle of our maritime law it would be competent whenever we happened, if we ever did happen, to be at war with Russia, to "bring that Power to her knees." I fail to follow that criticism, because, thinking over the facts of the matter, I do not see how by applying the old principle we could seriously injure Russia. In the first place, her foreign trade in the past has never been great; in the second place, her foreign trade now is not large; and in the third place, if it were much larger than I imagine it is, in all probability that would take place which we know, in point of fact, did take place in the war with her, that the goods which, in the ordinary course of things, would have found their way by ships into Russia, would find their way through Germany and otherwise without very much alteration in the volume of the trade to Russia. Her trade would be diverted but not necessarily diminished. Time will scarcely permit me to go into many other interesting points which have been raised; but I would say, in answer to Mr. Wyatt, that however excellent the ancient principle might be, it is to my mind—and I notice that that is the opinion which is gradually spreading—impracticable to resort to the old principle. I was very much struck by Dr. Raikes' interesting and, if he will allow me to say so, exceedingly original suggestions. I see great force in what he says. I admit that in some respects stopping the coal supply would be as likely as anything to stopping a war. But I hardly think that the scheme which he has promulgated upon this occasion would prove a working scheme. I hardly think it would obtain general assent. I see, too, some instances in which it would work grave injustice. Ships which were in distress, ships which were in real want of coal, might be placed in a very awkward predicament by the proposed rule. Furthermore, it would operate as a preferential policy in favour of some Powers, and would be very much to the disadvantage of others. A Power which had coal stores and coal bases all over the world would profit very much by this policy, and I am afraid that if the idea were presented to other Powers less fortunately circumstanced, they would merely say:—"We see the cloven hoof; this is one of the many instances in which, as in the past, England has cloaked her own private interests under some specious and illusory phrase."

The CHAIRMAN (Sir R. Giffen):—I am sure that I may say to Mr. Macdonell, on behalf of those present, that we have listened with great interest to his paper. As General Sterling remarked, there is a great deal of meat in it, and we have had a great deal to think about. The discussion has also been of such a character as to show there are a great many points in it for consideration. We must hope that a great deal of what has been said, both by Mr. Macdonell and by others, in the discussion will be considered in the right quarters. No more important paper could have been brought before us at the present time.