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S. S. "Lisman". Disposal of pecuniary claims arising out of the recent war (1914-1918) (United States, Great Britain)

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S.S. "LISMAN".

DISPOSAL OF PECUNIARY CLAIMS ARISING OUT OF THE RECENT WAR (1914-1918) [1].

PARTIES: United States of America, Great Britain.

SPECIAL AGREEMENT: Exchange of notes, May 19, 1927.

ARBITRATOR: Joseph C. Hutcheson, Jr. (U.S.A.).

AWARD: October 5, 1937.

Rule of exhaustion of local remedies.—Scope.—American vessel.—Contraband cargo.—Detention of ship in London.—Claim in the British Prize Court for clearance of the ship.—Wrongful detention of ship.—Belligerent and neutral rights.—Procedure before the Arbitrator.—Claim inconsistent with claim in British Prize Court.—No appeal filed in Great Britain.—Alleged futility.—Municipal or international character of Prize Court decisions.—Cause.—Proximity.—Damage.—Evidence.—Fraudulent concert to carry contraband.—Alleged denial of justice.—Evidence.

[1] For bibliography, index and tables, see end of this volume.

Special Agreement [1].

EXCHANGE OF NOTES OF MAY 19th, 1927.

[*See No. XLII, pp.* 1587 *et sqq.*]

IN ARBITRATION

Claim of EDWARD J. RYAN, Trustee in Bankruptcy of the INTEROCEAN TRANSPORTATION COMPANY OF AMERICA, INCORPORATED, *vs.* THE UNITED STATES OF AMERICA

Under Treaty Series No. 756, May 19, 1927.

ARRANGEMENT EFFECTED BY EXCHANGE OF NOTES BETWEEN THE UNITED STATES AND GREAT BRITAIN FOR THE DISPOSAL OF CERTAIN PECUNIARY CLAIMS ARISING OUT OF THE RECENT WAR.

REPORT AND DECISION OF

JUDGE JOSEPH C. HUTCHESON, JR.

SOLE ARBITRATOR.

THE PROCEEDING.

This is an arbitration proceeding commenced and prosecuted by agreement between claimant and the United States, to secure a determination as to whether the claim asserted is satisfiable, under the agreement of May, 1927, between the two Governments for the satisfaction by the United States of certain war damage claims against Great Britain. This is the diplomatic background.

In November, 1919, the Trustee's claim in the British Prize Court for damages suffered through British war measures was rejected and dismissed. An application for appeal belatedly made was, on March 9, 1920, granted, fixing the security at £350 and the time for appealing at three months. Instead of prosecuting his appeal from the judgment of the President rejecting and dismissing his claim, the Trustee allowed the time for appealing to expire, and in August, 1920, turned his efforts to securing its satisfaction as a diplomatic claim.

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[1] See also in this volume the S.S. *Edna* case, p. 1585, and the S.S. *Seguranca* case, p. 1861.

On March 1, 1920, the application was returned by the Department of State, with certain observations as to its proper preparation, but it was never presented to the British Government nor espoused by the United States for presentation.

On May 19, 1927, by an Exchange of Notes, the United States and Great Britain effected an arrangement for the disposal of certain pecuniary claims against each Government, arising out of the World War. One of its terms was that neither Government would present any diplomatic claim or request international arbitration on behalf of any of its nationals alleging loss or damage through the war measures adopted by the other. Another was that the United States would, under named circumstances and conditions, itself satisfy such claims of its nationals against Great Britain as it deemed meritorious.

Thereafter, the claim was attentively considered by the Department in the light of the Agreement, and definitely dismissed as unfounded, in its letter of May 24, 1929, concluding as follows:—

> The Department has carefully examined the record of the claim in the British Prize Court, and is of the opinion that neither the proceedings in that court, nor the detention of the vessel under the attending circumstances, constitutes proper grounds for reclamation.

The claim being further pressed, was again rejected by Department letter of November, 1933.

In 1934, after further extensive discussion, claimant and the Department agreed: that claimant would furnish the Department with a complete statement of his case, and the Department would reply; that briefs would then be exchanged, and in case the Department and claimant could not reach an agreement on the merits of the claim, it would be referred for arbitration to a sole arbitrator.

No agreement on the merits having been reached, and the parties having agreed upon and selected an arbitrator, the matter now stands for decision and award before him, under an Agreement for Arbitration, couched in the broadest terms.

By it, without limitation upon, or direction of any kind as to, the exercise of his powers, the parties submit to the arbitrament, and the final and irrevocable decision of the Arbitrator, all questions, whether of substance or of procedure, arising under the Agreement. A preliminary statement is therefore in order, not only generally, as to the function and duties of the Arbitrator, the methods and processes by which they are to be sustained and discharged, the scope and sweep of the inquiry into and the search for the facts and principles upon which the decision will depend, but also specifically as to the nature and grounds of the questions for decision, and the sources of their answering.

This may be briefly and adequately made by saying that this is an arbitration, not a mediation, the end sought not conciliation, but a determination according to law. In this proceeding therefore the function and duties of the Arbitrator are those of the judge, not those of the mediator; the methods and processes of decision judicial, not mediatorial [1]. The scope

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[1] The *Paquete Habana*, 175 U.S. 677; Moore, Int. Law Digest, Sec. 1069; "'Arbitration' as a Term of International Law", T. W. Balch, 15 Columbia Law Review, p. 590; Private Law Sources, and Analogies of International Law, Lauterpacht, Chap. 3, pp. 60-71.

and sweep of the inquiry and search, into the facts and the law, must therefore be as wide and as free as, but no wider nor freer than, judicial methods and processes permit and enjoin.

Since the wrongs complained of are charged not against the United States, but against Great Britain, and the claimant must therefore stand or fall by whether the claim is satisfiable by the United States under the 1927 arrangement between the two Governments, the nature and grounds of the questions for decision, together with the sources of their answering, are to be sought in and determined by the 1927 Exchange of Notes, and the full facts of complainant's claim, including of course the greatly important Prize Court proceedings. These, in turn, are to be read, examined, and interpreted in the light of the applicable principles of international law, as that law existed in 1915, when the acts complained of are alleged to have transpired, the wrongs complained of to have been inflicted, and the claim, if ever, arose.

THE EXCHANGE OF NOTES.

By the Exchange of Notes the Governments agreed:

(1) That, with exceptions not material here, neither would claim against the other for war supplies furnished, services rendered, or damages sustained, all such accounts to be regarded as closed and settled.

(2) That "neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal, or of the appellate tribunal, if any, to be regarded as the final settlement of such claim", it being understood that the British Prize Courts shall remain open, and the Government of the United States will use its best endeavors to secure in its own tribunals, to British nationals having claims, the same rights and remedies which may be enjoyed by American nationals, in British tribunals, under similar circumstances.

(3) That the judicial position of neither Government is prejudiced by the Agreement, each Government reserving full right to take the position it may deem appropriate with respect to the legality or illegality under international law of measures giving rise to claims referred to in the Agreement.

(4) That the Government of the United States realizes that the effect of the Agreement is to save to the United States certain sums of money, and that it will regard the net amount saved to it thereby as intended for the satisfaction of those claims of American nationals for loss or damage, through war measures, "which the Government of the United States regards as meritorious, and (*a*) in which the claimants have exhausted their legal remedies in British courts; or (*b*) in which no legal remedy is open to them, or (*c*) in respect of which, for other reasons, the equitable construction of the present agreement calls for a settlement".

(5) That the United States will recommend such action by Congress as will insure the utilization for the purpose just mentioned, of the sums saved to the United States under the provisions of the Agreement.

The effect of these provisions was to work an accord and satisfaction, and to completely close the books except as therein specified, as to claims of the

Governments against each other, so that neither should thereafter make claim against the other for war damages, either on its own account or on behalf of its nationals.

As to these claims, with the exceptions noted in it, the Agreement constituted an accord and satisfaction. As to the claims of the nationals of each Government to satisfaction by the other of war damage claims against it, full access to Prize Courts and similar municipal tribunals, and the full enjoyment of the remedies afforded by them, was reserved and assured. As to the claims of American nationals, not only was full resort to British Prize Courts reserved to them, but in addition, the effect of the Agreement was to provide that those remedies having been exhausted without success, the United States, having relieved Great Britain from accountability to her therefor, would stand answerable for, and would satisfy, in Great Britain's stead, all claims for which, but for the Agreement, Great Britain would be answerable by international law.

The intent and purpose, and therefore the effect of the Agreement, is quite obvious. It was, while doing away with diplomatic representations by the United States as to, and international arbitration of, war claims against Great Britain on behalf of American nationals, to preserve to such nationals the full substance of their claims. This was accomplished first, by not releasing Great Britain from, but holding her strictly to, accountability in the British Prize Courts. Second, the remedies in these courts having been exhausted without success, the United States were substituted for Great Britain as respondents, and made answerable in Great Britain's stead for all claims for which, but for the 1927 Agreement, Great Britain would, the prize proceedings notwithstanding, be liable by international law. The Agreement thus left Great Britain still liable to satisfy all claims adjudicated against her in her Prize Courts. It released her from, and made the United States liable in her stead for, such claims as, notwithstanding exoneration in her Prize Courts, Great Britain would have been answerable for under international law, through diplomatic representation or arbitration. Thus the Agreement draws and maintains the distinction between Great Britain's liability to respond in Prize Court proceedings, to awards in favor of American nationals claiming for themselves [1], and her diplomatic answerability to the American Government for claims for wrongs done to the nation through injury to its nationals [2].

Thus, too, in providing for the presentation against the United States of an international "as if" claim, in which the United States should stand in Great Britain's stead, the Agreement not only saves to American nationals their rights against Great Britain in her Prize Courts, but if their claims are well founded in international law, it also saves to them in substance and effect, their espousal by the United States as international claims. For though the Agreement does restrictively provide that the "net amount saved" will be regarded as intended for the satisfaction of claims of American nationals, "*which the Government of the United States regards as meritorious*"

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[1] In such instances, the claim presented, the obligation adjudicated, is in legal cognizance not a governmental, but an individual claim; the amount claimed is owed not to a government but to the individual claiming.

[2] Claims of this kind, though they take their substance from, and are concreted in, particular injuries to individuals, are in legal cognizance not individual, but national claims, the amounts claimed are owed by the government claimed against not to individual, but to the government claiming.

and "in which the claimants have exhausted their legal remedies in British courts" (italics mine), by its provision for and insistence upon an equitable construction of the Agreement in the consideration and disposition of the "as if" claims it thus authorizes, it assures to those claiming that their claims will be disposed of not upon formal and technical considerations, but upon those of substantial justice, and that if a claim has substance, no merely formal failure to precisely and literally comply with the Agreement terms. will defeat it.

By the Agreement, in short, upon considerations deemed sufficient, the Government of the United States (1) completely releases Great Britain from answerability to it, as well on claims due it for loss to its nationals as on claims for loss, debt, or damage due directly to itself; (2) holds her to full answerability to American nationals in British Prize Courts; (3) holds itself as to war claims of its nationals who, having real, not illusory remedies in the British Prize Courts, have exhausted them, answerable in Great Britain's stead to the same extent, but no further, than Great Britain would have been answerable upon such claims, but for the 1927 Agreement.

So apprehended, the Agreement is consistent with itself, and with national honor and fair dealing. So apprehended, it is consistent with the generally recognized view and practice of international law, that when local remedies are really, not merely apparently, available in the courts of the nation claimed against, these should be first exhausted, and resort had to diplomatic representation or arbitration only where the local proceedings have resulted in a denial of justice according to international law.

The Arbitrator is of the opinion, therefore, that the provision for satisfaction of claims "which the Government of the United States regards as meritorious" binds the United States to regard as meritorious claims which are in fact and in law so, and the provision that the Agreement shall apply to claims "in which the claimants have exhausted their legal remedies in British courts" must be interpreted equitably, as not requiring a vain and foolish thing. Particularly must it be interpreted as not requiring a claimant to avail himself of and exhaust remedies in the Prize Courts, when, by a settled course of decision, those remedies have been, as to a particular claim rendered illusory, and it is known in advance that an appeal to or from decisions in them, would be fruitless and futile.

The Arbitrator is of the opinion, on the other hand, that since the United States agreed to apply the sums saved by the settlement with Great Britain to those claims alone which had been denied satisfaction in the British Prize Courts, a claimant who has not pursued Great Britain there to the exhaustion of his remedies, is without standing to press a claim against the United States under the 1927 Agreement unless, by showing that such pursuit would inevitably have been vain and fruitless, he can explain and excuse his failure to do so. In short, a claimant, to have standing under that Agreement must show clearly and affirmatively (*a*) that he has exhausted his remedies in the British Prize Courts, and (*b*) that the complaint he makes is supported by principles of international law, neglected, disregarded, or violated in those courts; or (*c*) he must show that though he has not exhausted his remedies there, he did not do so because the remedies offered were not real, but illusory ones, and it would have been vain and foolish to have pursued them.

Thus, though claimant's failure to pursue his remedies against Great Britain to exhaustion in the British courts, by appealing from the adverse decision in prize of the President, is *prima facie* a bar to his right to prosecute

his claim, it is open to claimant to show that he did not do so because the settled course of decision in those courts had already predetermined the judgment on appeal, and that if he had appealed, he would inevitably have stood as he stands now, with judgment in prize against him.

The Arbitrator, then, rejects as untenable the extreme positions claimant and respondent respectively take as to the effect of the provision for the exhaustion of remedies. On respondent's part, it is insisted that, because claimant having, without, as required by the Agreement, exhausting his remedies in the British courts by appealing from the adverse decision, resorted to diplomatic efforts, he is without standing to claim under it, while claimant urges that the Agreement provision for the exhaustion of remedies in British courts should be wholly disregarded, the question submitted to arbitration, examined as though that provision did not exist. Rejecting both positions, the Arbitrator proceeds to an examination of the questions the arbitration raises, in the light of all the facts, including of course, the Prize Court proceedings, and of the law applicable to the facts.

THE FACTS.

(1) The Interocean Transportation Company was organized in and under the laws of the State of New York, in January, 1915. Its capital stock of $5,000, divided into five hundred shares of the value of $10 each, was issued to Hyman Epstein, a naturalized citizen residing in New York, who on June 5 of that year transferred 498 shares to his wife, and one share to his daughter.

(2) On April 18, 1915, the company entered into a twelve months charter party with the Shawmut Steamship Company of Boston, Massachusetts, for the hire at $7,500 a month, each payable in advance, of the *Lisman* and three other vessels, the *Seaconnet*, the *Penobscot* and the *Harper*, and the payment of provisions, wages, etc. To protect itself in the payment of the charter hire and other payments, and in the carrying out of the charter terms, the Shawmut Company required a deposit as to each vessel, of $20,000 to be made before its sailing, and to be maintained, from which the owner might draw, after a default of five days, any amount due it. It reserved, too, the option of canceling the charter of any vessel for the charterer's default in any of its obligations, as to that vessel. The *Lisman* and the *Seaconnet* were to be and were delivered in April. As to the *Penobscot* and the *Harper*, which were to be delivered in May, the record is silent as to whether they were ever delivered, and as to any voyages they made.

The record is most meagre as to how the company, with its small capitalization, undertook or expected to finance its business. The record merely shows that considerable sums, in excess of $500,000, were deposited in and withdrawn from various New York banks, but for what account or for what purpose used, there is no clear showing. The record also shows borrowings on promissory notes between April and July, 1915, amounting to $52,000. Part of these borrowings were for financing and operating the *Seaconnet*, the record showing the formation of a small holding company, the assignment of the charter to it under an operating agreement with Interocean, and the borrowing of $10,000 for that purpose. Too, the affidavit of Epstein, filed with the claim, shows that the company was operating on a shoestring, and very close to the wind; that of the $35,000 freight money received for the

Lisman's first voyage, $25,000 was paid to the Shawmut Steamship Company, $15,000 of this was for two months hire, *viz.*: from April 22nd to June 22nd, and $10,000 was deposited as part of the $20,000 security required by the charter party, payment of the remaining $10,000 being deferred upon the company's giving a promissory note for it; that the company looked to the $25,000 which it was to secure as freight money for the return cargo to pay the charter hire which was to fall due on the 22nd of June; that claimants were therefore compelled to delay the payment of the charter hire, and in August, the owners, proceeding under the terms of the charter party, withdrew the ship from the charter and took possession of it.

(3) The *Lisman* was delivered to the Interocean Transportation Company on April 22, 1915, at Pier No. 3, North River, New York [1].

(4) The Declaration of London, Order in Council, August, 1914, as modified by the Order of October 29, 1914, the contraband proclamations of August, September, October and December, 1914, and of March, 1915, and the reprisals Order in Council of March 11, 1915, being then in force, and the British Government being actively engaged in carrying out its program of preventing shipments of contraband and other goods from reaching Germany, the Interocean Company took precautions to avoid contravening British regulations, practices and arrangements relating to goods destined to Rotterdam and other neutral ports in countries adjacent to Germany. Among these arrangements and practices, formal and informal, was a requirement that goods, especially of contraband, destined to Holland must, in order to insure their not reaching Germany, be consigned with its prior consent, to the Netherlands Overseas Trust, which, at least at first, would take consignments of contraband only [2]. Another was that ships be loaded under the inspection of the British Consul General.

(5) The Interocean Company therefore paid $365 for a consular inspection and certificate that everything was in order, and on May 22, 1915, cleared from New York with a cargo of a general nature destined a part to London, a part to Rotterdam. 1,000 barrels of phosphate of soda of the Rotterdam cargo was consigned to John Otten and Zoon; 4,172 bags of coffee, to Paul Ledeboer, Amsterdam; 5,267 dry hides to Schmoll, Fils and Company, Rotterdam; 86 bales of tobacco, and 36,110 oak staves to Verburgh and Zoon, while the balance of the Rotterdam cargo, some absolute, the rest conditional contraband, was consigned to the Netherlands Overseas Trust [3], without, however, prior arrangement with that company, and therefore without its knowledge and consent.

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[1] On April 27, 1915, it was duly registered with Charles Smith as master, and the Philadelphia Trust Deposit and Insurance Company Trustee, as owner. The Shawmut Company was, however, in 1915 in control of the *Lisman* and its sister ships, and was, in fact, the real owner. The significance of the registry in the name of the Philadelphia Trust Safe Deposit and Insurance Company is that this company was on the list of banks and banking agencies which were remitting to enemy countries, and the point is made that this registry made the ownership and control of the *Lisman* sufficiently obscure to be a matter of concern to the British Government at the time the vessel cleared from New York.

[2] Foreign Relations, Supp., 1915, pp. 269-270-271, 273; Claimant's Memorial, p. 46; Foreign Relations, Supp., 1914, pp. 269-270, 1915, p. 138.

[3] Claimant's Annex, p. 123.

(6) In addition to the usual bill of lading provisions exempting the carrier from liability for losses due to arrest, restraint, capture, seizure, detention or interference by any power, ruler or people, the bill of lading contained provisions authorizing the master at his discretion, in case of war, etc., which would make it unsafe to proceed on or continue the voyage, to abandon the voyage and unload the cargo at any port, at the expense of, and without responsibility to, the shippers, all charges on account of such action to be paid by the shipper, consignee, or assigns, and to be a lien upon the goods.

(7) The vessel arrived at the West India Dock in London at midnight on June 8, and on June 9 began discharging its London cargo. On June 11 the cargo list was examined by the Contraband Committee, and the customs authorities were instructed to discharge 1,000 barrels of phosphate of soda. On June 12 the phosphate of soda was discharged and placed in the Prize Court, and the captain was notified that certain of the goods consigned to others than the Netherlands Overseas Trust, to wit, the coffee, tobacco and staves, all on the contraband list, must be either discharged or reconsigned to the Trust, before his steamer could clear.

(8) On June 9 the company appealed to the Department of State for assistance. On June 16 the items ordered discharged or reconsigned being still on board, but the London cargo not having been unloaded, the captain applied for, but was refused, clearance. Negotiations then and thereafter on foot for reconsignment to the Trust failed, in part because of the Trust's general unwillingness at that time, to give guarantees to the British Government for cargo carried on other than Dutch steamers, but in part because, though the balance of the cargo had been consigned to the Trust, this had been done without its knowledge or consent, and the Trust was unwilling to accept reconsignment of the contraband without a guarantee in the form of a deposit of 100,000 guilders (about $40,000) that the *Lisman* would not take the cargo to Germany.

(9) Continuing to discharge its London cargo, the ship accomplished this on June 19, but in the meantime complaining that the detention of the *Lisman* for want of clearance papers was causing it a loss of $2,000 a day, the company through diplomatic channels and otherwise, undertook to obtain the ship's release. Among other things, the company on June 22, took up the question of its right to discharge and the cost of transshipping the cargo, and on June 24 it was advised that under the bill of lading it could discharge the cargo at the risk and expense of the cargo owners. From that time forward the owners of the ship pursued a changing and vacillating policy. On June 25 the agent was ordered to transship ; on the following day this order was countermanded with the advice that "conditions required the *Lisman* to go to Rotterdam".

(10) While the master had been notified as early as June 12 that he could not get a clearance unless he would discharge or reconsign to the Trust certain items of contraband in his cargo, no action was taken while they were on board to seize them, or put them in the Prize Court. On June 30 the company sought permission to have the vessel take the interdicted items to Rotterdam, unload their other cargo there, and return with them to New York, but on July 2 it instructed its London agent to discharge all cargo and store it at the disposal of the consignees, subject to the payment of *pro rata* expenses, including demurrage at $2,000 per day. On July 3

the ship had partly discharged the coffee, staves and tobacco. On the 8th the turpentine, tanning extract, hides, coffee, staves and tobacco were seized for the Prize Court. The discharge of these items being completed on July 8, the *Lisman* departed on July 9 for Greenhithe, where it was to load a return cargo.

(11) On July 14 the company countermanded all previous instructions as to claims against the cargo, and ordered all cargo liens released.

On July 20 the company, in a letter to its London solicitors requesting them to make claim for damages for the detention of the *Lisman*, thus stated their claim:

> As a result of being forced to unload the Rotterdam cargo at London, we lost the friendship of our shippers who have since refused to deliver freight to us at a great loss. Our losses, demurrage $2,000 per day for each day from the time we were ordered to remove phosphate, tobacco, oak staves and coffee should be claimed from the British Government, traveling expenses of our representative, our attorneys fees, all amounting to about $5,000, are to be added to the claim. Also we had arranged another outward cargo, having expected her here July 1, and were forced to hand over the cargo to other steamship companies at a loss.

Copy of this letter, including a full set of papers on both the *Seaconnet* and the *Lisman*, both of which had sailed about the same time, and both of which had been detained in British ports because of contraband on board believed to be destined to the enemy [1], were on the same day sent to the United States Consul General at London.

By July 23 the *Lisman* had loaded a cargo for New York, and had obtained clearance. On August 9 she arrived at Boston, and the charter hire being still in default, the charter was canceled and the use and control of the ship was taken by the Shawmut Company for failure of the Interocean Company to meet the payments under the charter party.

While these things were transpiring with regard to the *Lisman*, the *Seaconnet* was also in difficulties. Clearing from New York with a general cargo for Christiania, Copenhagen and Gothenburg, she was taken off her course on June 14 and detained at Kirkwall from June 16 to 19, and docked at North Shields on June 21. Her discharging and the reloading of her cargo was completed on July 5. Clearance was granted on July 8, and the ship left North Shields July 9 [2]. On September 27, 1915, the Interocean Company was adjudicated an involuntary bankrupt. The bankruptcy

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[1] Claimant's Memorial, p. 69, its Annex, 42; *cf.* The *Seaconnet*, Lloyd's List Law Reports, Vol. 2, p. 260.

[2] The claim in the Prize Court on account of this detention as reported in Lloyd's List Law Reports, Vol. 2, p. 260, was a claim for $ 3,700 a day for 27 days undue detention. It appeared that 900 tons of the cargo discharged at North Shields were, upon the admission of counsel for claimants, contraband destined for Germany. It was found that there was no undue detention and the claim was dismissed with costs. The record does not show what finally became of the *Seaconnet*. It does show that on September 27, 1915, the Interocean Transportation Company, charterer of the *Lisman* and the *Seaconnet*, was adjudicated an involuntary bankrupt.

proceedings, because, no doubt, of this undisposed of claim, its main, if not its sole asset, have been since pending.

(12) IN THE BRITISH PRIZE COURT.

(A) THE PRELIMINARY PROCEEDINGS.

On July 29, 1915, Waltons & Co., as solicitors for claimants, entered an appearance in the prize proceedings for the owners of the *Lisman*, for "damages for detention and discharging expenses". On May 1, 1916, the claim of the company was filed "for costs, expenses, losses, damages and demurrage which have arisen, and shall or may arise, by reason of the seizure and detention of the ship, and of the discharge of the cargo, and for a declaration that the claimants are entitled to compensation in respect thereof." The grounds of the claim are—(1) the ship was a neutral ship, and was engaged in carrying cargo from a neutral port to a British port, and a neutral port, for delivery there. (2) That the cargo was not liable to capture, seizure, detention or condemnation. (3) That the part destined for Holland was consigned in the bill of lading to named consignees there. (4) That it was loaded under the supervision of inspectors appointed by the British Consul General at New York, and affidavits were given to claimants by all the shippers that the goods were intended to be used in Holland only, and not to be re-exported. (5) That the cargo consigned to Holland was neutral property, and of neutral origin, and had no enemy destination. (6) That the ship was properly documented. (7) It was unduly detained. (8) The claim for damages was for the loss of the use of the vessel, in the loss of large profits which it would have earned but for the seizure, discharge and detention, and the benefit of a part of the charter which was canceled by the owners of the ship. There was a prayer for damages, demurrage, and compensation for their losses, but nowhere in the record does it appear what amount was claimed, or what items made it up. It does appear, however, from *Lloyd's List Law Reports* of March 9, 1920, Vol. 2, p. 397, on application for the allowance of the right to appeal that there was claimed for the detention a very large sum, involving an amount of some $600,000. On December 17, 1916, the Trustee filed an affidavit setting forth a statement of the facts upon which he based his claim.

On April 30, 1918, and on December 4, 1918, affidavits of Post and Bloch were filed in support of the claim. These affidavits alleged that the company's credit had been seriously impaired by the detention, because of notice that the ship could not be placed on berth when expected, and the shippers thought that all of the ships operated by the company might be detained. These affidavits further declared that the company relied upon freight to be collected on account of the various commitments above referred to, to pay its operating expenses; that it had full freight commitments for three outward voyages, the first planned for July 1, the second for August 15, and the third for October 1, 1915. On June 21 and July 10 and 18 affidavits of British agents setting forth the facts relating to the investigation of the cargo, the seizure, and efforts made to effect the desired reconsignment, were made and filed. Other affidavits were filed in that year, but the case did not come up for hearing until November, 1919.

(B) THE HEARING IN THE PRIZE COURT.

As reported in *Lloyd's List Law Reports*, Vol. 1, pp. 455 *et seq.*, the following significant facts are shown.

(1) This was a claim against the Crown by the owners of the *Lisman* for damages, for detention of the ship owing to the seizure of its cargo. (2) On November 18, 1919, Mr. Balloch, instructed by Messrs. Waltons & Co., for the claimants, stated the contention of the complainants as follows:

> The seizure took place in London, in June, 1915, and the complaint of the claimants was not that there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents. Some of the goods were contraband, and some were not, and the latter were dealt with under the Reprisals Order of Feb. 11, 1915. There were two writs. One concerned 1,000 barrels of phosphate of soda, shipped by a chemical company, which were not contraband. They came within the Reprisals Order and there was no claim for condemnation. The second writ dealt with turpentine, tanning extracts, hides and coffee, some of which were contraband, and oak staves and tobacco, which were not.

Mr. Balloch further said, that the claim was for thirty-two days; that one had to recognize that it would have taken about nine days to discharge the cargo, hence there was at least twenty-three days delay.

(3) On November 19 Mr. Balloch, after drawing the attention of the President to, and discussing the filed affidavits which were material to the case, thus summarized his claim:

> The Crown, as a belligerent, had a right to require the non-contraband goods to be discharged if they were enemy property, or had an enemy destination under the Reprisals Order of March 11, 1915. Under that Order no penalty was imposed on the ship. It was not regarded as committing any wrong in carrying goods with an enemy destination if they were not contraband. With regard to conditional contraband, the Crown also had the right to require the goods to be discharged and to seize them as prize. With regard to the ship, the ship was not a wrong-doer *quo ad* the carriage of contraband, unless it were shown the ship had knowledge of the guilty character of the particular goods. If that be shown, the ship was subject to confiscation for carrying contraband with knowledge. That was not asserted in this case, and no proceedings were taken against the ship, so that the ship was entitled to be regarded as an innocent party in this transaction. The goods were liable partly to be dealt with under the Reprisals Order, and partly to be dealt with as contraband.
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> It was no part of the claimants' case that the action of the British authorities was unreasonable. No claim for costs and damages would lie against them for improper seizure.
>
> The position was this: True, the Crown had a right to seize and require these goods to be discharged if there were reasonable suspicion; but that suspicion and that right to discharge arose from the goods, and the goods alone. The shipowner was not concerned with that, and if the Crown sought to exercise belligerent rights, the Crown must do so with every regard to the interests of the innocent shipowner, and claimants' case was that the Crown or the Contraband Committee, with the knowledge possessed by June 11, ought to have made up their minds as between themselves and the owners of the goods, what they were going to do.

The Crown did wrong to detain the ship while negotiations were going on and efforts were being made to decide on the best course to adopt.

(4) Mr. Dunlop, for the Crown, noted that it was now admitted that the Crown had reasonable ground for their action, and in fact, it was abundantly clear that but for the measures taken by the British Government and by the Netherlands Overseas Trust, these goods would have reached Germany. With the exception of the staves and the tobacco, all the goods were contraband.

Mr. Dunlop also denied admitting that the ship or goods were innocent, but on the contrary, he thought the evidence showed that there was ground to suspect that if the vessel went to Rotterdam, it might go to Germany. That the Crown and the Netherlands Trust had not believed the real destination was Rotterdam. He called attention to the fact that four of the parcels were not consigned to the Trust, and the rest of them though consigned to the Trust, were so consigned without its knowledge or consent. That the Crown was not liable unless there had been undue delay in the sense that there had been delay which the exercise of reasonable care could have avoided.

(5) Mr. Balloch, in reply, said he did not say that the authorities were not justified in dealing with the cargo even though the goods were released, but what he did say was that there was undue delay. "Mr. Dunlop", said he, "in referring to the claim in the present case, said the claimants had abandoned the first six grounds of their action. He (Mr. Balloch) quarreled with that statement entirely; he had not abandoned any of those grounds."

He insisted that the claim was but this: that until interfered with by the Crown, it was the duty of the ship to proceed with its cargo; that there was restraint by the Crown, but that it was exercised not straightforwardly and at once, as it should have been, but in a vacillating, uncertain manner, causing undue delay to the ship while waiting for the Crown to make up its mind whether it would seize the goods or let them go forward.

(C) THE PRIZE COURT JUDGMENT.

In giving judgment the President, following claimants' own statement of their case, stated it as a claim for undue delay, in relation to the seizure and detention of various parcels of goods. In the course of rendering his judgment he said:

> There is no doubt about the principle which is to be applied here. Wrongful capture may be the cause for an award of damages; wrongful detention may be the cause for an award of damages by the Prize Court, and any wrongful or vexatious act in the course of the exercise of belligerent rights or seizure or detention may give cause for such award.

And again—

> It is conceded with regard to the phosphates and the other four parcels of goods, that there was good cause for action on the part of His Majesty's Government. That disposes of any question of there being any wrongful seizure or wrongful detention. But it is said that the Government ought to have acted with a degree of dispatch with which they did not act.

Then, reviewing the claim for undue delay in the light of the whole record, he concluded that it was unfounded, and so concluding dismissed the application for it.

The Damages claimed.

While, as already noted, no itemized statement of the claim in the Prize Court appears in the record, it does appear that large claims were made there, aggregating $600,000, and there is the affidavit of Post filed in that court in April, 1915, that there was a loss of freight for three outward voyages of $65,000 for each voyage. In 1920, in the claim filed with the Department, the losses claimed were $622,871.68. This claim was supported by the affidavit of the Trustee Leventritt, and by an affidavit of Epstein, substantially to the same effect. It was also supported in part by the affidavit of Post of May 12, 1921, that the *Lisman* had three outward bound commitments of $65,000 for each outward trip. Itemized, the claim was:

(1) 32 days demurrage	$ 43,871.68
(2) Extra expenses incurred in London	9,000.00
(3) Loss of 3 cargoes and return cargoes	255,000.00
(4) Loss of 3 further outward and 3 further homeward cargoes	315,000.00
	$622,871.68

As the claim is presented in the Memorial in 1934, the total is now placed at $1,218,269.68, with interest at 6 % from 1915. This total is itemized as follows:

(*a*)	Loss of use for three outward bound trips at $165,000 per trip under contracts, less charter hire and expenses (including return)	$431,113.20
	Loss amounting to difference between charter hire and market price of charter for months following cargoes booked	162,500.00
	Loss of return cargo from Rotterdam under agreement, and two probable cargoes	75,000.00
	Disbursements during detention	12,156.48
(*b*)	Loss through the inability to exercise right of option to purchase the *Lisman* at $225,000	$537,500.00

In support of all of these items but the last, claimant submits the affidavits of Epstein, Leventritt and Bloch, and a supplementary affidavit of Post, executed in 1934, in which he states that his previous affidavits fixing the commitments for outward-bound freight at $65,000 were incorrect; that the amount should have been placed at $165,000. No further explanation is made of the discrepancies in the two accounts, no further reconciliation of them is attempted.

In support of the last item claimant submits the affidavits of Stafford and Avrutis, former officers of the company, made by them in 1934, that in 1915 it had the option to purchase the *Lisman* at $225,000, and affidavit as to its sale in the year following for $762,500.

Claimant's Contentions.

His admissions in the course of the judicial proceedings in the British Prize Court, that the Crown had a right to seize the goods and require their discharge, that it was no part of the claim that the action of the British authorities in seizing the goods and detaining the ship was in itself unreasonable, and that no claim lay against the Crown except for undue delay, are completely ignored by claimant. His reliance is put here on the wholly inconsistent contention that the seizure of the goods, and the detention of the ship, were wrongful *ab initio*, an unlawful attack upon neutral commerce, in violation of the law of nations, as set forth in the Declaration of London. His legal position that all the acts of the British Government, during the World War, of which he sweepingly complains, were in violation of international law, seems to be based upon the premise that the London Declaration, though made up of "compromises and mutual concessions", and not to be binding until adopted by those proposing it, and then only as a whole, "was expressive of the view of the nations in 1909 as to the controlling rules of international law" (Claimant's Memorial, p. 13) [1], and was therefore binding upon neutrals and belligerents alike, and the measure of their respective rights and obligations during the World War [2].

Grounding himself on the Declaration of Paris that a neutral flag covers enemy goods, except contraband of war, and that a blockade to be binding must be effective, and on the Declaration of London in effect discountenancing the doctrine of continuous voyage as to conditional contraband bound to a neutral port, he roundly rates the British practices of rationing neutral countries; her unprecedented employment of measures for long range or paper blockade, extending, in fact, to neutral ports; her reprisals measures; her extension to unprecedented lengths as to absolute, and in violation of the London Declaration as to conditional contraband, of the doctrine of continuous voyage by carriage over land; the sweeping extension by successive Orders in Council of the contraband lists; and finally, the abandonment altogether of the distinction between absolute and conditional contraband. In short, in no manner confining himself to the question for decision here, whether his proof makes out a case of the actual denial to him of the justice which was his due by international law, claimant presents his case largely on the basis of the theoretic or abstract denial of neutral rights inherent in the British position and war measures. He presents it, in short, as though he stood in the lists, representing neutrality, champion of neutral rights in

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[1] *Cf.* Pyke, Law of Contraband of War, Chap. XIII, p. 166; International Law and the Great War, Phillipson, Chap. XVIII, pp. 327-9; Neutrality, its History, Economics and Law, Vol. III, The World War Period, p. 8 (Columbia University Press).

[2] It may be noted here that its adoption was opposed by Great Britain, that the proposal the United States made in August, 1914, that the Declaration be adopted, was not accepted, and that on October 22, 1914, the Government of the United States advised the British Government that it had withdrawn its suggestion that the Declaration of London be adopted as a temporary code of naval warfare, and that "this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law, and the treaties of the United States, irrespective of the Declaration of London". United States Foreign Relations, 1914, Supp., pp. 256-7-8.

general, opposed by the United States, representing Great Britain, champion of belligerent rights in general [1].

Thus, though the case here is not one of search and seizure on the high seas, but of detention in a port to which the ship had voluntarily come, with full knowledge of and in purported voluntary compliance with British Orders in Council, including the March, 1915, Reprisal Order, he brings into review the question raised sharply by the United States while still a neutral, of the binding force of the old practice of preliminary search at sea, and the illegality of the new one of bringing into port for search [2]. Thus, too, though there is no procedural question here of condemning or acquitting the ship in the Prize Court on her papers and evidence alone as against subjecting her to further search to make a case for condemnation against her, he makes an issue of the binding force of the old procedure, of action on the ship's evidence without resort to that of the captor, and of the unlawfulness of the new one under the changed rules, 1915—1920, of action on evidence obtained by the captors on further search and inquiry, for the purpose of getting up a case [3].

For it must be always kept in mind that the action taken here was based on an examination of the cargo lists while the ship was in the port of London, and not at all upon a seizure at sea, and a taking into port for a rummaging search of the vessel. It must be borne in mind too, that there was never any thought or question here of detaining the ship in order to get up a case to condemn either ship or goods, but only to prevent contraband with a suspected enemy destination, from getting into Germany.

It must be borne in mind, too, that when the ship, unable to give the guarantee required by the N.O.T. as a condition of accepting consignments, that she would not proceed to Germany, took the alternative of unloading the offending goods, she was at once given her clearance.

Examined apart from the indictment he brings against Great Britain's war measures in general, claimant's contentions as to the specific wrongs inflicted upon, and the specific damages suffered by him, seem to be (1) that in order to frustrate her voyage, the ship, after unloading in a British port, was unlawfully refused a clearance to proceed to Rotterdam, a neutral port. (2) That by dilly-dallying and shilly-shallying, the British Government not only frustrated the voyage, but caused an undue detention and delay of the ship in the port of London, and (3) that the frustration of the going and the delay of the returning voyage proximately caused the loss of outward bound freight already engaged, and of outward and inward bound freight to be reasonably expected, together with the loss of the value of the charter and of the option to buy the ship.

In support of his first contention, that the ship's voyage was deliberately frustrated, claimant points as evidence of collaboration to that end by the British Government and the N.O.T. to the condition imposed by the Government on the one hand, that the N.O.T. accept consignment of the offending goods, and the refusal of the N.O.T. on the other to do so, except upon the exaction of a bond, heavier than the ship could make, that it would not proceed to Germany. Arguing that these measures were not taken as war measures, in the legitimate exercise of belligerent rights, but as wholly

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[1] *Cf.* Millis, Road to War—America, 1914-17, pp. 82-89.

[2] *Cf.* Neutrality, Vol. I, The Origins, Chap. 6.

[3] Neutrality, Vol. I, The Origins, Chap. 7.

unjustified and illegal economic measures [1], in the interest of British and Dutch shipping and trade, claimant points to the enormous increase of Dutch and British business brought about by the War.

Arguing further for the illegality of the measures taken against the goods and ship without regard to whether they were in reality war measures in defense of national existence, or merely economic measures in furtherance of national trade, the point is made that the ship's destination was a neutral port, the questioned goods were consigned to merchants in that port, and though contraband in their nature there was no sufficient evidence of enemy destination to furnish probable cause of the detention of the ship or the seizure of the goods.

In support of claimant's second point, that assuming probable cause for the initial detention, there was undue delay on the part of the Government in working the matter out, claimant argues that the whole policy and procedure of the British Government was one of delay. Instead of at once taking the positive and definite position that the goods must be unloaded, or fixing some alternative with which claimant could comply, the British Government took no formal steps to seize the goods until July, and though refusing to give a clearance, was all along holding out to the ship that arrangements might be made for the completion of her voyage.

On the issue of damages, claimant insists that his proof by affidavit is sufficient to show not only direct damage by way of disbursements during, and of demurrage for the time of, the detention, but also equally direct damage for the loss of outward and homeward cargoes, of the charter party, and of the option to buy the ship, and that all these losses occurred as the result of the action of the British Government in frustrating and delaying the *Lisman*'s trial voyage.

Upon the precise question confronting him here, whether having gone into the Prize Court upon an admission, that because of the contraband nature of the goods, and the circumstances surrounding the shipment, the seizure of the goods and the detention of the ship was upon probable cause and rightful, and that the claim was one for delay only, and having lost on that contention, claimant can, under the 1927 Agreement, put forward and maintain here the entirely inconsistent claim that the seizure of the goods and the detention of the ship were unlawful from the beginning, claimant presents little of force or bearing. Indeed, he contents himself as to the whole prize proceedings with asserting that his going into the Prize Court was ill-advised, and that in view of the position taken by the United States while a neutral, that it would not consider British Prize Court decisions binding on it, because, though professing to be declaratory, they were really in derogation of international law, mere decisions of municipal courts emanating from and controlled by the Crown, it ought not now to invoke those proceedings as a defense to his claim.

Finally, on the head of the Prize Court proceedings, he argues (1) that generally the rule requiring primary resort to local tribunals is more honored in the breach than in the observance, especially in latter day arbitrations. (2) That the settled course of British Prize Court decisions justifies the view of the United States while a neutral, that that court was an agency of British belligerent pretensions, rather than of international justice, and

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[1] *Cf.* Neutrality, Vol. II, The Napoleonic Period, Chap. II, Chap. XIV; Neutrality, Vol. IV, Today and Tomorrow, Chap. II; Seymour, American Diplomacy during the World War, p. 43.

(3) that for these reasons, the whole Prize Court proceedings, including his admissions in them, may be ignored.

CONTENTIONS OF THE UNITED STATES.

The Government of the United States refuses to take up claimant's gage as champion of neutral rights in general, and American neutral rights in particular, and to enter the lists in the character assigned to it by claimant as defender of belligerent rights in general, and British belligerent rights in particular. It insists it still champions the freedom of the seas, and the rights of neutral traders thereon: still maintains that there are limits to belligerent pretensions, areas of rights for neutral traders, withdrawn from belligerent activities, areas created and protected by international law. It especially insists that it did not, when it became a belligerent [1], it does not now, abandon its position that unlawful belligerent interference with the activities of its nationals as neutral traders during the World War, must be compensated for. It points out that in the May, 1927, Agreement it expressly announced its continued adherence to that view, and by that Agreement it undertook to satisfy claims of American nationals, injured by British war measures taken in contravention of their rights as neutral traders. It vigorously insists, however, that the contentions, and their discussion, must be kept within the compass of the case in hand, and must bear upon and elucidate the precise questions for decision here. It particularly insists, therefore, that though heard *de novo* and unaffected by the Prize Court action, the facts of the case at bar as the record presents them, do not disclose any violation of neutral rights, upon which a diplomatic claim could be sustained, the case may not be examined or viewed in that way. It must be viewed as in fact it is, as one in which a claimant under the 1927 Agreement, having taken a firm position against Great Britain in her courts and lost on that position, may not now, the United States standing in her stead, reopen the whole matter by taking a wholly inconsistent position. Insisting in short, that claimant's general positions, that during the World War Great Britain made belligerent contentions, and adopted belligerent practices, which violated neutral rights, are purely academic ones, it urges that claimant's real case, as it stands on the record and the Agreement, is a hopeless one. For it requires claimant to now deny, when the claim is for satisfaction by the United States, what he formerly affirmed when it was for satisfaction by Great Britain, that the seizure of the goods and the initial detention of the ship were lawful, and that the sole claim was for delay.

Thus, the United States urges, claimant finds himself faced, not with the ordinary difficulty which confronts one who undertakes to present for the first time in arbitration, a claim which he did not present to the appropriate local tribunal of the nation claimed against, but with the extraordinary, indeed, the insuperable difficulty of seeking, under an Agreement which requires the claim to be first presented against, and if possible collected from Great Britain in her courts, to recover against the United States, upon a position which, by his solemn admissions in the Prize Court, he prevented himself from recovering on there.

[1] "United States and the Rights of Neutrals, 1917-1918", Am. Jour. Int. Law, January, 1937, Alice M. Morrissey; United States Foreign Relations, 1917, Supp., p. 865 and note; Claimant's Annex 155.

In addition, the United States insists that the claim is without merit and claimant cannot prevail, because (1) he did not, by appeal to the Privy Council, exhaust the remedies available in the British Courts. (2) The decision of the Prize Court, in denying damages, was not a denial of justice under international law, because (*a*) the fact was, that the seizure of the goods and the detention of the ship was lawful, because done under British municipal law while the ship was in the port of London, to which it had voluntarily come, and because of contraband on board suspected on probable cause, of an enemy destination. (*b*) It was solemnly admitted by claimant in the British Court that the seizure and the original detention was lawful; (*c*) on the whole proof it is quite clear that the finding of no undue delay in the detention of the vessel was a wholly justified one, and (*d*) if there was undue delay, it was, under all the circumstances, so slight and the damage legally flowing from it so small, as to be negligible from the standpoint of an international claim.

Finally, on the issue of damages, it takes the position that if any recoverable damage was shown, it was only for a few days demurrage at a figure based on the proven earning power of the ship at that time, and not on what ships earned in the later years of the War.

As to the huge amounts now claimed for loss of cargoes outward and homeward bound, the loss of the charter party and of the option to buy the ship, the United States insists that the record does not support the claims either as to the fact of their having resulted from the detention complained of, or as to the quantum of the damages claimed.

Pointing to the inconsistency between the claim, that, at the time the charter was forfeited, the freights earned and to be earned, the charter and the option to purchase were of a very great value, and the record showing that the forfeiture occurred because of claimant's inability to pay the small amount which would have kept the charter alive, the United States argues that the damage claims are preposterous.

Pointing, too, to the small capital and sketchy financial arrangements the company had made, it insists that it was the company's inadequate provision for financing its venture under the conditions then obtaining, and not the mere circumstance of a delay in the port of London, which was the proximate cause of its failure to keep financially afloat, and that to lay the retirement from business and consequent bankruptcy of the company to the fact alone of the *Lisman*'s detention, is fantastic and unreasonable.

To claimant's position that the frustration of its first voyage lost it its customers because of their fear that the ship would again be stopped, the United States replies that at that time, under the British Orders in Council, there was a general interference with and stoppage of neutral carriers, the ships of the Interocean Company no more than others, and the evidence does not support the claim that the freight consignments were cancelled because of that fear.

More, there is nothing, except the affidavits of Post, contradictory of each other and unsupported by any papers, that any outward freight was actually booked at any price, while the actual earnings of the first outward voyage and the undisputed testimony of Bloch, the company's agent in London, that there was very little return cargo available, make it clear that there is no basis in the record for the award as damages, of any of the great sums claimed for freight.

THE DECISION.

It might be expected that the Arbitrator, newly come to the house of international law, would stand hesitant and confused upon the threshold, unwilling to enter. Hesitant and confused, indeed, discouraged and dismayed by the apparent uncertainty and fluidity of opinion as to, and therefore of, the law itself upon the highly controversial questions claimant and respondent raise, as to where belligerent pretensions end, and neutral rights begin. Especially might it be expected that because of his long accustomedness to and observance of the common law practice of precedent following, the Arbitrator might find himself, for want of binding precedents, lost in the maze of opinion and assertion of those who, having no authority by international mandate, either to bind or loose, freely and without reserve, attempt to do both.

But such expectations would spring from, and be grounded on, an opinion and view as to the fact and the desirability of the fixity and certainty of law, which the Arbitrator does not share.

One of those who has long believed that in "the glorious uncertainty of law", its ever changing content under the steady pressure of the changing life it serves, its continuous, though slow, progression from the actual to the ideal is to be found its greatest source of strength [1], the Arbitrator has stepped confidently over the threshold into a new wonderland of law, fascinated equally by "the glorious uncertainty" of international law, the delicacy and precision of its formal adjustments, and by the greatness of its unquestioned testimony to the fact that not force, but just opinion, is at last the source of law, at least with lawminded nations and peoples, and particularly with the United States and Great Britain.

Accustomed, in the decision of municipal law cases, to regarding precedents as guides to, and not obstructions of, just decision, as mere applications of the principles upon which such decisions rest, the Arbitrator has not been greatly disturbed by the lack of precise and binding precedent. The general underlying principles upon which the decision must turn seem to him to have been clearly enough laid down and expounded. What differences in viewpoint and contradictions in opinion there are as to the matters put forward here seem to him to inhere not in the statement of the underlying principles, but in their attempted application by belligerents and neutrals alike during the stress and strain of the Great War.

In order that claimant's position, and the relevance and force of his arguments in support of it, might be certainly known and understood, and the principles upon which the decision should finally rest might be correctly apprehended, the Arbitrator has, before attempting to define the precise issues for his determination, taken the greatest care to examine the texts claimant and respondent cite, with many others, bearing upon the validity under international law, of British war measures and war activities in general. In the light of these writings the Arbitrator has examined and considered all the British Orders in Council, including particularly those creating presumptions as to, and throwing upon neutrals the burden of proving, innocent destination, the practices of the British Navy and the decisions of British Prize Courts applying the doctrine of continuous voyage to shipments to neutral ports, in connection with the policies of rationing neutral

[1] Law as Liberator, p. 135 (Hutcheson, Foundation Press, Inc.); "The Judgment Intuitive," C.L.Q. April, 1929.

countries, of blockade and of reprisals. In order, too, to obtain a perspective from which to view claimant's contentions and respondent's defenses, particularly as to the static or changing character of international law as applied to belligerent and neutral pretensions, he has considered and examined at some length writings on the origins of neutrality, as international law knows it, and the rights and duties inherent in that conception, not only from the standpoint of those who insist upon its continued recognition and furtherance as essential, both to national integrity and international amity, but from the standpoint of those who, greatly questioning whether neutrality as thus conceived is not a complete misnomer, and but a cover for economic exploitation and profiteering out of war, on the part of those fortunate enough not to be drawn into it, advocate in lieu of it a policy of collective security, or of neutral embargoes on munitions and war supplies [1].

He has considered these latter writings in their bearing upon the contention that the so-called rights of neutral traders have no moral, but only a strictly legal basis in convention and custom, and should therefore at least be confined within the limits of situations already settled and established, and not extended by analogy to situations either new or extraordinary.

Swinging now to one side, now to the other as he read Adams [2], Trimble [3], Garner [4], Jaffe [5], Baty [6], Moore [7], Pyke [8], James [9], Phillipson [10], Hyde [11], Oppenheim [12], Yntema [13], Borchard [14], Pilotti [15], and many others, the Arbitrator found himself greatly engaged by and concerned with the problems they discuss. Particularly was he interested in the question whether the decisions of prize courts are really municipal law decisions and therefore without authority as expositions of international law, as some say, or inter-

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[1] "The Principles Underlying Contraband and Blockade", Montmorency, Grotius Society, 1916, Vol. II (Sweet & Maxwell, Ltd.).

Neutrality, its History, Economics and Law, Vols. 1-2-3-4, Columbia University Press, 1936.

United States Neutrality Act 1935, as amended in 1936, and re-enacted in 1937. The discussion of it by Garner, Am. Jour. Int. Law, July, 1937, p. 385; Proceedings of the Society of International Law, April 29 to May 1, 1937.

"Neutrality and Collective Security", Harris Foundation Lectures, 1936. (University of Chicago Press.)

[2] "Growth of Belligerent Rights over Neutral Trade", Penn. Law Review, Vol. 68, pp. 20-49.

[3] "Violations of Maritime Law by the Allied Powers during the World War", Am. Jour. Int. Law, Vol. 24, p. 79.

[4] Prize Law during the World War (Macmillan), p. 26.

[5] Judicial Aspects of Foreign Relations, Harvard Studies in Administrative Law, Vol. 6.

[6] "Neglected Fundamentals of Prize Law", 30 Yale Law Rev., Vol. 3; "Prize Law and Modern Conditions", Am. Jour. Int. Law, Vol. 25, p. 625.

[7] International Law and some Current Illusions (Macmillan).

[8] "The Kim Case", Law Quar. Rev., Vol. 32, p. 50; The Law of Contraband of War (Oxford Press, 1915).

[9] "Modern Developments of the Law of Prize", Pa. Law Rev., Vol. 75, p. 505.

[10] International Law and the Great War.

[11] International Law chiefly as Interpreted and Applied by the United States.

[12] International Law, Vol. II, Part 3, Neutrality.

[13] "Retaliation and Neutral Rights, The *Leonora*", Mich. Law Rev., Vol. 17, p. 564.

[14] "International Law of War since the War", Iowa Law Rev., Vol. 19, p. 165.

[15] "Plurality or Unity of Juridical Orders", Iowa Law Rev., Vol. 19, p. 245.

national law decisions [1] as the British courts and those of the United States say they are.

He was greatly interested, too, in considering to what extent the concession of the Privy Council in the *Zamora* [2] that Orders in Council are presumptively valid, and their holding in the *Stigstadt* [3] and the *Leonora* [4] that the 1915-1917 Reprisals Orders were valid, impair their position taken in the *Zamora*, that international law is their rule and guide [5].

But interesting as these questions are to examine and consider, the case for arbitration, as the record presents it, does not bring them up for decision. The Reprisals Order of 1917 was not in existence when the detention in question occurred, and while that of 1915 was, it is not claimed that any delay or damage was caused by the prompt seizure and unloading of the phosphates under that order, before the London cargo had been discharged. Neither are there any questions here of changes in procedure in the Prize Courts [6] or of a rummaging search of the vessel for evidence, or of condemnation on captor's evidence, for no condemnation was had or sought of either ship or cargo. As to all of the other questions involved in the general indictment claimant brings against British war measures and activities, the case as made by the record is such that they may not be considered *in vacuo*, but only as they arise and are important in the precise case the record makes, a case in which the proceedings in the Prize Court, and especially claimant's position and admissions there, loom large and formidable.

Indeed, the United States, upon the authority of numerous citations, insists (1) that the claimant's failure to appeal from the President's judgment is of itself fatal to his claim; (2) that if the failure to appeal has not altogether concluded claimant, his action and position in the Prize Court has cut him off from any claim here, except that the judgment in that court that there was no undue delay, was a denial of justice. It particularly insists that he is precluded from denying now what he admitted then, that the goods were rightfully seized, the ship rightfully detained, and the sole question was one of delay.

Claimant on his part argues that neither generally, nor under the particular circumstances here, was the failure to appeal of itself a bar. He vigorously denies too that the concessions he made in the Prize Court, as to the rightfulness of the seizure and detention bar him now from asserting the contrary.

As has already been stated, the Arbitrator agrees with claimant that the mere failure of claimant to appeal, under the 1927 Agreement, is not a bar to the prosecution of this claim. None the less, the Agreement of 1927, the undisputed facts of this case, especially claimant's action, and the positions he took, in the Prize Court, have brought the questions for decision here within the narrowest compass, and it is within that compass that their consideration and decision must be confined. Under that Agreement, for claimant to have any standing here, he must have shown with the certainty

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[1] *Cf.* "British Prize Courts and International Law", British Year Book of International Law, 1921, p. 21; "Development of German Prize Law", Columbia Law Rev., Vol. 18, 503, at pp. 508-511.

[2] 4 Lloyd's 1, App. Cases, Vol. II, p. 77.

[3] App. Cases, 1919, p. 279.

[4] App. Cases, 1919, p. 974.

[5] Garner, Prize Law since the World War; Pyke, "The Law of the Prize Court", Law Quarterly Rev., Vol. 32, p. 144.

[6] *Cf.* Tiverton, Prize Law (Butterworth & Co., 1914).

and definiteness which the circumstances of his case, and the position in which he stands, require, that though he did not exhaust his remedies in the British Prize Courts he did earnestly present there the claim he now makes; that the judgment against him there was a denial of justice under established principles of international law; that because of the uniform course of British decision, an affirmance of the judgment against him was inevitable; and that the United States has therefore not been prejudiced by his failure to take an appeal.

This is so because, since the United States has agreed with Great Britain not to present any diplomatic claims against her, the 1927 Agreement is claimant's sole reliance, and that Agreement prevents his coming to the United States for satisfaction until after he has done everything reasonably within his power to compel Great Britain to answer to the claim. And further, it requires him to show that in his efforts against Great Britain he met with a denial of justice, as that term is understood in international law.

So situated, claimant is under another, a heavier compulsion than that imposed by international law in favor of a Government claimed against diplomatically, that the remedies in its courts should be first exhausted. He is under the additional, the more binding compulsion in favor of the United States whose provision for settlement he seeks to avail of, to show, in accordance with that provision, that he has done everything reasonably within his power to first obtain satisfaction from British sources of the claim he now asserts.

When the claim is viewed in this light, it is seen at once that by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.

So viewed, claimant stands here with only one possible basis for his claim, that is, that the judgment of the Prize Court that the detention and delay was not undue, was a denial of justice; that it clearly appears from the course of appellate decisions in prize that that decision would inevitably have been affirmed, and that therefore the United States has taken no injury from his failure to appeal.

So viewed, all questions of contraband and of probable cause, of the validity or invalidity of Orders in Council, of the Reprisals Orders, and of the blockade measures, disappear from the case.

So viewed, the questions now sought to be raised, (1) whether the British measures under which the seizure and detention were carried out were in accordance with or violative of international law; (2) whether the contraband on board, or any part of it, was in fact destined to the enemy, or whether in fact, there was probable cause for the seizure and detention, pass out of the case.

There remain for decision only (1) whether claimant has shown that any of the damages claimed were in fact, the result of the undue delay he claimed for in the Prize Court, and (2) whether he has shown that in the finding and judgment, that there was no undue delay, there was a denial of the justice that was his by international law.

Upon the first question it may not be doubted that if the detention of the *Lisman* was unduly delayed, claimant should be awarded a reasonable sum for the items of demurrage and expenses during that delay. Equally may it

not be doubted that none of the other items of damage are in any event recoverable.

Wholly apart from the vagueness and insufficiency of the proof of loss on account of the option to purchase, the record showing no claim on that account until nearly twenty years had elapsed, and no proof then of the existence of the option, but the affidavits of two former officers, it is quite clear that proof of legal connection between the detention and the loss of the option is wholly wanting.

This is true, too, of the loss of the charter party, and of the loss of freights on hypothetical future voyages. The whole gravamen of the complaint here, that because of the ship's detention, the ship had lost face, and shippers were afraid to book freight upon it, is shown to be without foundation, by the fact, affirmed by claimant, of the immediate rechartering of the ship, at a higher charter rate, and its sale in the following year for a large sum. It is shown to be without foundation, too, by the showing in the record and in the official documents of which the Arbitrator takes knowledge, that there was general interference with all neutral shipping, not merely with the *Lisman*, and that this condition, increasing as the war went on, was the very cause of the unprecedented demand for ships, and the great rise in freights, upon which claimant largely bases his demand for the loss, as profits, of huge freights to be earned. By claiming $165,000 per outward trip for future freights, in the face of only $35,000 actually received for the first voyage, claimant affirms the fact that the ship would have been in great demand, and thus refutes his claim that its reputation as a carrier was ruined by the detention, its opportunity to carry freight in future, completely destroyed.

Of course claimant does not mean to claim what the judgment of the Prize Court in part implies, but claimant has all along denied, that the Interocean Company was engaged with its shippers, in a concerted enterprise to get contraband into Germany, and that by the seizure and detention this enterprise was broken up. Such a position might logically, though of course it would not legally, tend to support the claim for damages on the ground that the detention, by breaking up the concert, had caused the losses claimed. If, however, as claimant vigorously maintains, it was free from collusion with its shippers, and innocently carried contraband with an enemy destination, the seizure of the contraband and the detention of the ship could not have destroyed the reputation, either of the ship, or of the company, and the Arbitrator finds no basis in the record for a finding that the company was formed for, or deliberately engaged in, the enterprise of running contraband.

It is quite plain that the damage he claims in loss of freights, loss of charter, and loss of purchase option, if actually suffered by the company, accrued to it not because of the specific detention complained of, but because of its inadequate financing. It is quite plain, too, that at best for claimant, if these losses were even remotely caused by British action, they were caused not by the detention, but by the state of war, and the interaction of the measures taken by all the belligerents in support of their pretensions, in its general sweep and course. For such damages, thus vaguely placed and identified, no international reparation claim will lie. For it is as necessary between nations as it is between individuals, where damages are claimed, that the claimed losses be traced not remotely, but proximately to the specific acts complained of.

The opinion of Judge Parker, in War Risk Insurance Claims [1] is a notable and distinguished contribution to the law on this subject. The Arbitrator contents himself, on this phase of the claim, with referring to and approving it.

It may well be that on a vastly greater and more justly balanced scale than that of human justice, all the losses and all the gains of all the neutral traders from the war [2] might be measured out, and a balance struck between them and the nations, singly or as a whole, responsible for the net loss, but the Arbitrator has no such scales. The only balance available to him is a legal one, which can weigh out only the specific damage reasonably and proximately resulting from the wrong complained of, the undue detention of the ship.

Putting aside altogether then, the impeachment of its verity arising out of the unreasonable character of the claim now made, of $165,000 per voyage outward bound, in face of the twice earlier stated one of $65,000 per voyage, and the fact of $35,000 actually earned on the first voyage; and out of the claim of $25,000 for freight for the first return voyage, in face of the uncontradicted evidence of Bloch that there was no return freight available at Rotterdam, and little in London; putting aside, too, the insufficiency of the proof as to the specific amounts claimed, all of the items claimed, except those for demurrage and expenses, must be rejected out of hand, as speculative and remote, and as having no possible causal relation in law to the undue delay complained of.

It remains only, considering the claim as one for demurrage at a reasonable allowance per day, and for necessary expenses while unduly detained, to examine how it stands upon the point claimant must rest his case on here, that the judgment of the Prize Court, that the detention was not unduly prolonged by the fault of the British Government in not acting promptly, was a denial of justice under international law.

If claimant could stand here upon his claim for a denial of justice on the ground he put forward in his memorial and briefs, that the seizure and detention were unlawful, because based upon the Orders in Council, and not upon international law, and that the Prize Court, in holding them lawful, gave effect to municipal law and regulations in violation of the law of nations, his task would not be so difficult, his burden so overwhelming. But he cannot stand so. The burden he carries here is not that of showing that any specific principle of international law was violated by the judgment. His burden is to show that the finding of fact that there was no undue delay was without credible evidence to support it.

For undoubted as is the right of a government to press a diplomatic claim against another, although the subject matter of it has already been decided adversely to its national in a Prize Court, it is equally undoubted that the judgments of prize tribunals import verity, and that where there is no legal principle at issue, but only the matter of a fact finding, the heaviest sort of burden rests upon the claiming government to overcome the presumption of verity which attaches to the solemn decisions of municipal tribunals having jurisdiction. Drawing on municipal law analogies, just as the verdict in a common law case will not be overturned where there is any evidence to support it, and just as a fact finding of a legislature, or of an administrative

[1] Mixed Claims Commission, Consolidated Edition of Decisions and Opinions, 1925-8, pp. 33 *et seq.*

[2] Neutrality, Vol. 2, The Napoleonic Period, particularly Part 2.

board or tribunal, its creatures, will not be disturbed unless it has no basis in reasonable thinking, so a denial of justice as to findings of fact in prize proceedings will not be found unless the findings are wholly without evidence to support them; that is, unless they are such that reasonable and impartial minds could not draw them upon the record.

Tested by this rule, claimant's case does indeed appear a hopeless one. For starting with the admission of a lawful seizure on probable cause, of contraband apparently destined to the enemy, the case made by claimant shows a vigorous, straightforward, and definite course of action on the part of the British Government to prevent those goods from reaching Germany, and nothing more. It shows that this effect was accomplished by prompt notice to the ship, before its London cargo was unloaded, that the offending goods must be unloaded or reconsigned with its consent to the N.O.T. From this position the Government never varied. At no time did it proceed vindictively or oppressively against the ship or the cargo, to condemn or punish it in the Prize Court. On the contrary, its position all along was that if given adequate assurance that the contraband goods, apparently destined for, would not proceed to, Germany, the clearance asked for would be granted. When this assurance was at last furnished by an unloading of the goods, clearance was immediately granted.

According to the record, the Government was at all times willing, indeed, anxious to facilitate both ship and cargo in taking the easiest way out. It was the contention of the Crown in the Prize Court, that what difficulty and delay there was, was not on the part of the British Government in making up its mind to act. It was at first, on the part of the ship and the N.O.T. in not being able to come to an agreement for the reconsignment, and afterwards, on the part of the ship in not being able to make up its mind whether to unload or to reconsign. What difficulty and delay there was, the Crown contended, was not on the part of the British Government in making up its mind. It had immediately and definitely given claimant the option of one of two courses, and it never varied from this position.

True, claimant contended otherwise, but under the facts as the record presents them, both in the Prize Court proceedings and here, it would be impossible to say that reasonable and impartial minds could not have concluded as the President did, that the Crown ought to be exonerated from charges of delay, impossible to say that the finding exonerating it was a denial of justice. Indeed, it appears to the Arbitrator that, conceding as claimant did in the Prize Court, the right of the Crown to require the unloading of the goods and the detention of the ship until this was done, a finding exonerating the Crown of actionable fault in the premises was the only reasonable finding warranted by the record.

Though, therefore, the United States cannot, because the judgment would inevitably have been affirmed, complain of claimant's failure to appeal, neither can the claimant complain of the judgment, for its affirmance would have followed not because of a settled course of wrong decision, but because it was, upon the record made, a just and reasonable judgment.

Upon the case as a whole, it is the opinion of the Arbitrator that there is no merit in the claim, and that it should be *Rejected.*

Jos. C. Hutcheson, Jr.
Sole Arbitrator.