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## Book Review: Maritime Trade in War

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## Book Reviews

*Maritime Trade in War.* By Lord Eustace Percy. New Haven, Published for the Institute of Politics by Yale University Press, 1930. pp. 114. \$2.

THIS is quite a remarkable book. It consists of six lectures delivered at the Williamstown Institute of Politics by a distinguished Englishman—lectures in which he undertakes, in a broad sweep, to analyze and explain the legal relations between belligerents and neutrals in time of war, and to propose possible solutions for the present conflict of views. Recognizing what he claims to be confusion and uncertainty in the subject and the fact that the United States and Great Britain seem to entertain different views upon it, he undertakes to discuss the policies and justifications which led to the adoption of the British practices in the late war and indicates how far these might be modified in the future. Without once explaining to the reader the underlying reasons for the whole structure of maritime law in this respect, namely, the distinction between combatant and non-combatant and the necessity for a working compromise between belligerent military and neutral trading privileges, he presents what in the main must be regarded as a defense of the British practices in the late war as the natural and presumably lawful outcome of the “logic” of the existing rules—practices which the British Government, during the War, did not venture to excuse on any other ground than that of retaliation for enemy illegality. He freely admits that Great Britain by these measures—which in fact ultimately wiped out any neutral rights—controlled the trade of the world; but he suggests that she would not resort to these extremes in an ordinary war, but only in an extraordinary war (p. 49). He intimates that the solution of the question of freedom of the seas in the future lies in a distinction to be made between just wars and unjust wars—the “just” belligerent to have a fairly free hand which neutrals shall concede, the “unjust” belligerent to be greatly restricted. Presumably if one cannot tell which is the “just” side—and that would be in most cases—the objective law shall prevail. Lord Percy is not impressed with the practicality of League wars against aggressors or with the possibility of abolishing the status of neutrality. He admits that the conflict (which he occasionally seems to consider, though it is believed incorrectly, one between the continental view and the Anglo-American view) must be settled before a new war breaks out. But he concedes that an international conference would not be appropriate because it would probably make matters worse, and suggests that the better mode of procedure would be for private groups of experts, first an Anglo-American group, endowed with a statesmanlike outlook, to undertake drafts of proposed rules to be submitted for consideration to governmental bodies and public opinion, in order thus to accomplish the desired end with the least friction. He does not think that the United States and Great Britain would easily submit differences which arise in actual cases to an international tribunal until an agreement on the rules has been reached.

The argument of the book is fundamentally influenced by certain misconceptions which make its assumptions and conclusions unacceptable and even jeopardize any international understanding on the question. The learned author seems to believe that inasmuch as the law accords a bel-

ligerent the right to "blockade" and to seize contraband, therefore, if hard pressed the belligerent can in "logic" use any measures he sees fit to keep goods from reaching his enemy, whether directly or indirectly, and can extend at will the contraband lists because anything might be of use to the enemy military plans. He thus explains why the British Government in the late war felt obliged by Orders-in-Council to prevent any goods, particularly foodstuffs, from reaching even neutral countries whence they might find their way into Germany, notwithstanding the fact that neutral traders had a perfect legal right not only to send these goods into neutral countries, but even directly into belligerent countries. The author seems to believe that the certainty of no trade at all is better for the neutral than the uncertainty as to what the belligerent will permit. The law—which is by no means so uncertain as the author seems to think—has developed through several hundred years a protection for non-combatants against starvation, except by a prescribed type of limited blockade, and protection for neutrals of their right to trade in non-military goods even with belligerents. Blockade is a strictly limited military measure of investing a port, analogous to land siege. With such a specific siege or blockade, neutrals may not interfere. Lord Percy at times seems to believe that blockade looks only to a whole coast, and that as this was impossible to the British in the case of Germany, they were therefore justified in adopting other measures to achieve the same end. He does not concede that these "measures of blockade" were illegal, though Jefferson in 1793 and Wilson in 1915 correctly so characterized them. The author admits that the "measures" were an economic weapon against the civilian population, though at times he defends them on the ground that the goods thus kept out of Germany might have reached military forces. Goods always might reach military forces, but that never has justified the exclusion of any except admittedly military goods, such as munitions and their analogues. To justify the seizure of goods conditionally contraband (like foodstuffs) their specific destination for military forces had to be not merely possible, but absolutely proved. Non-combatants also eat. Like Sir Samuel Evans, Lord Percy does not see the "logical" distinction between absolute contraband and goods "conditionally contraband." The emphasis on "logic" in this examination of the subject indicates fundamental misconceptions. The compromise between belligerent rights and neutral rights, of which this distinction is a part, was not logical but practical, and thenceforward became law, which both belligerent and neutral must strictly observe. It is true that the contraband list has never been fully agreed on; the author seems to believe that, by using the privilege of extending the contraband list, the British Government legally escaped the restrictions placed on blockade, and contraband as well. It is hard to defend such a position. The mere fact that no agreement on the contraband list exists does not justify the inclusion of foodstuffs and hundreds of other articles never deemed of primary military use or justify the abolition of the distinction between goods absolutely and goods only conditionally contraband.

The argument that the late war was an exceptional war because all the enemy population was enlisted in it, that the enemy government controlled the food and other supplies, and that the enemy was a particularly unrighteous one was exactly the argument that Washington and Jefferson refused to admit as an alleged justification for similar illegal practices in 1793. Time has not made the argument more valid. The United States submitted to the British blacklist before 1917, but, strange to say, Canada did not; and Canada was right. So long as British spokesmen undertake to maintain the validity of the unheard-of practices adopted in the late war, even though coupled with a promise of self-restraint in employing

them, there is little possibility of an understanding between the United States and Great Britain. In this connection, it is well to observe that the 1927 agreement for the settlement of American neutrality claims against Great Britain indicates the rift by the provision "that the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to [the neutrality] claims is fully reserved, it being specifically understood that the juridical position of neither Government is prejudiced by the present arrangement." It would be unfortunate if this supposed irreconcilability should tend to become a reality and if the British Government should continue to prefer to conceive itself as a potential belligerent rather than a potential neutral. The author makes no reference to the Swedish settlement, and probably similar settlements with other neutral countries, by which Great Britain paid damages for the injuries inflicted by some of its measures, and thereby presumably implicitly admitted their illegality. Great secrecy attaches to these settlements, which the British Government should lift. The author's suggestion that between just wars and unjust wars there is a distinction which should produce a difference in the reciprocal rights of belligerents and neutrals is hardly practical, it is believed; it would only increase the propaganda and tend to drag neutrals into the conflict, because partiality is the easy road to belligerency, and because not all neutrals may take the same view as to which is the "just" side in any particular war.

One cannot better indicate the author's misconceptions on the relation of logic to law and the effect of "logic" on the respective rights of belligerents and neutrals as built up through the centuries than to quote from John Bassett Moore's review of Mr. Hyde's *International Law*:

"The simple truth is that the distinction between what in very recent years has, inaccurately and unfortunately, been styled 'conditional contraband,' and articles absolutely contraband, never did rest on logic, in the sense that it was imagined that 'conditional contraband,' which includes food stuffs, was not of military value, potentially even of capital military value, to belligerents. Not to cover a wider range, one need not be at a loss for examples, during the past three hundred years, of situations in which the question of food supply was of capital importance in war. And yet, did anyone at the time ever imagine that foodstuffs imported into a belligerent country were not immediately available for military purposes, or that the government of such country could not or would not take and use for its own purposes all foodstuffs, whether imported or of domestic origin, which it might need? That such a supposition was ever indulged, is altogether incredible. The rule, so forcibly stated by Lord Salisbury during the Boer War, that 'foodstuffs, with a hostile destination can be considered contraband of war only if they are supplied for the enemy's forces,' and that 'it is not sufficient that they are capable of being so used,' but that it 'must be shown that this was in fact their destination at the time of the seizure,' was not framed as a logical reconciliation of the right to trade, with a supposed belligerent right to seize whatever might be used by the enemy for the purposes of the war. If framed in this sense, the rule would have made a laughing stock of logic. In reality the rule represented and has continued to represent not a logical reconciliation of, but a practical compromise between two claims either of which, if carried to its logical conclusion, would have destroyed the other, being in this particular like most other legal rules; and it further represented and represents the advance painfully made, through centuries of struggle, toward greater freedom of commerce in time of war.

"Is the recent great war to differ in its effects from previous great wars,

in that extraordinary measures which hard pressed belligerents as the struggle grew more intense, adopted generally on the professed ground of retaliation, are to be considered as having changed the established law, and as having created in its stead a system essentially based on the concession of belligerent pretensions? Is there reason to believe that the recent war will differ in this respect from the wars growing out of the French Revolution and the Napoleonic Wars, whose decrees and orders in council were regarded twenty years later only as the passing expedients of a contest desperately waged? Is it more likely now than it was a hundred or two hundred years ago that nations will find their general and continuing interests to be in accord with what they did in an exceptional exigency?"<sup>1</sup>

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*Cases and Other Materials on Credit Transactions.* By Wesley A. Sturges. St. Paul, West Publishing Co., 1930. pp. xi, 1228. \$6.50.

THIS casebook is a new grouping, from the functional approach, of materials customarily covered in courses on mortgages, suretyship and bankruptcy, with the addition of cases on several other topics. The subject matter is short term rather than investment credit. Of the six chapters into which the volume is divided the first and second deal with accommodation contracts, mortgages, pledges, and conditional sales. Each of these chapters takes up *seriatim* (1) the technical contract, (2) consummation of the credit extension, (3) relations and dealings of the parties during the period of the credit extension, (4) payment and discharge of the obligation, (5) extensions and renewals of the obligation, (6) "outlaw" of the obligation—statutes of limitation, and (7) insolvency and bankruptcy. The subject of the third chapter is dealers' financing by accommodation contracts, mortgages, pledges, conditional sales and trust receipts. Chapter four covers the security holder's use of the credit and security documents. Chapter five is concerned with the security holder's protection and priorities. The last chapter is given over to enforcement proceedings, chiefly of mortgages. It is interesting to observe Mr. Sturges' insistence throughout that the student consider the technical contract creating the relationships before considering the incidents of the relationships themselves.

The cases are almost all American, and a great many of them have been decided in the last twenty years. Many cases are obviously chosen because either in the statement of facts or in the court's opinion there is an exposition of the business situation. Numerous divisions of the book are introduced by brief extracts from treatises and many cases are followed by short comments and citations. In this connection the author has inserted throughout the book acutely drafted questions intended to enforce a comparison between the principal case and the cited cases, or between the principal case and the comments or quotations. The total number of the author's questions is rather large, although the distribution is so skillful that the number does not seem excessive. A novel feature is the frequent inclusion of extracts from law review case notes and comments, often arranged as a series of divergent views on the same topic. These extracts, furthermore, are accompanied by copious citations of other law review discussions. Several recent authors have availed themselves generously of law review material, but no one has exploited it more thoroughly than Mr.

<sup>1</sup> (1923) 23 COL. L. REV. 84.