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Further extracts from An examination of the BRITISH DOCTRINE, *which subjects to capture a neutral trade not open in time of peace.*

[CONTINUED]

In July, 1667, a treaty was concluded with the United Provinces, of which art. III provisionally adopts certain articles from the treaty of Breda, between the United Provinces and France, on the subject of maritime commerce; until a fuller treaty could be perfected between the parties. The articles adopted, in relation to the trade between the subjects of one of the parties and the enemies of the other, declare that the trade shall extend, without impediment, to all articles not contraband, and to all places not besieged or blockaded.

In February, 1667—8 the same parties, then under a perpetual defensive alliance by virtue of a treaty of 21st July, 1667, and in a league moreover with Sweden by the triple league of 1668, resumed the subject of maritime and commercial affairs, and repeated, in the first article of their treaty, the precise stipulations adopted provisionally from the treaty between France and the United Provinces.

A treaty with Denmark, in 1669, stipulates, that they may trade each with the enemies of the other, in all articles not contraband, and to all places not blockaded, without any other exceptions.

On the 11th July, 1670, another treaty of *alliance* was concluded with Denmark, the XVI. art. of which declares that "neither of the parties shall be impeded in furnishing to the enemies of the other any merchandizes whatever; excepting only articles of contraband, as described in the treaty, and ports and places besieged by the other."

It is worthy of notice in this treaty, and the remark is applicable to others, that the V. art. having stipulated a right mutually to trade in the kingdoms, provinces, marts, towns, ports, and rivers of each other, it was immediately provided in the next article, that *prohibited ports and colonies* should be excepted. If it had been conceived that such ports or colonies of enemies were not to be traded with, under the general right to trade with enemies acknowledged in the XVI. article, it is manifest that they would have been as carefully excepted in this as in the other case, out of the meaning of general terms equally comprehending them. This treaty proves also, that as early as 1670, colonies began to fall under attention in making treaties.

In a marine treaty of Dec. 1. 1674, with the United Provinces, stating in the title that it was "to be observed throughout *all and every the countries and ports of the world* by sea and land," it is stipulated again, in art. I. to be "lawful for all and every the subjects of the most serene and mighty prince, the king of Great Britain, with *all freedom* and safety to sail, trade, and exercise any manner of traffic *in all those kingdoms, countries, and estates*, which are, or any time hereafter shall be in peace, amity, or neutrality with his said majesty; so that they shall not be any ways hindered or molested in their navigation or trade, by the military forces, nor by the ships of war, or any kind of vessels whatsoever, belonging either to the High and Mighty States General of the United Netherlands, or to their subjects, upon occasion or pretence of any hostility or difference which now is, or shall hereafter happen between the said Lords the States General, and any princes or people whatsoever, in peace, amity, or neutrality with his said majesty;" and so reciprocally.

Art. II. "Nor shall this freedom of navigation and commerce be infringed by occasion or cause of any war, in any kind of merchandises, but shall extend to all commodities which may be carried in time of peace, those only excepted which follow in the next article, and are comprehended under the name of contraband."

Art. III. enumerates the articles of contraband.

Art. IV. contains a negative list, which with *all* other articles not expressly included in the list of contraband, may be *freely* transported and carried to *places under the obedience of enemies*, except only towns or places besieged, environed, or invested.

This recital has been made the more minute, because it is necessary, in order to understand the whole force of the explanatory declaration between the parties bearing the same date; a document so peculiarly important in the present discussion, that its contents will be recited with equal exactness.

This document, after stating "that some difficulty had arisen concerning the interpretation of certain articles, as well in the treaty marine concluded this first day of December, 1674, as in that which was concluded the 17th February 1667—8 between his majesty of Great Britain on the one part, and the states general, &c. on the other part," proceeds to state "that sir William Temple, &c. on one part with eight commissioners on the other, have declared, and do by these presents declare, that the true meaning and intention of the said articles is, and ought to be, that ships and vessels belonging to the subjects of either of the parties, can and might, from the time that the said article were concluded, not only pass, traffic & trade, from a neutral port or place, to a place in enmity with the other party, or from a place in enmity to a neutral place, but also from a port or place in enmity to a port or place in enmity with the other party, whether the said places belong to one and the same prince or state, or to several princes or states, with whom the other party is in war. And we declare that this is the true and genuine sense and meaning of the said articles; pursuant whereunto we understand that the said articles are to be observed and executed on all occasions, on the part of his said majesty, and the said states general, and their respective subjects; yet so that this declaration shall not be alleged by either party for matters which happened before the conclusion of the late peace in the month of Feb. 1673—4.

Prior to the peace, neither of them could claim the rights of neutrality against the other.

This declaratory stipulation has been said to be peculiarly important. It is so for several reasons:

1st. Because it determines the right of the neutral party, so far as may depend on the belligerent party, to trade not only between its own ports and those of the enemies of the belligerent party, without any exception of colonies, but between any other neutral port and enemies ports, without exception of colonial ports of the enemy; and moreover, not only between the ports, colonial as well as others, of one enemy and another enemy, but between the different ports of the same enemy; and consequently between one port and another of the principal country; between these and the ports of its colonies; between the ports of one colony and another, and even to carry on the coasting trade of any particular colony.

2d. Because it fixes the meaning not only of the articles in the two specified treaties; but has the same effect on all other stipulations by Great Britain, expressed in the same on equivalent terms; one or other of which are used in most, if not all her treaties on this subject.

3d. Because it made a part of the treaties explained, that free ships should make free goods; and consequently, the coasting and colonial trade, when combined with that neutral advantage, was the less likely to be acknowledged, if not considered as clearly belonging to the neutral party.

4th. Because the explanatory article was the result of the *solicitation* of England *herself*; and she actually claimed and enjoyed the benefit of the article, she being at the time in peace, and the Dutch in war with France.

In the treaty with France, February 24, 1677, articles I. II. and III. import that each party may trade freely with the enemies of the other, with the same merchandise as in time of peace, contraband goods only excepted, and that all merchandises not contraband, "are free to be carried from any port in neutrality, to the port of an enemy, and from one port of an enemy to another; towns besieged, blocked up or invested, only excepted."

In 1689, England entered into the convention with Holland, prohibiting *all* neutral commerce with France, then the enemy of both. In consequence of the counter treaty of Sweden and Denmark, for defending their neutral rights against this violent measure, satisfaction was made, according to Vattel, for the ships taken from them; without the slightest evidence, as far as can be traced, that any attempt was made by either of the belligerent parties, to introduce the distinction between such part of the trade interrupted, as might not have been allowed before the war, and as was therefore unlawful, and such part as having been allowed before the war, might not lawfully be subject to capture.

We are now arrived at the treaties of Utrecht, an epoch so important in the history of Europe, and so essentially influencing the conventional law of nations, on the subject of neutral commerce.

The treaty of navigation and commerce, March 31, 1713, between Great Britain and France, art. XVII. imports, that all the subjects of each party shall sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden, thereon, from *any port*, to the places of those who now are, or shall hereafter be, of enmity with the queen of Great Britain and the christian king," and "to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or of either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also *from one place* belonging to an enemy, *to another place* belonging to an enemy, whether they be under the jurisdiction of the same prince or under several."

Art. XVIII. "This liberty of navigation and commerce, shall extend to all kind of merchandises, excepting those only which follow in the next article, and which are specified by the name of contraband."

Art XIX. gives a list of contraband which is limited to warlike instruments.

Art. XX. specifies others, many of which are in other treaties on the list of contraband, declaring that these with all other goods, not in the list of contraband in the preceding article may be carried and transported in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time, besieged, blocked up round about, or invested.

Could the principle maintained against Great-Britain be more clearly laid down, or more strongly fortified by her sanction?

To give to this example the complete effect which it ought to have, several remarks are proper.

In the first place, on comparing the description given of the free trade which might be carried on between the neutral party and an enemy of the other party, with the description of the free trade allowed between the parties themselves, by the 1st article of the treaty, it appears that in order to except the colonial trade in the latter case, the freedom stipulated in article 1, is expressly limited to *Europe*.

The terms are, "that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between the subjects on each part, through all and every the kingdoms, states, dominions of their royal majesties *in Europe*." In the stipulation relating to the neutral commerce of either with the enemy of the other (who, if a maritime enemy, could not fail to possess colonies out of Europe) the terms are, "that all merchandizes, not contraband, may be carried in the freest manner to places belonging to an enemy, such towns or places only being excepted, as are at that time besieged or blockaded, &c." without any limitation to Europe, or exception of colonies any where. It is obvious, that the terms here used comprehend all colonies, as much as the terms in the first article would have done, if colonies had not been excepted by limiting the freedom of trade to places "*in Europe*;" and consequently that if any distinction between the colonial and other places of an enemy, had been contemplated in the neutral trade of either party with him, as it was contemplated between the colonies and European possessions of the parties in their commerce to be carried on between themselves, the distinction would have been expressed in the latter case, as it was in the former; and not being so expressed, the trade in the latter case was to be as free to the colonies, as would have been in the former, if the colonies had not been excepted by the limitation of the trade to Europe.

Secondly. But the treaty not content with this necessary construction, in favor of a neutral commerce with the colonies of an enemy, proceeds, in conformity to the example in the declaratory convention between England and Holland in 1674, explicitly to declare the freedom of the neutral party, to trade not only from *any port*, to the places of an enemy, and from the places of an enemy to neutral places, but also from *one place to another place* belonging to an enemy, whether the places be under the same or different sovereigns. Here both the coasting trade and the colonial trade, which, in relation to the parent country, is in the nature of a coasting trade, are both placed on the same footing with every other branch of commerce between neutral and belligerent parties, although it must have been well known, that both those branches are generally shut to foreigners in time of peace, and if opened at all, would be opened in time of war, and for the most part, on account of the war.

Thirdly. It is well known, that this particular treaty underwent great opposition and discussion, both without and within the British parliament; and that it was for some time, under a legislative negative. Yet it does not appear, either from the public debates, or from the discussions of the press, as far as there has been an opportunity of consulting them, that the difficulty arose in the least from this part of the treaty. The contest seems to have turned wholly on other parts, and principally on the regulations of the immediate commerce between the two nations. This part of the treaty may be considered, therefore, as having received the complete sanction of Great-Britain. Had it indeed been otherwise, the repeated sanctions given to it on subsequent occasions, would preclude her from making the least use of any repugnance shewn to it on this.

On the 28th November, 1713, a treaty of peace and another of commerce and navigation, were concluded at Utrecht with Spain, renewing and inserting the treaty of May 13th, 1667, the XXI, and XXVI articles of which have been seen to coincide with the rules of neutral commerce, established by the treaty at Utrecht, between Great Britain and France.

Genoa and Venice were comprehended in the treaty of Utrecht, between Great Britain and Spain.

The above treaty of 1713, was confirmed by article XII, of a treaty of December 3, 1715, between Great-Britain and Spain.

From the above date to the treaty of 1748, at Aix la Chapelle, the following treaties between England and other powers took place; in each of which, the principles established by her treaties at Utrecht, are reiterated:

With Sweden, January 21, 1720, art. XVIII.

With Spain, June 13, 1721, article II—confirming the treaty of 1667 and 1713.

With France and Spain, November 9, 1729, article I—renewing all treaties of peace, of friendship and of commerce, and consequently those of Utrecht.

With the emperor of Germany and the United Netherlands, March 16, 1731, article I—Renewing all former treaties of peace, friendship and alliance.

With Russia, December 2, 1734—stipulating in article II, a free trade between either party and the enemy of the other, in all articles except munitions of war; and consequently articles permitted after, though not permitted before the war.

With Spain (a convention) January 14, 1739, article I—Reiterating among former treaties, those of 1667 and 1713, above cited.

The treaty of Aix la Chapelle concluded in 1748, forms another memorable epoch in the political system of Europe. The immediate parties to it were Great Britain, France and the United Provinces.

The III. Art. of this treaty renews and confirms, among others, *the treaties of Utrecht*.

This treaty was acceded to by Spain, Austria, Sardinia, Genoa, and Modena.

In 1763, in the treaty between Great Britain, France, and Spain, to which Portugal acceded, the 1st Art. expressly renews and confirms, among other treaties, the treaties of peace and *commerce* at Utrecht.

The treaty with Russia in 1766, Art. X. stipulates a free trade between either party, being neutral, and an enemy of the other, with the sole exception of military stores, and places actually blockaded.

In a convention with Denmark, July 4, 1780, explanatory of a list of contraband settled in a former treaty, it is expressly determined that merchandize not contraband, may be transported to *places* in possession of enemies, without any other exception than those besieged or blockaded.

The treaty of peace in 1783 with France, by Art. II. renews and confirms, among others, the treaties of Westphalia in 1648, of Utrecht in 1713, of Aix la Chapelle in 1748, and of Paris, 1763; in all of which the neutral right, now denied by Great Britain, was formally sanctioned by her stipulations.

In her treaty of the same date, with Spain, the same confirmation is repeated.

In the treaty of commerce again with France in 1786, deliberately undertaken in pursuance of Art. XVIII. of the treaty of 1783, the articles above recited from the treaty of Utrecht are inserted word for word; and thus received anew the most deliberate and formal sanction—Chalm. vol. 1. p. 350.

It may be here again remarked, that although this treaty underwent the most violent opposition in Great Britain, it does not appear that the opposition was at all directed against the articles on the subject of neutral commerce.

The treaty of 1786 was explained and altered in several particulars, by a convention bearing date August 31, 1787; without any appearance of dissatisfaction, on either side, with the articles on neutral commerce.

In the negociations at Lisle, in 1797, it was proposed on the part of Great Britain, by her ambassador, lord Malmsbury, to insert, as heretofore usual in the articles of peace, a confirmation of the treaties of Utrecht, Aix la Chapelle, &c. which was opposed by the French negociators, for reasons foreign to the articles of those treaties in question.

On this occasion, lord Malmsbury, in urging the proposed insertion, observed, "that *those treaties had become the law of nations*, and that if they were omitted it might produce confusion." This fact is attested by the negociations, as published by the British government.

If the treaties had become, or were founded in, the law of nations; such an omission, although it might be made a pretext for cavil between the parties, could certainly have no effect on the law of nations; and if the treaties expressed the law of nations on any subject at all, on what subject, it might be asked, have they been more explicit than on that of the maritime rights of neutrals?

This series of treaties, to which G. Britain is an immediate party, lengthy and strong as it is, has not exhausted the examples by which she stands self-condemned. One, in particular, remains for consideration; which, if it stood alone, ought forever to silence her pretensions. It is the treaty with Russia on the 5—17 of June, 1801.

A very important part of the treaty is the preamble:

"The mutual desire of his majesty the king of the United Kingdoms, &c. and his majesty the emperor of all the Russias, being not only to come to an understanding between themselves with respect to the differences which have lately interrupted the good understanding and friendly relations which subsist between the two states; but also to prevent, by frank and precise *explanations* upon the navigation of their respective subjects, the renewal of similar altercations and troubles, which might be the consequence of them; and the *common object* of the solicitude of their said majesties being to *settle*, as soon as can be done, an equitable arrangement of those differences, and an *invariable determination* of *their principles* upon the *rights of neutrality*, in their application to their respective monarchies, in order to unite more closely the ties of friendship and good intercourse, &c. have named for their plenipotentiaries, &c. who have agreed, &c."

With this declaratory preamble in view, attend to the following sections in article III.

"His Britannic majesty and his Imperial majesty of all the Russias having resolved to place under a sufficient safeguard the freedom of commerce and navigation of their subjects, in case one of them shall be at war while the other shall be neuter, have agreed:

"1st. That the ships of the *neutral* power may *navigate freely to the ports and upon the coasts* of the nations at war.

"2d. That the effects embarked *on board neutral ships* shall be *free*, with the exception of *contraband of war* and of *enemy's property*; and it is agreed not to comprize under the *denomination of the latter*, the merchandize of the produce, growth or manufactures of the countries at war which should have been *acquired* by the subjects of the neutral power, and should be *transported on their account*; which merchandise cannot be excepted *in any case* from the freedom granted to the flag of the said power." &c. &c.

These extracts will receive additional weight from the following considerations:

First. This treaty made with Russia, the power that took the lead in asserting the principles of the armed neutrality, was, with exceptions not affecting the point in question, acceded to by Sweden and Denmark, the two other European powers most deeply interested in, and attached to those principles. It is a treaty, therefore, of Great Britain, as to this particular point, as well as to most of the others with Russia, Sweden and Denmark.

Secondly. The treaty had for its great object, as appears by its adoption of so many of the definitions of the armed neutrality, to fix the law of nations on the several points therein, which had been so much contested; the three northern powers yielding the point of free ships, free goods; & Great Britain yielding to all of them, those relating to the coasting, as well as every other branch of neutral trades; to blockades, and to the mode of search; and yielding to Russia, moreover, the point relating to the limitation of contraband. With respect to the case of convoys, a case not comprehended in the armed neutrality of 1780, but of much subsequent litigation, and inserted in that of 1800; a modification, satisfactory to the northern powers, was yielded by Great Britain; with a joint agreement, that the subjects on both sides should be prohibited from carrying contraband or prohibited goods, according to an article in the armed neutrality of both dates.

Thirdly. The treaty is expressly declared to be an *invariable* determination [fixation] of their *principles* upon the *rights of neutrality*, in their application to their respective monarchies."

It cannot be pretended that this *stipulated* application of the rights of neutrality to the contracting parties, limits the *declaratory* effect, which is equally applicable to all neutral nations. *Principles* and *rights* must be the same in all cases, and in relation to all nations; and it would not be less absurd than it would be dishonorable, to profess one set of principles or rights in the law of nations towards one nation, and another set towards another nation.

If there be any parts of the treaty, to which this declaratory character is regarded as not applicable, it cannot be pretended that they are the parts relating to the rights of neutrals to trade *freely* to the *ports* and *on the coasts* of nations at war; because, as already observed, the main object of the treaty was to settle the questions involved in the armed neutrality; of which this was a primary one, and is here placed by the structure of the article under the same precise stipulation, with the liability to confiscation, of enemy's property in neutral ships; a point above all others which Great Britain must have wished to consecrate as the law of nations, by declaratory acts for that purpose.

It cannot be pretended that the neu-