The starting point of these recommendations were the considerations that in subsequent treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain had adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals, and that in the course of the negotiations between Great Britain and the United States a similar rule had been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts.

Though these considerations, in the opinion of the majority of the tribunal, were not sufficient, as they seemed to Dr. Drago, to constitute this a principle of international law, it nevertheless seemed reasonable to them to recommend this rule with certain exceptions, especially since this rule with such exceptions had already formed the basis of an agreement between the two Powers. *These recommendations were the result of a compromise* and *to that compromise I recall to have alluded* with the words which the editor of this JOURNAL did me the honour to quote from my article in the *Recht*.

I think it necessary to make this statement with reference to what I meant by the words in question, because not only the distinguished editor of the JOURNAL but also two other prominent American lawyers, with whom I had the pleasure to collaborate at The Hague, Mr. Robert Lansing, in the *University of Pennsylvania Law Review* (1910, p. 143), and Mr. Wm. Cullen Dennis in the *Columbia Law Review* (1911, p. 499), seem to have interpreted my article in the *Recht* in a sense which I must most respectfully decline. I did not state that the sentence in the fisheries cases *was* a compromise, but that it did *contain elements of a compromise*.

DR. LAMMASCH.

NAVAL PRIZE BILL AND THE DECLARATION OF LONDON.

The rejection by the House of Lords on December 15th of the Naval Prize Bill [1] carries with it the repudiation of the International Prize Court, created by the Second Hague Conference. The bill amends the English law relating to naval prizes of war in such a way as to enable the Hague Convention to be carried into effect, while Article 28 of the bill provides that British courts shall enforce the decrees of the International Prize Court. It is evident from the attacks upon the bill, both in the press and in the House of Commons, that the real reason for the opposition to the International Prize Court was the fact that the Declaration

[1] 1 and 2, George V.

of London lay behind it — that the fate of the former decided the fate of the latter.

On February 27, 1908, the chief naval Powers were invited by the British Government to meet in conference in order to reach an agreement as to just what were the "generally recognized rules" of international law, which by Article VII of the convention establishing the International Prize Court, were to be applied by that tribunal in the decision of cases coming before it. The conference met on December 4, 1908, and on February 26, 1909, published the results of its deliberations, which became known as the Declaration of London.[2] The Declaration met from the start with the most violent opposition in England: the greater part of the press denounced it, and a petition to the King, issued by the Imperial Maritime League, asking that ratifications be delayed, was signed by an extended list of commercial associations, mayors, members of the House of Lords, general officers, and other public officials. As many as 138 officers of flag rank addressed to the Prime Minister a public letter of protest against the Declaration.

What is at the bottom of this repudiation of an agreement which was formulated at a conference at which Great Britain was represented by chosen delegates under instruction from their governments? It is safe to say that the undercurrent of uneasiness existing in the public mind over the possibility of war with Germany made it almost certain in advance that the Declaration would not be subjected to calm and dispassionate public criticism before being ratified or rejected. The constant reference on the part of critics to a future war in which the island might be reduced to starvaton in consequence of food-stuffs being placed on the list of conditional contraband, indicates clearly that the Declaration was being tested with reference to a war in which the existence of England would be at stake. Now it is evident that when judged from such a point of view a definite statement of rights is much less satisfactory to the public mind than a vague conception, however unfounded, of what those rights should be; — the imagination prefers to enlarge upon the latter rather than face the facts contained in the former.

The Declaration may be considered in this connection under two separate headings: what change does it make in the position of Great Britain as a belligerent, and what change does it make in her position as a neutral? It is important to consider the two points separately, since

[2] Printed in SUPPLEMENT, 3:179.

it is evident that if a given rule adds to the rights of a nation when belligerent it will take away from the rights of a nation when neutral. An exception, however, must be noted with respect to conditional contraband, in which case, owing to the peculiar situation of England as an island, she has more to gain as a belligerent in leaving neutral trade in food-stuffs unhampered than in restricting it. Now, while it is chiefly from the point of view of England as a belligerent that the Declaration has been discussed, many of the critics of the Declaration seem to think that England should not suffer as a neutral where she gained as a belligerent. Strangely enough, the fact that Great Britain's earliest interest in the International Court of Prize was the desire to protect her commerce *as a neutral* was overlooked in the discussion of the bill.

As a belligerent Great Britain gains in having what were practically her own views as to blockade adopted. The Continental doctrine was that blockade must be limited within a line drawn around the blockaded port, and that until a vessel attempted to break through that line it could not be captured. France and Italy even held that a ship could not be captured until it had been visited and formally notified of the existence of the blockade, thus making possible a first attempt to break through the blockade with impunity. The Declaration allows the blockading fleet to enforce the blockade throughout the *area of operations* — a rule which, though theoretically narrower than the English claim, is practically the law applied by her admiralty courts. On the question of contraband the chief point of opposition to the Declaration was that food-stuffs were classed as conditional contraband, that is, as subject to capture when destined for the use of the armed forces or government departments of the enemy state. It was on this point that the cry arose that the Declaration endangered the food supplies of the country in time of war, the assertion being made that any port of the Island Kingdom might be regarded as "serving as a base for the armed forces of the enemy." In answer to this it may be said that if Englnad is to depend upon neutral vessels for her food supplies her position will already have become hopeless. But apart from that, it is no loss to England to have food-stuffs declared *conditional* contraband (however liberally that term may be construed) when they might in fact be declared *absolute* contraband, as they were by France in 1885 (a position of which Germany approved), and by Russia in 1904. As Sir Edward Grey said in his speech of December 8 in the House of Commons:

If guarantees and safeguards existed to-day keeping our ports open, by all means compare the guarantees you would get under the Declaration of London with those you have to-day and see which are the greater, but at the present moment there are no guarantees whatever, and even if there are none under the Declaration of London, you are no worse off than you are to-day.

Further opposition to the International Prize Court and to the Declaration was made on the ground that both the Hague Convention (No. 7), relative to the conversion of merchant ships into war ships, and the Declaration left unsettled the question whether such conversion might take place *on the high seas*. It is difficult to see what argument can be drawn from that fact. Without the above convention and the Court the great Powers will undoubtedly exercise a right which they declare they are unwilling to abandon. Far from "legalizing piracy" or "reintroducing privateering" by its failure to forbid conversion on the high seas, Convention No. 7 actually places important restrictions upon the conversion *in general* of merchant ships into war ships, and England can continue to treat such ships as have been converted *on the high seas* as she sees fit — the decisions of the International Court of Prize, even should it in some way recognize the legality of conversion on the high seas, cannot affect the relations between the belligerents themselves, inasmuch as the question of conversion on the high seas is specifically excepted from Convention No. 7.

Opponents of the Declaration endeavored to arouse public sentiment against the article of the Declaration permitting the destruction of neutral prizes when the observance of the general rule forbidding their destruction would "involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time." Sir Robert Finlay describes the article as "a relapse into the methods of barbarism." Again, it is difficult to see how the Declaration will make matters worse than they now stand. Without the Declaration, Russia, Germany, Austria, France, Italy, and Japan will exercise the right they assert, whereas under it there will at least be some restrictions upon its exercise. The restriction (Art. 50) that all persons on board the ship must first be placed in safety before the ship is destroyed would, as Mr. Bray points out in his monograph on the Declaration, make "the presence of another neutral ship to which the crew can be transferred . . . practically a *sine qua non*."

It is not contended here that the Declaration of London is an ideal code of naval law in time of war. There are several rules in it which

clearly do not represent an ideal system. It would have been progressive policy to have declared private property of the enemy immune from capture at sea as it now is on land. Food-stuffs should have been placed in the free list, and the prevention of commerce in them left to blockade. The destruction of neutral prizes should have been unconditionally forbidden. These last two rules would have prevented the many disputes that will undoubtedly result from the application of the present rules, which from their nature cannot be applied in a precise and rigid manner. But though not an ideal code, the Declaration is a great advance from the present uncertainty in the law, which amounts in fact to an absence of law.

The question of the ratification of the convention creating the International Prize Court, although it was the immediate object of the Naval Prize Bill, was a minor feature in the discussion of it. Criticisms were passed upon the organization of the court, to the effect that English commercial interests, the largest in the world, would be subjected to a court in which England would be represented by only one judge out of fifteen. The argument seems to overlook the fact that if there is no international prize court English commercial interests will be subjected to a belligerent court, from which no appeal can be taken. Theoretically it is possible for England to protest diplomatically against the decision of a belligerent court, but if the protest is unavailing, as it was during the Russo-Japanese war, there is no redress but war, which is hardly an acceptable form of redress when such comparatively small interests are at stake.

On the whole, then, it would seem that Great Britain stands to gain by the Declaration more than she stands to lose; and in addition consideration must be given to the fact that Great Britain, together with the other nations, gains more in having *definite rules* agreed upon, even at some cost to its theoretical rights, than in leaving the law in its present chaotic state. It is unfortunate that the Declaration had to be subjected to public opinion at such an inopportune time. It would seem reasonable that the rules formulated by the chosen delegates of a nation at an international conference should have a strong claim for acceptance on the part of the people. When nations meet in conference it becomes clear from the start that compromise is the only possible means of securing agreement. Each nation must be ready to surrender what it considers less important for what it considers essential; and at times even essential interests must be limited and circumscribed, if a solution is to be found

which will be satisfactory to all. But the necessity for this resort to compromise is almost entirely overlooked when the rules agreed upon in a conference of delegates are submitted to national parliaments for ratification. The expressions of public opinion regarding the advisability of the adoption by a given nation of an agreement like that of the Declaration of London invariably reflect a narrow national point of view, which has little sympathy with concession as a principle. Moreover, the public opinion of one country, while tending to magnify the concessions which have been made to others, can seldom realize the importance which other nations attach to the concessions they have made. The statement of M. Renault in his report accompanying the Declaration and explaining its provisions gives expression to the spirit which animated the conference:

> The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole, otherwise there is a risk of the most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardized by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions. Is it, as a whole, a good one?
>
> We confidently hope that those who study it seriously will answer that it is. The Declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents with those of neutral commerce; it consists of Powers whose conditions, from the political, economic, and geographical points of view, vary considerably. There is therefore reason to suppose that the rules on which these Powers have agreed take sufficient account of the different interests involved, and hence may be accepted without objection by all others.

It is as yet too soon to predict whether the House of Commons will attempt to use its power of overruling the veto of the House of Lords. Considering that the bill passed by a majority of only forty-seven it does not seem likely that the Government will attempt to pass it until the present state of public opinion has changed. It is to be hoped that in due time English public opinion will realize that in repudiating the International Prize Court, with the Declaraton of London as its code, a step backward has been taken. The International Court of Prize stands as the first truly international court in the history of the world. It gives promise, if adopted, of gradually accustoming the world to a code of law

truly international in character, and in addition it offers a means of familiarizing the nations with the idea of a court of arbitral justice, which it was sought to create at the Second Hague Conference, but which could not be carried into effect for lack of agreement as to the method of constituting its membership.

THE PASSPORT QUESTION BETWEEN THE UNITED STATES AND RUSSIA.

The Jewish question, or so-called "passport question," with Russia arises out of the fact that the Russian Government, for certain historical reasons based on economic and political considerations, reserves the right to exclude from entry into Russia all alien Jews. For this purpose the point of religious faith has been adopted as the readiest test or shibboleth of race. Very many exceptions are made to the rule of exclusion, so that in practice very few persons of Jewish race or religion who have legitimate business in Russia are excluded. These rules and exceptions are applied alike to all nationalities other than Russian.

The Jewish question is to be carefully distinguished from the questions arising from the unlawful emigration and naturalization in other countries of Russian subjects. Russia is one of those countries which not only denies the right of expatriation, and therefore regards as invalid the naturalization which any of her subjects may secure in foreign countries, but imposes severe penalties therefor. It is more usual in practice, however, for the Russian consuls simply to refuse the necessary visé to the passports of naturalized Americans who were formerly subjects of Russia.

The Jewish question is also to be distinguished from that arising out of Russia's refusal to waive the claim of military service in the case of her subjects who have emigrated.

The legal elements involved in the present question arise out of the Treaty of Commerce and Navigation concluded between the United States and Russia in 1832. Article I of that treaty reads as follows:

> There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective States, shall, mutally have liberty to enter the ports, places, and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce.