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International law.

Lecture No. 6. Commercial Domicil.

When questions concerning property arise during war and especially maritime war it will be found that the character of enemy extends to others than the citizens or subjects of the enemy State. An alien residing in an enemy country or having a commercial agency & house of trade in that country though residing elsewhere, becomes defacto an enemy subject so far as his property in that country is concerned. This state of residence quasi or real is termed commercial domicil.

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Devastation. Capitulations. Armistice
and Termination of War.

Mr. Dacey defines "A commercial domicil as such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form a part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country, with the intention of continuing to trade there."

The question of commercial domicil is governed by intent and length of residence.

"Time", says Lord Stowell, "is the grand ingredient in constituting domicil. In most cases, it is unavailingly conclusive."

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The reason that enemy taint (so to speak) goes with commercial domicil is that a person in that position renders assistance directly or indirectly to the enemy. Furthermore the choice on the part of the alien is a deliberate one and making that choice he becomes an enemy, sharing his fortunes to a more or less extent, with that of the enemy.

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"Time", says Lord ~~Stowell~~ ^{Sowell}, "is the grand ingredient in constituting domicil. In most cases, it is unavoidably conclusive.

It is not unfrequently said that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified ^{latitude} and without some respect to the time which such a purpose may or shall occupy; for if the purpose be of such a nature as may probably or does actually, detain the person for a great length of time, a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him for the whole of his life. Against such a long residence, the plea of an original, special, purpose could not be averred; it must be inferred in such a case; that other purposes forced themselves upon him, and mixed themselves with the original design, and impressed upon him the character of the country where he resided. Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guards against the frauds and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time a priori, but such a rule there must be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain quantity of time, would nevertheless have that effect if distributed over a larger space of time. This matter is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time, be the occupation what it may, it cannot happen, with but few excep-

tions, that mere length of time shall not constitute a domicile."

(Case of Harmony* turning upon the national character of an American residing in France.)

If a citizen or subject, however, of a belligerent State, is domiciled in a neutral country his property on the sea in connection with that neutral country is considered to be neutral property. This however must be a case of actual residence in the neutral country. A case of this kind was decided in the British Admiralty Court - that of the Danous - in which it was held that a British subject, resident in the neutral country of Portugal, in a war between Great Britain and Holland, was not only neutral so far as his Portuguese property and residence was concerned, but was also free to carry on a trade between Portugal and Holland, which was allowable to neutrals.

This ruling does not extend to the case of a merchant residing in a belligerent country and having an interest in a house of trade in a neutral country. In the case of the Antonia Johanna, for instance, the Supreme Court of the United States held that the share of a partner in a neutral house, is, pire belli subject to confiscation where his own domicile is in a hostile country. Wheaton criticises this as being wanting in reciprocity but Dana in his notes says that rather than being the converse of the ruling in regard to neutral share in a belligerent house of trade it is a different position of a hostile connection. He says "In the one case, a stranger to the belligerents is neutral, as far as his personal domicile is concerned, but has an active commercial interest involved with the enemy's interests, and subject to the enemy's control and taxation. In the other, his special commercial interest referred to is neutral, as far as its locality is concerned; but by reason of his personal domicile, he is himself subject to the enemy's control, and liable to compulsory,

and to unlimited taxation and forced contributions, which may reach and include the profits of his commercial house in the neutral country."

The rule of commercial domicile is largely built up of judicial precedents and I have followed here and will follow naturally the precedents established by English and American courts. It is but fair to say, however, that the French rulings are different and state that a neutral merchant domiciled in a belligerent country does not acquire a belligerent character and that his property at sea is neutral property.

The Supreme Court of the United States has on the contrary as in the case of the *Venus*, the Prize Cases of 1862, and the case of the *Friendschaft*, followed the English precedents not only as to enemy character in commercial domicile but also as to parts of our own country in rebellion and that the property of a house of trade in enemy country is condemnable as prize whatever may be the personal domicile of the partners. A foreign consul even when residing in a belligerent country if engaged in trade partakes of the belligerent character so far as his sea borne trade is concerned.

The products of an enemy soil, whether the soil is enemy by original holding, or only so by military occupation, is hostile property, before being sold and while in transit at sea whatever may be the domicile or nationality.

This was decided in an interesting case by the Supreme Court of the United States known sometimes as the *U.S. vs. 30 Hhds. of sugar* and sometimes as *Bentzen Vs. Boyle*.

When the Island of *Sta. Cruz* in the West Indies was captured by the British in the early part of this century, Mr. Bentzen an officer of the Danish government and a planter left the island

and returned to Denmark. He still retained his plantation in Sta. Cruz under the management of an agent who shipped 30 hogsheads of sugar, the produce of the estate, in an English ship, to a house in London, on account and risk of the proprietor Bentzen; On the passage the English vessel was captured by an American privateer - the Comet - and brought into Baltimore where the vessel and cargo were condemned. Upon this a claim was made for the 30 hogsheads of sugar and afterwards an appeal made to the Supreme Court of the United States. Chief Justice Marshall rendered the decision denying this on the grounds that Bentzen was identified so far as his plantation in Sta. Cruz was concerned with the permanent interests of Sta. Cruz which was at that time British soil, and though as a Dane he was at war with Great Britain and an enemy, yet as a proprietor of land in Sta. Cruz, he was no enemy; he could ship his produce to Great Britain in perfect safety. Landed property, the Chief Justice went on to say, was fixed. "Wherever the owner may reside that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of this character; and that the produce, while the owner remains unchanged, is subject to the same disabilities."

An exception is found to the rule of commercial domicile in the character of Americans and Europeans residing in Eastern countries where ex-territoriality exists. Here the nationality and status of the domiciled merchant is determined by the nationality of the Consulate under whose protection they live and on whose register their names are borne.

Merchandise in transit on the sea.

Questions arise very often in maritime war as to the ownership of goods in transit upon the sea. For example goods shipped from a belligerent port to a neutral one and vice versa. The general rule in such cases is that the goods are owned by the Consignee unless specially arranged otherwise. This rule, without the exception is adopted in war time and the consignee is held to be the owner no matter whether a neutral consignor or shipper claims otherwise or not.

The French rule varies from the above which is founded upon the decisions of both English and American prize courts.

Merchandise shipped to become the property of the enemy upon arrival, if taken in transit is to be condemned as enemy's property. It is taken for granted that as it will become enemy's property at the end of the voyage the capture ends the voyage and the property is held as enemy's property and hence subject to capture and condemnation. The best thing that can be said for this ruling by the prize courts is that it meets an attempted evasion of capture.

Transfer in transit. For the further meeting of attempts to evade capture the English and American prize courts have adopted the rule that property belonging to an enemy at the time of shipment cannot have its belligerent character changed during the voyage by sale to a neutral. By decisions of the same courts goods belonging to an enemy which left before the outbreak of war hold their enemy character notwithstanding a sale or transfer while at sea to a neutral. This latter transaction is held to be practically under the first rule as an illegal transfer while in transit, and the character upon capture is hostile. The

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only exceptions to these rules are when a person formerly domiciled in an enemy state sails with his goods for his own country with an intention of remaining there, and (2) when the consignee has become bankrupt and the goods belong to neutral creditors.

Lord Stowell speaking of the general rule of the illegality of transfer of goods on the sea while in transit, says "if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect."

Devastation. Bombardment of unfortified places.

The question of deliberately ordered devastation on land is linked with the question of destruction of private property captured at sea before adjudication and also the bombardment or ransom of unfortified sea ports and coast towns.

Military devastation, properly so-called does not permit nor include the wanton destruction of private property. In the code recommended by the Institute of International law in 1880 it is forbidden to destroy public or private property, unless such destruction be commanded by urgent military necessity.

"Such destruction", says Winthrop, "may indeed be justified where resorted to in furtherance of the legitimate operations of war. Thus such property may be destroyed where otherwise it would fall into the hands of the enemy by whom it would be utilizable for the maintenance of his army or other military purposes."

The destruction of the Connecticut Sound towns during the Revolutionary War; the burning of the public buildings at Washington in the War of 1812 and the partial destruction of the town of Chambersburg during the late Civil War are examples of unjustifiable devastation.

It is probable that much of the devastation that followed in the wake of Sherman's army in its march to the sea was not strictly proper; but the action of Sheridan in the Shenandoah valley stands

upon a different footing. As this action is referred to unfavorably by English writers upon international law I will treat this matter somewhat fully. Sheridan's views upon the matter formed a subject of discussion in the Franco-German war between him and Von Moltke and Bismark who fully agreed with him in his views.

Devastation of this kind, properly ordered and applied for military purposes and not for revenge or retaliation, though distasteful to better feelings, is certainly one of the most powerful means of reaching the pockets and resources of an adversary and causing feelings that tend to bring a war to a close. The Shenandoah Valley was the granary, so to speak, of the Confederate Army under General Lee. It was also the road to the north through which the Confederate forces attempted its invasion in that direction, a road which not only provided ingress and egress but afforded subsistence and forage to such forces while they were on the way.

As a military necessity in view of the circumstances just named General Grant issued the following instructions.

"In pushing up the Shenandoah Valley, as it is expected you will have to go first or last, it is desirable that nothing should be left to invite the enemy to return. Take all provisions, forage and stock wanted for the use of your command. Such as cannot be consumed, destroy. It is not desirable that buildings should be destroyed - they should, rather, be protected; but the people should be informed that so long as an army can subsist among them, recurrences of these raids must be expected, and we are determined to stop them at all hazards."

In commenting upon these instructions which he carried out Sheridan says in his Memoirs (p.487) "I endorsed the programme in all its parts, for the stores of meat and grain that the valley provided, and the men it furnished for Lee's depleted regiments were

the strongest auxiliaries he possessed in the whole insurgent section. In war a territory like this is a factor of great importance, and whichever adversary controls it permanently reaps all the advantages of its prosperity. Hence as I have said I endorsed Grant's programme, for I do not hold war to mean that lines of men shall engage each other in battle, and material interests be ignored. This is but a **duel**, in which one combatant seeks the other's life; war means much more, and is far worse than this. Those who rest at home in peace and plenty see but little of the horrors attending such a duel, and even grow indifferent to them as the struggle goes on, contenting themselves with encouraging all who are able-bodied to enlist in the cause to fill up the shattered ranks as death thins them. It is another matter however when deprivation and suffering are brought to their own doors. Then the case appears much graver, for the loss of property weighs heavy with the most of mankind; heavier oftener than the sacrifices made on the field of battle. Death is popularly considered the maximum of punishment in war, but it is not, reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict."

(Quote Von Moltke's letter to Bluntschli R.D.I. XIII p. 79, etc. Also Busch's Bismark (Gov't resources, finances & credit - prestige.)

As to recent opinions on this subject De Martens says - Property may be destroyed which cannot be spared without prejudicing military operations and a country may be ravaged in extraordinary cases either to deprive an enemy of subsistence, or to compel him to issue from his positions in order to protect his territory."

Hall says, "destruction is always illegitimate when no military end is served as is the cases when churches or public build-

ings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. Finally all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender, it would even be impossible to deny an invader the right to cut the Dykes of Holland to save himself from such a fate; but when as in the case supposed, the devastation is extensive in scale and lasting in effect, modern opinion will demand that the necessity should be extreme and patent.

In the code recommended by the Institute of International law in 1880 it is forbidden to attack or bombard open or undefended towns. This of course has not been made authoritative. It is not unfair to say judging from the writings of French naval and political writers that it would not be a matter of surprise to find the French in a maritime war bombarding open sea ports in case of the refusal of a ransom. It is understood in these cases that the non-combatants would have sufficient notice and that the destruction would be confined to property alone. Although some English naval authorities have considered this operation as a legitimate one it is not so considered generally by English text writers. The practice of the English navy in this respect in previous wars has been in accord with the views of some of their officers rather than with their publicists.

Hall says "that in the face of a continued softening of the customs of war it should be proposed to introduce for the first time with modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land is nothing short of astonishing."

By modern it is supposed that Hall means since the War of 1812 and though he considers the bombardment of Valparaiso repre-

hensible it must be remembered that the English naval authorities at that place would not join the American commander-in-chief in preventing such action. Hall does not object however to the destruction of ship building yards, naval or military vessels or shipping available as transports in an open harbor.

T.J. Lawrence, another English authority, call the bombardment of open or undefended places or the extortion of ransom from them with the threat of bombardment in case of refusal as measures that are both retrograde and barbarous. He considers that there is little real danger of such affairs on account to the damage to neutrals and the early exhaustion of ammunitions. The domiciled neutrals would not I think interfere while specially arranged bombardments would provide ^{have} vessels to meet the demands for ammunition.

Walker, also an English authority, is uncertain as to whether the practice of belligerents has attained to the merciful standard set up by the Brussels conference and the proposed code of the institute and says "it may well be doubted how far such moderate counsels would in a future embittered struggle protect from injury the houses and dockyards of a defenceless seaport."

(See Calvo - Bluntschli.)

Armistice. An armistice is an agreement which may be applicable to an entire army or naval force or to only a portion or district for the suspension of hostilities or operations. Its duration is usually fixed and official notice of its period and other terms is given without delay to all those whom it may concern. During its pendency neither party - in the absence of a special condition authorizing it - may engage in any military work, operation or movement, at least upon the immediate theatre of war; or under its cover execute a retreat. If violated by one of the parties, the other is entitled to terminate it, and its violation by private individuals subjects them to punishment under the laws of war and to a liability to give indemnity.

If the cessation of hostilities is for a very brief period or for a temporary purpose - such as for a parley or for removing the wounded or burying the dead it may be well to use the term "suspension of arms."

On the contrary if it should be a cessation of hostilities preliminary to a treaty of peace and a cessation that covers the general operations of the war ashore and afloat it may be called a general armistice - a general truce - indifferently.

The offence of violating of an armistice may consist of a violation of its terms or some act which is opposed to the state of the suspension of arms. In a general way it may be said that any military operations which would have to be done under fire should not be done during an armistice, but any act which could be done without reference to the enemy is proper during an armistice.

During a general armistice each belligerent may do what it pleases beyond the zone of actual hostile operations. Ships can be fitted out, troops moved, and recruits made. As to revictualling of besieged places the fairest plan would be to allow it to be supplied every few days in order to keep up the state it was in at the time of the armistice. This is however a matter for special agreement or as the besiegers are the strongest party at their option. The Germans for instance in 1871 refused to allow Paris to receive any provisions during the armistice which preceded its final surrender.

A cartel or rather a cartel of exchange is a formal written agreement entered into by the opposing belligerents for the exchange of prisoners. A cartel is a convention of weighty character which imposes solemn obligations upon both parties in which both the national honor and faith is involved. A cartel can be made between commanders in chief or by the governments through other

agents.

A cartel ship is a vessel employed to exchange prisoners or to arrange under a flag of truce for cessation of hostilities or similar matters. The cartel ship is neutralized by her office and is unarmed.

Capitulation . A capitulation is an agreement for the surrender of a military or naval force or of a fortified place the terms of which are settled by the opposing commanders. The conditions of a capitulation should be such as would not involve any unnecessary disgrace or ignominy. Private effects should not be required to be surrendered and officers are generally allowed to retain their swords.

A capitulation is subject to be disapproved and annulled by the government of either commander. The capitulation of General Johnson to General Sherman was repudiated by the government at Washington upon the ground of its assuming to deal with political issues.

Such stipulations in excess of ^{the} ~~its~~ powers of commanders are sometimes called sponsions and are null and void unless the principals on each side accept them. The main conditions of General Sherman's agreement that were not acceptable to the Federal government were those recognizing the State governments which submitted to the Federal authorities and those guaranteeing to the people of the Confederacy their political rights and franchises as citizens of the United States.

If an officer in ^{chief} command of an army, fleet or fortified place makes stipulations affecting other portions of the field of operations not within his control, these stipulations must be ratified by the Commander-in-Chief before they become valid.

--Termination of War.--

War between civilized states almost always ends by the conclusion of a treaty of peace. Sometimes however the war fades away by the inability, or want of desire, to continue hostilities and no treaty is concluded as the war between Spain and Chile, 1867, and France and Mexico, 1864, and sometimes it ends also without treaty when the nationality or existence of one of the belligerents disappears as in the case of the third Partition of Poland or of the fall of the Southern Confederacy.

A treaty of peace as a rule settles all the matters in dispute between the belligerents. There are instances however as in the case of ~~the~~^{our} second war with Great Britain when to an earnest desire for peace on both sides is added a practical impossibility of settling the questions which brought on the war. In this case the Treaty of Ghent established peace and amity between Great Britain and ourselves but dealt with little else except various boundary questions which were of no particular importance as causes of the war or of its prolongation.

The Constitution of the United States in vesting in the President by and with the advice and consent of the Senate the authority to make treaties constitutes him with that body the peace making power of the Republic so far as foreign nations are concerned. Under the circumstances of his position he generally takes the initiative, though Congress can compel him to act by refusing the means of carrying on war.

The war status in foreign wars is held to end with the date of the treaty or agreement, formally entered upon, with the opposing belligerent. The date is generally announced

in a public manner by a proclamation by the President.

In the case of Civil War, rebellion, &c., in the absence of any legislative provision upon the subject, a proclamation by the President to the effect that hostilities have come to an end or the rebellion has been suppressed is ordinarily accepted, as fixing an authoritative date for the discontinuance of the status belli."

In our Civil War different States were included in different proclamations and hence the war closed at *different times in various*

States. A treaty of peace has been well defined as an act by which the belligerent governments, taking into consideration the state of their forces and the results of the war, determine their respective pretensions and convert them into rights and obligations.

As soon as peace is established all acts must cease which are permitted only in time of war.

Thus, says Hall, if an army is in occupation of hostile territory when peace is made not only can it levy no more contributions or requisitions during such time as may elapse before it evacuates the country, but it cannot demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorized by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war, such as to remain in occupation of territory until specific stipulations ~~and requisitions~~ have been fulfilled or to levy contributions or requisitions if the subsistence of the troops in occupation is not provided for by the Government of the occupied district.

Preliminaries of peace are an arrangement intended

to put an end to hostilities without waiting for the delays incident to the discussions preceding the establishment of a regular and definite treaty of peace. In the China and the Japanese war an armistice was agreed to on the 30th of March the actual treaty of peace not being ratified and going into effect until the 8th of the following May.

Very often the preliminaries provide for more than a cessation of hostilities, containing stipulations which are afterwards with changes of detail incorporated into the Treaty of Peace.

When a treaty fixes a date in the future for the commencement of peace, which is very exceptional, it is done on account of the delay in notifying regions in which hostilities are still going on. This is of course a very rare instance in these days of quick communication. It may happen though in distant seas or in inland territories and it may happen that official information reaches such vessels and such forces before the time designated as the commencement of peace. Under such circumstances it is considered proper if the news is official and well authenticated to have hostilities stop and the state of peace begin.

A naval or military commander is not obliged however to accept any information as to peace which is not duly authenticated by his own government. The consequences of suspending hostilities upon false news may be very serious and if it were once established that commanders were ever bound to act upon information obtained otherwise than by official sources from their own government it might be difficult to prevent them from being misled by intentional deceit.

In the Treaty of Ghent it was provided that hostilities were to cease upon the ratification of the treaty and prizes taken after that date were to be restored but with a time

allowance for the intelligence of the peace to reach the various parts of the seas of the world. An American cruiser captured a British vessel before the period fixed for the cessation of hostilities and in ignorance of the fact, before the prize had been condemned it was recaptured at sea by a British ship of war after the period fixed for the cessation of hostilities, but without knowledge of the peace. It was judicially determined that the capture by the American was lawful but the recapture - after the peace - was not lawful. The commencement of peace put an end to all force and then the general principle that things acquired in war remained as to title and possession as they stood when the peace began. This general principle is known as the *uti possidetis* and is the basis of every treaty of peace unless the contrary is expressly stipulated. Peace says Wheaton gives a final and perfect title to captures without condemnation and as it forbids all force, it destroys all hope of recovery as much as if the captured vessel was judicially condemned."

In the case of the *Mentor* an American vessel captured by British ships off the Capes of the Delaware after the cessation of hostilities though in ignorance of the fact, it was held in the British Admiralty Court by Sir William Scott that the capture was illegal and that as the hostile acts were illegal the officer committing the acts were liable for damages; but if the officer committed such acts in ignorance of the conclusion of the war his own government should protect him - as it was the duty of the government to have given him notice of the ending of the war.

The restoration of peace carries with it the revival of certain private ~~rights~~ - as well as public rights and obliga-

gations. Debts can be again sued for, contracts again enforced between the subjects of the late belligerent powers. Performance of acts rendered impossible by the war cannot be claimed. A man cannot be required to sell a house or live stock destroyed by war and the time named for obligations does not include the period of war.

Treaties of peace are valid whether made with the authority that declared the war or de facto governments that have arisen since, so long as the authorities are those entrusted with this duty by the Constitutional Law.

Conquest of territory invests the conquering State with title to all the State property in that territory and with all the rights and obligations that pertain to that territory.

The conquering State obtains sovereignty over all the subjects of the acquired territory and the inhabitants become citizens or subjects by acquisition. They may or may not be given full political rights. It is usual however to insert a stipulation in modern treaties giving liberty of choice to the inhabitants of the conquered territory to remain citizens of the original country. Sometimes this liberty of choice is fettered with the condition that they must leave the conquered territory if they elect to go with their former State. In the cession of Alsace & Lorraine it was provided that those who wished to retain their French nationality, must emigrate but ^{they} were allowed to retain the ownership/ of their real estate within the ceded territory.

Territory which is retaken from the conqueror or which is restored by treaty of peace to its former rulers is entitled to the right of post liminum, or statuo quo ante bellum. That is, by the restoration the former ruler acquires no new rights over the territory.

There are certain acts which remain good notwithstanding the right of post liminium . Administrative and similar acts not of a political or military nature, remain good such for example as the sentences on ordinary criminals, the payment of taxes, &c.

Conquest is distinguished from military occupation in that it is the completed and final status of the acquired territory, recognized by treaty or otherwise.

Intervention.