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"Continuous Voyages."

International Law.

LECTURE NO. 10.

Continuous voyages.

By the ruling known as the rule of the war of 1756, neutrals were not allowed to trade directly between the enemy and his colonies. This was so adjudged because in time of peace this trade was a monopoly of the home country, and not permitted to foreighers, hence it was considered an enemy trade.

As a result of this ruling neutral carriers from an enemy colony began to stop en route as it were, at a neutral port, when really bound to the home country of the enemy. This was declared by the English prize courts to be an evasion, even when the entire cargo was landed and re-shipped at the neutral ports and the vessel was condemned and the principle of continuous voyages established so far as colonial and coasting trade was concerned.

At the time of the application of this doctrine we were the great neutral carriers and the doctrine of continuous voyages was decidedly adverse to our interests.

When the civil war broke out and ports like Bermuda and Nassau became the great entrepot of the blockading and contraband trade of the United States, the doctrine of continuous voyages was revised and applied by our courts to captures, and this time England, the great neutral, found the doctrine adverse to her interests; and yet the captures made between the English ports and Nassau or Bermuda were quite as reasonable as those made by English cruisers in the great wars of the French and English and their respective allies.

If we recall the circumstances of the blockade of the civil war we will find that two classes of vessels were required to make a successful and complete voyage so far as the contraband cargo was concerned. The larger class of vessels in which speed was secondary and capacity the principal quality, made the longer and less exposed voyage from England to Nassau or Bermuda . Here was a wide expanse of sea and the mid-ocean as a shelter as well as highway. Between the intermediate neutral ports , however, and the blockaded ports, the distances were short and the belligerent or federal cruisers plentiful. Speed and light draught were requisite and hence the sacrifice to secure both, made the type of vessels have a small cargo capacity. The value of cotton and the great scarcity of ceratin articles in the confederacy was sufficient, however, to make blockade running ,if successful, one of the most remunerative of employments.

The rule that the illegal (to belligerents) nature of the trade must be judged by the destination alone,left, it is evident, too large a loop hole for the offending parties, and when cargoes bound for Nassau or Bermuda had the evident and unmistakable signs that they were intended for the use of the Confederate forces or to violate the blockade of the Confederate ports, it was logical and just that this evasion should be exposed and the captured vessel adjudged guilty. The destination in the light of international law is the ultimate destination and if that ultimate should be the enemy the other belligerent can rightly adjudge the carrier at fault. Suppose, for instance, a fleet in neutral waters--not a port--but an anchorage like so many that abound in the world out of reach of municipal law, and a neutral carrier

with destination to the nearest neutral port, stops enroute and carries contraband to the fleet. Is it not a plain violation of the law of contraband, no matter if she continues her voyage to a neutral port.

"Nothing is more common" said the English foreign office to the owners of the Peterhof "than for those who contemplate a breach of blockade, or the carriage of contraband, to disguise their purpose by a simulated de stination and by deceptive papers" And this was done during our civil war by English vessels in at least three ways;--by clearing for Nassau and running the blockade, by clearing for Matamoras with cargo intended for the Texas side of the Rio Grande and by clearing for Nassau and transhipping to vessels especially adapted for blockade running.

Perels says on this point that because a ship laden with merchandise which has the character of contraband, sails from one neutral port to another equally neutral port, that it follows that the place of destination ought to decide absolutely, the innocence of the cargo. Sir Travers Twiss says in this case there is a presumption juis et de juie. Gessner replies, with reason, that it matters little from the judicial point of view whether the transport of the contraband is performed directly or by a detour, so long as the hostile destination be established. The judicial difference is that if the contraband is found enroute to a neutral port the presumption is that its destination is neutral. However, he says, this presumption is not as Twiss said, juris et de jure, that is to say--not admitting contrary proof, but juris tantum, that is capable of being reversed by positively determined proof. It is above all a question of proof-

a hostile destination, with an interposed neutral port makes the articles susceptible of concemnation, if the proof is clear and certain.

The continuous voyage then, commences with the departure from the original port for a belligerent destination and the offense is proven when it is established that the vessel is carrying directly or indirectly the contraband to the enemy. I will close this subject by quoting a paragraph from the note of R.H.Dana, in his edition of Wheaton, the paragraph being founded upon Justice Story's decision in the case of the . He says:--

"If the vessel is to deliver a contraband cargo into the hands and control of the enemy's government, or of its executive officers, that makes the destination hostile whether the place of delivery be at sea, or in a neutral or in a hostile port.

DECLARATION OF PARIS

At the close of the Crimean war, the Powers of Europe assembled in the conference which resulted in the Treaty of Paris, also agreed upon a separate document concerning maritime international law which is known as the Declaration of Paris. This was adopted on April 16th.,1856, and it consists of the four following articles.

1---Privateering is and remains abolished.

2---The neutral flag covers enemy's goods with the exception of the contraband of war.

3---Neutral goods, with the exception ofcontraband of war, are not liable to capture under the enemy's flag.

4---The Blockades, in order to be binding must be effective,that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

Great Britain, France, Austria, Prussia, Russia, Sardinia and Turkey were the original powers signing this declaration. The invitation to accede to this declaration yhas been accepted by most of the civilized nations of the world, the United States Spain, Mexico, Venezuela and China being the principal countries which have declined to adopt it.

This declaration, adopted over forty years ago, and which is only binding upon the powers acceding to it and by them only in relation to each other, has been scrupulously followed during all wars that have occurred since then, not only by the signatory powers with each other, but by the signatory powers with relation to the non-signatory powers, and even as in our civil war and the war between Spain and Chile, by non-signatory powers. It is not international law, because the adoption is not universal, and so long as the United States with its strong naval and mercantile marine, holds aloof, it lacks an element to make it complete; but as time passes and its stipulations become positively and tacitly observed, it tends more and more to the position of an established usage and principle of the law of nations.

To the first of these articles of the Declaration, the President of the United States, on July 14th., 1856, declined to accede. Mr. Marcy, then Secretary of State, stating that the United States were willing, however, to accept the abolition of privateering with an amendment which should exempt the private property of individuals of belligerents states from seizure or confiscation in maritime war. This was not accepted and was withdrawn.

Privateers, however, were not used or authorized by the federal government in the civil war, and it is not likely that from the changed conditions of warfare they will be used by us.

It is stated that the Confederate government, owing to the disabilities to which their privateers were exposed in foreign ports, discontinued the little privateering they had begun and the cruisers afloat claimed the right of public ships of war and were commanded by officers commissioned by the Confederate states.

Citizens of the United States are forbidden by statute to take part in the equipment or manning of privateers to act against nations at peace with the United States. Treaties making privateering under such circumstances piracy, have been negotiated with England, France, Prussia, Holland, Spain and Sweden.

IMMUNITY OF ENEMYS' PROPERTY IN NEUTRAL VESSELS

The second article of the Declaration of Paris provides for the immunity of enemy property in neutral vessels, if not contraband of war. This is popularly known as the doctrine of "Free ships, free goods."

The position of the United States has been a peculair one with respect to the doctrine contained in this article of the Declaration of Paris. While the executive department has advocated the adoption of this rule, the courts and the text writers have not accepted it as a rule of maritime warfare.

It is hardly necessary to go into the history of the question of free ships make free goods, and the contrary rule of enemy ships make enemy goods. The struggle has been going on for centuries, each country taking both sides of the question as their interests were for the time affected. In our country the rulings and practice of the English courts affected the our courts, which were against the rule of free ships make free goods , but with the adoption of the declaration of Paris by the great powers, and especially by England the great sea power of the world, a chapter

as Lawrence says, in the history of maritime law was closed.

The last clause of the Declaration of Paris contained a proviso that the Declaration is not and shall not be binding, except between those powers who have acceded or shall accede to it. Notwithstanding this proviso, the practice has been to apply the rules towards the non-signatory powers in the various wars which have occurred since.

In 1860, when France and England were at war with China- a non-signatory state, they applied the second and third articles of the Declaration to neutral trade; both the federals and the confederates did the same in the civil war, though the United States was not a signatory power. In the Franco-German war of 1870-71, both sides applied the rule in question to the property of American citizens and Spanish subjects, though neither country had acceded to the Declaration, and in 1885, Chile and Peru did the same towards Spain. In the last war-the Chino-Japanese- so far as it can be learned, China made no attempt to capture Japanese goods under a neutral flag or Japan to capture Chinese goods when in same conditions.

In the treaty between Italy and the United States, in 1871, the principle of free ships and free goods was affirmed; the neutral flag was to cover persons except officers or soldiers in the actual service of the enemy. But this treaty went further and exempting all private property of the two countries from capture in case of maritime war existing between them. The exemption did not, of course, extend to contraband of war or violation of blockade.

In the treaty with Peru, made by the United States in

1887, this doctrine of free ships and free goods was agreed upon as in earlier treaties, but with the proviso that it was to apply to those neutrals who followed the same practice ih time of war.

Lawrence closes his discussion of the subject--as we may-- with the following sentence."We may adopt, with confidence, the view of one of the greatest of modern authorities on naval warfare,Captain Mahan, and hold that 'the principles that the flag covers the cargo is forever secured.'"

IMMUNITY OF NEUTRAL GOODS IN ENEMYS' SHIPS

This is covered by the third article of the Declaration of Paris,i.e.,"Neutral goods, with the exception of contraband of war,are not liable to capture under the enemys' flag."

This doctrine has been more universally accepted than the doctrine of free ships,free goods. In fact the adoption of the doctrine of free ships,free goods, had a tendency to change the previous exemption of neutral goods and lead to a converse rule--enemy's goods,enemy goods, though euphonious in sound it was false in principle.A commercial trade of an enemy is legitimate if confined to innocent articles and the carriage of neutral goods should hot bring taint to the goods on account of the character of the carrier.

In the _____ the neutral goods were not considered as fair prize and Grotius argued against the seizure of neutral goods in enemy's ships upon the ground that their position ought not to be ruled against them, but should at the most only indicate a presumption of hostile character, which might be rebutted by proof to the contrary. Bynkershock was of the same opinion and Vottel was at least as positive , if not more so than Grotius.

Wheaton says the rude which subjects to confiscation the goods of a friend, on board the vessels of an enemy, is manifestly contrary to reason and justice.

Dana, in his comments upon this portion of the text of Wheaton, says that "Not only are the two maxims--free ships,free goods, and hostile ships,hostile goods--separate, but they have no logical connection with each other. x x xThe rule that the cargo found in enemy's ships not being contraband or engaged in violation of any of the captors rights of war, is to be examined into on proof , and to be restored to a neutral who proves his title and right of possession, clear of other causes for condemnation, is now acted upon withoutquestion in the prize courts of England and America."

The Declaration of Paris has settled this matter, though, as Spain nominally remains the only country which adhered to the principle of enery ships,enemy good s, it is doubtful, in the face of the prevailing opinion of the rest of the world whether she would enforce her views in time of war.

Although neutral property in enemy ships has this immunity from confiscation, the neutral owner is not exempt from the incidental loss which arises from making a belligerent ship his carrier. Like the neutral in a belligerent territory, he cannot claim compensation for the regular operations of war. Hence losses from the destruction of the ship, its capture and detehtion awaiting adjudication, are not compensated by the other belligerent. Circumstances,though in such cases they should be justifiable ones, may require the destruction of the captured ships as an act of war, and such loss and destruction ~~seres~~ carries with it the loss of neutral cargo without legitimate claim for compensation.

War between Spain and the United States would be a war between two non-signatory powers of the Declaration in which much unnecessary injury would be caused to neutrals and to our own people because of a lack of adhesion to the articles of the Declaration of Paris. The last article of the Declaration in regard to blockades, is one which has been accepted in better terms by the United States in her treaty with Italy. With this version of the last article and with the fact that privateering no longer is an effective means of maritime war, there seems to be no reason apparent to the writer that the United States at once should accede to the Declaration of Paris. It would set a seal of final approval upon the Declaration and besides being of material advantage to the United States, would cause the acceptance of the principles involved by many smaller nations, most of which have been advocated by the government of the United States for more than a century.

CAPTURE AND CONDEMNATION OF A MERCHANT VESSEL.

The right of search and manner of approach and visit has already been discussed under the head of maritime war in a previous lecture (No.5). The responsibility of the captors for seizure upon false, frivolous or insufficient gorunds is also there referred to. It must be borne in mind that by international law there are established methods for determining whethere the vessel captured be a legal prize. Capture alone does not change the title of the property or transfer any right in the ship or cargo to the captor, either as an agent for the government or for the beneficiaries. The property is still with the original owners subject to trial and finding of a regularly established prize court. The trial must not be ex parte, both parties can be heard

and can be duly represented by counsel. The prize courts of the country of the captor are recognized as the legitimate tribunals before which the case is to be tried. The Institute of International Law, has drawn up a scheme for an international prize tribunal with a code in accordance with which all trials are to be conducted and prizes condemned. This scheme provides a mixed tribunal ih which the neutral vessel seized is represented by a consul of the neatral country, or by a friendly consul or by a judicial functionary named by them. The code provides for the exemption from capture of private property except when violating the war rights of the belligerents; such as the right of search, blockade, carriage of contraband or unneutral service. A court of appeal or international tribunal of maritime prizes is also to be provided for by proper legislation.

This code and proposition was finally advocated by the Institute, in 1887, at Heidelberg, and has been, it is presumed, communicated to all of the Powers. I have not been able to find that in the ten years that have elapsed, that any favorable response has been received from any maritime power.

The courts of the United States, which take cognizance of such prize cases are the District Courts, the Circuit Courts and the Supreme Courts of the Federal government.

The prize courts of the United States vary both in constitution and jurisdiction. No civilized state, which has a merchant or naval marine is, however, without such a court, and the general principles upon which are based are similar. In 1794, a mixed tribunal was established by the United States and Great Britain to try American vessels captured by the English in their war against France; such tribunals are very rare.

If it should happen that the vessel captured or any part of her cargo is not in a fit state to be sent into port for trial, the laws of the United States provide for an appraisement and, if possible, a sale and a deposit of the proceeds, subje ct to the order of the prize court, in which proceedings finally take place.

In case any captured vessel or property is taken for the use of the United states before coming into the custody of the prize court, it must be surveyed, appraised and inventoried, and the Department taking the vessel or property, must deposit the amount of the appraisal, subject to the order of the court which takes cognizance of the case.

If there is danger of immediate re-capture, if the vessel is un-seaworthy, if there is an infectious disease on board, or if it is impossible for any other reason, to send in a captured vessel, international law permits its destruction or abandonment, but all papers are saved and the adjudication proceedings go on for the satisfaction of all concerned. If damage happens to vessel or cargo while in the hands of the captors and the court holds the capture to have been reasonably sound, the responsibility of the captor does not extend beyond a failure to use due care and skill.

Dana says as to the duty of captors that :--

"From the nature and objects of the prize tribunals, it is clear that the captors duty is to see that his act of capture is submitted to adjudication by the prize court of his country. Of course he must do this in a reasonable and fair way. He must send in the prize as speedily as possible to a convenient court, in proper hands and with all the papers, cargo, and other sources of evidence, and with the Master, Supercargo (if any) and other chief

persons on board likely to be useful to the owners as witnesses and to see everything properly delivered to the court. For a breach of these rules, although the claimant does not suffer, still the captor may lose his prize money. If there is reason to believe that the misconduct of the captor has beenfftal to a fair inquest, the vessel is restored. If damage happens to the vessel or property in the hands of the captord and the court holds the capture to have been with probable cause, their responsibilities are only those of lawful custodians or bailees; i.e. responsibility for failure to use reasonable care and skill.

After such examination as the commander of the cruiser can make, his duty, as against neutrals is to decide between two courses:--he must either release the vessel absolutely, with her cargo, papers, passengers, and all entire, or he must complete his capture, make her a prize and send her in for adjudication. He cannot take a middle course, and, releasing the vessel, exercise any belligerent authority over the cargo, passengers or ~~perhaps~~ papers or destroy any property or take from her persons or property. If he should take <u>this</u> course, he will be considered as having declined the exercise of the only belligerent right neutral nations permit to him---that of capture and sending in for adjudication---- and his act of destroying or removing will be treated as not a lawful belligerent proceeding. Not being a recognized belligerent act, it is either, in law, an act of piracy, or an attempt to exercise a police power over neutral vessels on the high seas. X X X The modern practice of neutrals prohibits the use of their ports by the prizes of a belligerent, except in cases of necessity; and they may remain in the ports only for the meeting of the exigency. The necessity must be one arising from perils of the seas, or need

of repairs for sea-worthiness or provisions and supplies. Increase of armament is prohibited. The neutral will protect the prize against pursuit from the same port for twenty four hours, and against capture within his own waters; but, beyond that the general peril of war, arising from the power or vigilance of the other belligerent, does not constitute a necessity which the neutral recognizes as justifying a remaining in his port. X X X X It seems clear that to allow prizes to fly to a neutral port, and remain there in safety, while prize ~~courts~~ proceedings are going on in a home port would give occasion to nearly all the objections that exist against prize courts in neutral ports."

It may be considered as settled that a neutral government is not required, by executive action, to restore a vessel owned by one of its citizens which has been re-taken from a belligerent before condemnation by her crew when demanded by the belligerent government.

Such re taking is legally and properly called a rescue; a re-capture being the recovery of a vessel from the possession of her captors by a force from without the vessel, also before condemnation. In either case dana considers that a case of salvage is presented; in the case of rescue a civil salvage, in the case of re-capture a military salvage. He also states that if a cruiser takes a prize and loses it, whether by rescue, recapture or otherwise and she is again captured by a second cruiser of the same nation, it is not a re-capture for the first cruiser subject ~~for~~ to salvage, but an original capture.

In d osing the subject of prize tribunals, it would be well to speak of the standard given by Lord Stowell in the case of

the Maria, for the judges, he says in such cases:--

"It is ~~not~~ the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties in Sweden as a neutral country, which he would not admit belong to Great Britain in the same character."

TRANSFER OF FLAG

The general adoption of the article of the Declaration of Paris, which provides that the neutral flag will cover goods belonging to the subjects of a belligerent unless it is contraband of war, increases the value of the neutral vessel for purposes of trade during war times. A transfer to a neutral flag not only saves the vessel from capture, but also the goods it carries. There are two varying practices or rules in regard to the transfer of a vessel from a belligerent to a neutral flag in time of war. One that of the French, who refuse absolutely to recognize the validity of such change, the presumption being that the change is a fraudulent one.

The other practice and rule is that of the English and our own courts which recognizes the transfer as a legal one, if it be a clear bona fidi ~~one~~ transaction. Such purchases,however, are viewed with suspicion and must undergo the most searching investigation. The sale must be absolute and unconditional; any doubt is ruled against the vessel.

Sir William Scott said in a case that came under his cognizance that "The rule which this country has been content to apply is that property so transferred, must be bona fidi and absolutely transferred; that there must be a sale divesting the enemy of any further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether."

In case of a war between France and England the French rule would bear heavily upon any English ships transferred to a neutral flag, while any French ships so transferred would probably in view of the French law, be held by English courts to be still French and subject to condemnation.

It has been suggested that in view of the immense amount of shipping, English built and English owned, under the English flag, engaged not only in the home and colonial trade, but engaged as carriers all over the world between other ports that in case of any maritime war, there would be a general transfer from an English to a neutral flag. There are a number of reasons to prevent it. In the first place there would be the French rule, which would prevent a recognition of such transfers, so far as France is concerned, besides there would be other obstacles. The sale must be bona fidi, and bona fidi sales of such an amount of shipping would require an immense amount of capital in a short time, an amount which would be practically impossible to obtain. War rates of insurance would be so great as to eat up the margins of profit from the shipping trade, for neutral vessels so transferred would be subject to capture and examination to see if the sale was bona fidi.

Besides, the ~~amount~~ most effective way of commerce de-

stroying is by means of a ~~commerce~~ commercial blockade , and such a blockade applies to neutral vessels attempting to violate as much as it does to the enemy vessels.

Convoy and fast individual vessels will probably be the means of evading capture on the part of the ~~enemy~~ merchant vessels.

Intervention--Virginia case.