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EDITORIAL COMMENT

THE RIGHT OF PRIZE AND NEUTRAL ATTITUDE TOWARD ADMISSION
OF PRIZES

The presence in American jurisdiction of the *Appam*, an English vessel captured by a German cruiser, suggests some remarks upon the right to make prize, the method of determining the title thereto, and the practice of nations in allowing or prohibiting prizes, accompanied or unaccompanied by the capturing vessel, to enter and to remain in neutral ports.

In the first place, public armed vessels of the enemy upon the high seas are subject to capture, and title passes from government to government without the need of a decision of a prize court, unless the individual captors are by the law of their country entitled to a share in the spoils,

called "prize money," in which case, the decision of a prize court is necessary to apportion the shares due to the captors.

In the next place, private property of the enemy upon the high seas is by the laws of war subject to capture, although there has been for more than a century past a determined effort made on the part of the United States to secure the immunity from capture of unoffending private property of the enemy upon the high seas. As, therefore, according to the practice of nations it is legal to capture private property of the enemy upon the high seas, it would seem that capture vests title in the captor and that judicial proceedings in such a case are only instituted by the government of the captor in order to determine whether the circumstances of the case justify capture, and if there be municipal statute or practice granting the individual captors a share of the prize money, to apportion the shares to which each person taking part in the capture is entitled.

An exception to the right of capturing enemy private property exists in the case of ships engaged on a scientific mission, employed for philanthropic and merciful purposes, as in the case of the Red Cross, and ships engaged in inshore fishing.

The presence of neutral interests in ships belonging to or sailing under the flag of the enemy, or the presence of neutral cargo upon enemy ships, which cargo is by the Declaration of Paris exempt from capture, renders it highly desirable that the validity of the capture of enemy merchant vessels be determined by a prize court, and in the interest of neutrals, rather than of belligerents, this has become the settled practice of nations.

Finally, a neutral ship may be engaged in what is called unneutral service; or it may be an ordinary merchant vessel carrying contraband. In certain cases of this kind, the vessel may be seized, passed upon by a prize court, and condemned. In this last case, however, the neutral clearly has a right to have the regularity of the capture passed upon in a judicial decision, because if force be a measure of title between belligerents, law determines the relations of belligerent and neutral.

A quotation from Hall's International Law will make this subject clear. Thus Mr. Hall says:

As the property in an enemy's vessel and cargo is vested in the state to which the captor belongs so soon as an effectual seizure has been made, they may in strictness be disposed of by him as the agent of his state in whatever manner he chooses. So long as they were clearly the property of the enemy at the time of capture, it is im-

material from the point of view of international law whether the captor sends them home for sale, or destroys them, or releases them upon ransom. But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.¹

It has been thought advisable to quote these passages from Hall's treatise as the statements on these questions are confusing, and as statements of a conflicting nature are to be found in the reports.

Perhaps the clearest statement on the question of passing title is to be found in *Commodore Stewart's Case* (1 Ct. Claims, 113), decided by the Court of Claims in 1864, in which the court was very desirous to hold that title to the *Levant* passed to the individual captors upon its capture by the frigate *Constitution*, then under the command of Captain Stewart. Captain Stewart on the 20th day of February, 1815, sighted, chased, and captured the *Cyane* and *Levant*, two British men-of-war. Followed by a superior British squadron, he sought to carry his prizes to the United States, but the *Levant*, unable to keep up with the *Constitution*, took refuge in Portuguese waters, where, notwithstanding Portugal was neutral, the *Levant* was captured by the British squadron without an attempt on the part of Portugal to hinder such an unlawful act, or even a remonstrance. The loss of the prize rankled in the breast of Captain Stewart, and, insisting that the failure of the United States to secure satisfaction against Portugal for permitting this violation of its neutrality by virtue whereof Stewart lost the prize, he brought suit in the Court of Claims against the United States in order to recover damages for the failure of the United States to prosecute and to enforce its right against Portugal. In considering the effect of capture upon title to the captured vessel, Chief Justice Casey, speaking for the court, said:

Attention for a moment to the foundation and origin of the right of the individual to the captured property will assist us in the solution of this question. That right is acquired not in virtue of the seizure of it as enemies' property, but by grant of the sovereign whose commission the captor bears. Judge Story says: "It is now clear

¹ Hall, 6th ed., pp. 451-2.

that all captures in war inure to the sovereign, and can become private property only by his grant." (*The Emulous*, 1 Gall., 569; 11 East., 619.)

The right to all captures from the earliest times has vested primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, except that which he received from the bounty of the State. (Law of Maritime Warfare, p. 374; Valin, Com. II, 235; Bynk., cap. 17; Sir L. Jenkins's Work, p. 714.) An interest in a prize can only be derived from the government. (Phillips on Insurance, 182, § 320; *The Joseph*, 1 Gall., 558; 11 East., 428.) It is even denied that the individual captors, prior to condemnation, have an insurable interest in the captured property. (*Routh v. Thompson*, 11 East., 432; *Devaux v. Steele*, 6 Bingh. N. C., 370; *Lucena v. Crawford*, 3 B. & P., 75; 5 *ibid.*, 323; *Crawford v. Hunter*, 8 T. Rep., 13.)

The principle applicable to this case to be extracted from the authorities cited is, that by the capture of this ship the property to it vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority.²

Chief Justice Casey then went on to quote a portion of the opinion of Sir William Scott in the case of *The Elsebe* (5 C. Rob. 173), holding that capture vests property in the crown and that individual captors only obtain an interest by a local municipal statute or practice, and are vested with that interest by the decision of a prize court. The Chief Justice then said:

If these principles are sound, and we think they are sustained by the strongest reasons and the highest authorities, it must follow that this suit cannot be maintained by this claimant, for want of title to and interest in the subject-matter in respect of which the claim is made.

By the seizure of the ships they acquired a right to carry them into a port of this country for adjudication. It is the condemnation under the act which gives the interest, and not the seizure. The capture vests it in the United States—the condemnation in the captors.

Next, as to the attitude of neutral nations concerning the admission of enemy prizes to their ports. The capture of an enemy merchant ship by a belligerent man-of-war or privateer vests possession in the government of the captor because such vessels are authorized by their commissions to make captures. The prize is therefore public property in the possession of the capturing vessel, and if the man-of-war or privateer should enter a neutral port with its prize, it would be treated, if permitted to enter, as public property, and as such exempt from local jurisdiction, if admitted without condition, and as long as it was permitted to remain

² *Stewart v. United States*, 1 Ct. Claims Reps., 118.

and by so remaining to enjoy the hospitality of the port. The presence, however, of belligerent vessels is a menace to a neutral port, and international practice limits their stay and conduct during such stay. The presence of a public vessel with a prize does not lessen but rather increases the inconvenience. The presence of a privateer with a prize was still more objectionable because the officers of privateers were not subject to military discipline and control; and their misconduct was so great and dishonorable that privateering was abolished by the Declaration of Paris of 1856.

But there is an objection to the presence of a prize in a neutral port accompanied or unaccompanied by a vessel of war or a privateer. There is a danger that a capturing vessel sent into port with a prize crew may not be able to maintain order, and there is a tendency to have the prize unduly prolong its stay, and even have prize proceedings begun in the home country to condemn the prize and pass title to the captors while the captured vessel lies in a neutral port. This is very much like making a neutral port the basis of hostile operations, and in any event neutrals should not allow their ports to be a depository for the spoils of war. There has therefore been for generations a strong tendency to exclude prizes from neutral ports, even when accompanied by belligerent vessels of war or privateers. Thus, as far back as 1650, France issued the following declaration:

And in order to obviate frauds perpetrated for the purpose of concealing illegal prizes and piracies which ruin commerce, we forbid all governors of towns, places and castles under our sway to allow any captains of vessels bearing a foreign commission who have made prizes to remain in their ports and roadsteads more than twenty-four hours, unless they have been forced to put into port and remain there by stress of weather; and, further, on condition that they do not sell or leave there any of the goods taken by them, in any way or manner whatsoever.³

An ordinance of 1681 followed, which has been pretty generally followed and which is said to be the origin of the twenty-four hour rule applied to the stay of public belligerent vessels in neutral ports. The text of this ordinance is as follows:

No vessels taken by captains bearing a foreign commission may remain more than twenty-four hours in our ports and harbors, unless they are kept there by stormy weather, or unless the prize is taken from our enemies.⁴

³ Ortolan, *Règles internationales et diplomatie de la mer*, V. 2, p. 304, note.

⁴ Pistoye & Duverdy, *Traité des prises maritimes*, Paris, 1855, V. 2, p. 449.

By the time of the Crimean War, the practice to exclude prizes was becoming very general, subject to exceptions of a humanitarian nature, as appears from the following passage, quoted from Pistoye and Duverdy's *Traité des prises maritimes* (1855), Volume 2, page 452:

On the occasion of the present war, the neutral powers with the exception of one, Austria, went further than the French ordinance. In effect, according to the terms of Article 14, every belligerent cruiser may at any time, and whatever may be the condition of the sea, bring prizes into French ports, on condition, however, of not remaining there more than twenty-four hours. Now, most of the neutral powers have declared this year that they will not admit belligerent privateers in their ports except in case of absolute necessity; whence it follows that privateers may not bring their prizes into the ports of these powers, even if they remain only twenty-four hours (see ordinance of the Senate of Hamburg, April 26, 1854; *idem*, Lubeck, Art. 3; *idem*, Bremen, April 28–29, 1854, Art. 2; ordinance of the Government of Oldenburg, April 20, 1854, *in fine*; declaration of the King of Sweden, April 8, Art. 9; declaration of the King of Denmark, April 20, Art. 4; ordinance of the Duke of Mecklenberg, April 26, Art. 1; law of May 5, 1854, of Hanover, Art. 2; decree of the King of Two Sicilies of May 17; ordinance of the Grand Duke of Tuscany, June 3, Art. 2; notice of the Belgian Government, April 25, 1854; decision of the King of the Sandwich Islands, July 17, 1854). As for the Emperor of Austria, he has declared, in his ordinance of May 23, 1854, that prizes made by belligerents would not be admitted to the ports of the empire, except the port of Trieste. Article 7 allows the unloading of foreign prizes in this port and even their sale.

It will be of interest briefly to state the attitude of European nations toward the admission of prizes during the Civil War, the last great maritime war to which the United States was a party.

Great Britain announced on June 1, 1861, that it intended to forbid "the armed ships, and also the privateers, of both parties, from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, or of any of Her Majesty's Colonies or possessions abroad."⁵ Later, on June 2, 1864, the following additional instructions were issued:

1. If any prize captured by a ship of war of either of the belligerent Powers shall be brought by the captors within Her Majesty's jurisdiction, notice shall be given by the governor to the captors immediately to depart and remove such prize.
2. A vessel which shall have been actually and *bonâ fide* converted into, and used as, a public vessel of war, shall not be deemed to be a prize within the meaning of these rules.
3. If any prize shall be brought within Her Majesty's jurisdiction, through mere

⁵ Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (1870), pp. 136–137.

stress of weather, or other extreme and unavoidable necessity, the governor may allow for her removal such time as he may consider to be necessary.

4. If any prize shall not be removed at the time prescribed to the captors by the governor, the governor may detain such prize until Her Majesty's pleasure shall be made known.

5. If any prize shall have been captured by any violation of the territory or territorial waters of Her Majesty, the governor may detain such prize until Her Majesty's pleasure shall be made known.⁶

FRANCE

Declaration of Emperor Napoleon III, of June 10, 1861.

1. No vessel of war or privateer of either of the belligerents will be permitted to bring prizes into our ports or roadsteads and to remain there more than twenty-four hours, except in case they have been forced to put into port.

2. No captured articles can be sold in our said ports or roadsteads.⁷

BELGIUM

Belgium has given its adhesion to the principles laid down in the Declaration of the Congress of Paris of April 6, 1856. This adhesion was published, together with the said Declaration (6th June, 1856) in the Belgian *Moniteur* of June 8, 1856.

The commercial public is notified that instructions on this subject have been given to the judicial, maritime, and military authorities, warning them that privateers, under whatever flag or commission, or letters of marque, are not to be allowed to enter our ports except in case of imminent perils of the sea. The aforesaid authorities are charged, consequently, to keep a strict watch upon all such privateers and their prizes, and to compel them to put to sea again as soon as practicable.⁸

NETHERLANDS

In obedience to the King's orders, the Ministers for Foreign Affairs, of Justice, and of the Marine, present to the knowledge of all whom it may concern, that to guard against probable difficulties during the doubtful complications in the United States of North America, no privateers under any flag, or provided with any commission or letters of marque, or their prizes, shall be admitted into our havens or seaports, unless in case of distress, and that requisite orders be issued that under any circumstances such privateers and their prizes be required to go again to sea as speedily as possible.⁹

SPAIN

Article 3. It is forbidden to vessels of war or privateers with their prizes, to enter or to remain for more than 24 hours in the ports of the monarchy, except in case of

⁶ Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (1870), pp. 140-141.

⁷ *Ibid.*, p. 144.

⁸ *Ibid.*, p. 145.

⁹ *Ibid.*, p. 146.

stress of weather. Whenever this last shall occur, the authorities will keep watch over the vessel, and oblige her to go out to sea as soon as possible without permitting her to take any stores except those strictly necessary for the moment, but in no case arms nor supplies for war.

Article 4. Articles proceeding from prizes shall not be sold in the ports of the monarchy.¹⁰

PORTUGAL

Article 1. In all the ports and waters of this kingdom, as well on the continent and in the adjacent islands as in the ultramarine provinces, Portuguese subjects and foreigners are prohibited from fitting out vessels destined for privateering.

Article 2. In the same ports and waters referred to in the preceding article is, in like manner, prohibited the entrance of privateers and of the prizes made by privateers, or by armed vessels.

The cases of overruling necessity (*force majeure*), in which, according to the law of nations, hospitality is indispensable, are excepted from this regulation, without permission, however, being allowed, in any manner, for the sale of any objects proceeding from prizes.¹¹

From the actions of European nations in the Crimean War and in the Civil War, it seems to be clear that the attitude of neutral nations is against the admission of prizes, except for humanitarian reasons. Further proof is furnished by Convention No. 13 of the Second Hague Peace Conference of 1907 concerning the rights and duties of neutral Powers in naval war. The subject of the admission of prizes is stated and regulated in the following three articles:

A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew. (Article 21.)

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21. (Article 22.)

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty. (Article 23.)

This convention is not cited as binding, because by Article 28 thereof, "its provisions do not apply except between contracting Powers, and

¹⁰ Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (1870), p. 147.

¹¹ *Ibid.*, p. 148.

then only if all the belligerents are parties to the convention." Inasmuch, however, as neutrals are admitted to have the right to exclude prizes, or to admit them on conditions, it is evident that any neutral can enforce Articles 21, 22, and 23 if it should so desire, irrespective of the question whether the convention is or is not legally binding. It should be said, as explaining the attitude of the United States in this matter, that in adhering to the convention, the United States specifically excluded Article 23.

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DAYS OF GRACE FOR MERCHANT VESSELS OF THE ENEMY

A degree of consideration for merchant vessels of one belligerent within the ports of the other belligerent has often been shown since the seventeenth century. Such consideration was particularly common after the middle of the nineteenth century, though no clear principle could be said to be established. The practice of granting days of grace showed wide differences in the period granted, varying from six weeks to a few hours. At the Conference at The Hague in 1907 the delegates of the United States took the position that days of grace for departure of merchant vessels of one belligerent in the port of the other belligerent at the outbreak of war should be regarded as obligatory. The British delegation were opposed to making the grant of a period for departure obligatory, though supporting the idea that it would be desirable as a favor. The result of the consideration at The Hague in 1907 was the formulation of a convention less stringent in its provisions than recognized by the United States delegation as then legally binding under international practice.

The objection brought forward against an obligatory period was that a fixed number of days would be undesirable, as the period should be determined in each case as it arose. This objection seemed sound, but in no way insurmountable. The Convention of 1907 relative to the Status of Enemy Merchant Vessels announces in the preamble that the states of the world are anxious in negotiating the convention "to insure the security of international commerce against the surprises of war" and to protect commercial operations "in process of being carried out before the outbreak of hostilities." As commercial relations involve mutual exchange, the difficulty which many felt lest one state should gain an advantage over another at the outbreak of war would seem to be met by the insertion of a reciprocal obligation to grant days of grace