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International Law Situations with Solutions and Notes

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SITUATION IV.

A United States naval force falls in with and subdues a naval force of the enemy engaged in convoying a fleet of merchant vessels. Among the latter is found a neutral vessel, bound to an unblockaded port, with a cargo containing nothing of a contraband character.

Should the vessel be released, or be brought before a prize court?

SOLUTION.

The question whether the acceptance by a neutral vessel of the convoy of a belligerent man-of-war is an illegal act, which in itself affords good ground for condemnation if such vessel be captured by the other belligerent, is one which has been much discussed and which has given rise to not a little divergence of opinion. The affirmative of the question is maintained by the English courts and English writers, and also by leading publicists of the United States, among whom may be mentioned Kent, Duer, Woolsey, and Dana.[1]

On the other hand, the Government of the United States on one occasion took the opposite ground, maintaining, in a controversy with Denmark which arose in 1810, that so long as the association of the neutral vessel with the belligerent convoy was not attended with any attempt at concealment or deceit, nor with any participation in the actual resistance of the convoying force, she did not lose her neutral character. In this controversy the United States was ultimately represented by Mr. Wheaton, who thus became committed to that view. But, while it was contended by Mr. Wheaton that the mere association, though voluntary, of the neutral vessel with the belligerent convoy did not justify condemnation, yet it was not denied by him that such association afforded ground for bringing in the vessel for adjudication, although he intimated in the course of his argument that in at least some of the cases before him there was no other association than that which

[1] Dana's Wheaton, 708, note 245.

resulted from an accidental and temporary coincidence of routes.

Mr. William Beach Lawrence, referring to the negotiation with Denmark, says: "That the success of the negotiation was, in a great degree, to be attributed to the personal character and special qualities of Mr. Wheaton can not be doubted by anyone who reads the passages which we have cited from eminent publicists."[1] In the passages thus referred to the view opposite to that expounded by Mr. Wheaton is maintained, and it appears to be supported by the preponderance of recent opinion. Snow, referring to the question "whether neutral vessels who place themselves under the convoy of a belligerent cruiser are liable to capture and confiscation," states that "the weight of opinion favors the doctrine that such acts are sufficient to condemn the vessel."[2] Says Rivier: "A neutral merchant vessel which sails under enemy convoy violates neutrality; its seizure and confiscation would be legitimate."[3]

Upon full consideration of the subject in all its aspects, including the discussions between the United States and Denmark, it seems to be unquestionable that the vessel should not be released, but should be sent in for adjudication.

NOTES ON SITUATION IV.

The controversy between the United States and Denmark, mentioned in the foregoing solution, grew out of the enforcement of certain revised instructions which were issued to the Danish men-of-war and privateers, March 28, 1810. By one clause of these instructions all vessels were declared to be good prize which had "made use of British convoy either in the Atlantic or the Baltic."[4] Under this clause 18 American vessels were seized in 1810, out of a total of 122 captures of American vessels by Danish cruisers in that year.

The convoy cases were first discussed, on the part of the United States, by Mr. George W. Erving, who was sent as special minister to Copenhagen in 1811. In the course of a comprehensive general report of June 23, 1811, on

[1] Wheaton's Elements, Lawrence's ed. of 1863, p. 871.

[2] Stockton's Snow, 163.

[3] Principes du Droit des Gens, II, 424: Paris, 1896.

[4] Am. State Papers, For. Rel., III, 329, 524.

the Danish captures, he thus referred to the convoy cases: "The ground on which they stand, I am aware, is not perfectly solid, yet I did not feel myself authorized to abandon them, and therefore have taken up an argument which may be difficult, but which I shall go as far as possible in maintaining."[1] The Danish Government, however, contended "that neutral vessels that make use of the convoy or protection of the vessels of war of Great Britain are to be considered as good prize if the Danish privateers capture them under convoy." Such was the construction given by Denmark to the convoy clause, which, as thus interpreted, that Government refused to modify. The principle on which the clause was justified was, as stated by Mr. de Rosenkrantz, Danish minister of foreign affairs, "that he who causes himself to be protected, by that act ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of friend to him against whom he seeks the protection. If Denmark should abandon this principle the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of British ships of war, without running any risk. We every day see this done, the Danish Government not being able to place in the way of it any obstacles."[2]

After May, 1811, few American vessels were molested by the Danes, and between May, 1812, when Mr. Christopher Hughes' special mission ended, and 1827, when Mr. Wheaton was sent as minister to Denmark, little serious effort was made to effect a settlement of any of the claims against that Government.

Mr. Wheaton's principal argument in relation to the convoy cases was embraced in a note of Nov. 24, 1829.[3] He assumed the following grounds:

1. That under the convoy clause vessels and cargoes were condemned by the high court of admiralty, although in most, if not in all, such cases there was satisfactory proof that the vessels had been compelled to join the British convoy, and although the Danish prize ordinance was

[1] Am. State Papers, For. Rel., III, 521.
[2] Am. State Papers, For. Rel., III, 526.
[3] H. Doc. 249, 22 Cong., 1 sess., 34–38.

not known at St. Petersburg when they sailed from that port. Whoever considered the geographical position of the Baltic Sea, its outlets into the ocean, and the winds and currents by which its navigation was affected would, said Mr. Wheaton, readily perceive how difficult it must have been for neutrals passing during the war through the narrow and sinuous channels to avoid becoming entangled in the numerous convoys of the enemy of Denmark, even supposing that there was no disposition on the one side to receive or on the other to impart protection against the multiplied perils of those times. To make the protection accidentally received by or forcibly obtruded upon the neutral under these circumstances a ground of confiscation was an injustice strikingly apparent.

Comment.—This ground, it may be observed, was in the nature of a confession and avoidance, since, while admitting the presence of the vessels with the convoy, it suggested as excuses want of notice and coercion.

2. But it was, said Mr. Wheaton, less material to dwell on this aspect of the case, since the United States wholly denied the principle on which the clause in question was founded. This clause, as construed by the Danish tribunals, involved, so Mr. Wheaton declared, "the application of a principle (to say the least) of *doubtful* authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent, without the knowledge or orders of the owners, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect." As interpreted by the Danish tribunals, it made "the fact of having navigated under the enemy's convoy * * * *per se* a justifiable cause (not of capture merely, but) of condemnation in the tribunals of the opposite belligerent, and *that* without inquiring into the proofs of proprietary interest or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects." A belligerent pretension so harsh, apparently so new, and so important in its consequences, said Mr. Wheaton, must, before neutral nations could consent to it, be rigorously demonstrated on the authority of writers and the usage of nations; yet no expounder of the law of nations even men-

tioned it, and still less could it be asserted that any neutral nation had ever acquiesced in it. Even the records of the British courts might be searched in vain for any support of the pretension that the fact of having sailed under belligerent convoy was in all cases and under all circumstances conclusive cause of condemnation. Being found in company with an enemy's convoy might, indeed, furnish a presumption that the captured vessel and cargo belonged to the enemy, but it was a slight presumption only, which would readily yield to countervailing proof, and for this purpose the vessel should have been permitted to show, for example, that she had been compelled to join the convoy, or that she had joined it to protect herself not from examination by Danish cruisers but against others whose notorious conduct and avowed principles rendered it certain that captures by them would be followed by condemnation.

Comment.—From this argument it is to be inferred that the Danish tribunals gave to the clause in question a more extensive effect than that ascribed to it by the Danish Government. The construction of that Government, expressed in the correspondence with Mr. Erving, was, as has been seen, that vessels seized on the ground of accepting British protection were "good prize if the Danish privateers capture them under convoy;" while, as stated by Mr. Wheaton, "the fact of having navigated under the enemy's convoy" was held by the tribunals to be in itself a cause of condemnation.

3. Mr. Wheaton also contended that as Denmark had, when neutral, asserted the right to protect her commerce against belligerent visitation and search by means of armed convoys of her own public ships, she was *a fortiori* precluded from asserting a right to condemn neutral vessels for sailing under belligerent convoy. Great Britain treated navigating under the convoy of a neutral ship as a ground of condemnation, because it tended to defeat the lawful right of belligerent search and render every attempt to exercise it a contest of violence. But the belligerent, continued Mr. Wheaton, had a right to resist; and the masters of vessels under his convoy, not participating in his resistance, could no more be involved in the legal consequences of resistance than could the neutral shipper of

goods on a belligerent vessel or the neutral owner of goods found in a belligerent fortress. If the vessels in question had been armed, and had thus contributed to augment the force of the belligerent convoy, or if they had actually participated in battle with the Danish cruisers, they would justly have fallen by the fate of war. They were, however, unarmed merchantmen, whose junction with the convoying squadron, by expanding the sphere of its protection, tended to weaken it; and instead of participating in the enemy's resistance, there was in fact no battle and no resistance, and they fell a defenceless prey to the force of the assailants.

Comment.—This branch of Mr. Wheaton's argument embraces the questions of (1) neutral convoy and (2) neutral goods shipped on an armed enemy vessel. As to the first question, it may be observed that the conception of neutral convoy by nations which recognize and practise it is not that of resistance to search, but of the substitution for the process of search of a responsible governmental guarantee. This idea is conveyed in Stockton's Naval War Code:

"ART. 30. * * * Convoys of neutral merchant vessels, under escort of vessels of war of their own state, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy."

As to the second question, Mr. Wheaton's contention was drawn from the case of the *Nereide*,[1] in which the goods were held to be exempt, Mr. Justice Story and one other justice dissenting, while two others were absent.[2] From this decision Mr. Wheaton reasons by analogy, and to a great extent draws his language on this point. It is, however, to be noticed that in a subsequent case the Supreme Court sharply distinguished the case of lading goods on an armed enemy vessel from that of the acceptance of belligerent convoy.[3] Mr. Wheaton himself, in his treatise on international law, thus summarizes the court's reasoning on the subject of belligerent convoy: "A convoy was an association for a hostile object. In undertaking it a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining

[1] 9 Cranch, 388.

[2] Dana's Wheaton, 698, note 243.

[3] The Atalanta, 3 Wheaton, 409.

a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture."[1]

4. Mr. Wheaton further contended that, in view of the multiplied ravages to which American commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of the vessels in question might be sufficiently accounted for without resorting to the supposition that they meant to resist, or even to evade, the exercise of the belligerent rights of Denmark. Even admitting that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right, said Mr. Wheaton, to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this right was wholly unaffected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish Government, which refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, surely could not consider it culpable, on the part of American shipmasters, to have defended themselves against the operation of those decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which

[1] Dana's Wheaton, 698.

could not be avoided by the parties without sacrificing their rights of self-defence.

Comment.—With regard to this particular contention, it may be suggested that, while it assumes that the British convoy was accepted for protection against French and not against Danish cruisers, and therefore (contrary to contention 1) deliberately, it also assumes that a neutral vessel may, at the expense of the rights of one belligerent, seek from another that protection which its own Government may fail to give against the exorbitant pretensions of a third belligerent. In order to support this contention, it should seem that the facts would in any event have to be clearly established.

5. But, finally, even supposing that it was the intention of the American shipmaster, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had, Mr. Wheaton further contended, failed of its effect; and it might be asked what belligerent right of Denmark had been practically injured by such an abortive attempt? "If any," said Mr. Wheaton, "it must be the right of visitation and search. But the right of visitation and search is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of the greater right of capturing enemy's property or contraband of war, and to be used as a means to an end to enforce the exercise of that right. Here the exercise of the right was never, in fact, opposed, and no injury has accrued to the belligerent. But it may be said that it might have been opposed, and entirely defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from this circumstance? If the property be neutral, and the voyage lawful (as they were in the present instance), what injury would result from the vessels escaping from examination? On the other hand, if the property was that of the enemy, its escape must be attributed to the superior force of the enemy, which, though

a *loss*, would not be an *injury* of which Denmark would have a legal right to complain."

Comment.—With regard to this special phase of the case it may be observed that the contention that whether or no the vessel was enemy's property or otherwise subject to capture, no injury was done to the belligerent whose exercise of the right of search was prevented, may be accepted merely as a reassertion of one view of the controversy, since it obviously assumes the point at issue, viz, whether such prevention was an injury of which the belligerent had a right to complain, or in other words, a substantial injury.

Considering Mr. Wheaton's argument as a whole, it appears (1) that it was directed against the condemnation and not against the capture of the vessels; (2) that it was chiefly designed to show that the condemnations were, under the special circumstances of the case, improper; (3) that it alleged that the condemnations proceeded upon a construction of the instructions of 1810 which was, as has been pointed out, more extensive in its effect than that which was originally given to them by the Danish Government; (4) that it nowhere suggests that the acceptance of belligerent convoy did not create an adverse presumption which justified the sending in of the vessels for adjudication.

On March 28, 1830, a convention was signed by which the King of Denmark, while renouncing all claims against the United States, agreed to pay a lump sum of 650,000 Spanish milled dollars "on account of the citizens of the United States, who have preferred claims relating to the seizure, detention, condemnation, or confiscation of their vessels, cargoes, or property whatsoever, by the public or private armed ships, or by the tribunals of Denmark, or in the States subject to the Danish sceptre," during the maritime war in question. And it was further stipulated that "the intention of the two high contracting parties being solely to terminate, definitely and irrevocably, all the claims which have hitherto been preferred, they expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, can never hereafter be invoked by one party or the other as a precedent or rule for the future."