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TOPIC VIII.

TRANSFER OF VESSEL FROM ENEMY TO NEUTRAL OF FLAG.

What regulations should be made in regard to the transfer of a vessel from an enemy to a neutral flag in anticipation of or in time of war?

CONCLUSION.

Articles 55 and 56 of the Declaration of London, 1909, in regard to transfer of private vessels from a belligerent to a neutral flag are in accord with modern ideas and safeguard rights of neutrals and the rights of belligerents.

ART. 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than 60 days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than 30 days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than 60 days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

ART. 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

- (2) If there is a right of redemption or of reversion.
- (3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

NOTES.

Transfer to another flag.—The transfer of a vessel from a belligerent to a neutral was under consideration in Naval War College Conferences on International Law in 1906 and 1910.

In 1906 the following suggestions were made in regard to transfer :

(a) The transfer of a private vessel from a belligerent's flag during war is recognized by the enemy as valid only when bona fide and when the title has fully passed from the owner and the actual delivery of the vessel to the purchaser has been completed in a port outside the jurisdiction of the belligerent States in conformity to the laws of the State of the vendor and of the vendee. (International Law Topics and Discussions, 1906, p. 21.)

Declaration of London.—The subject of transfer received careful consideration at the International Naval Conference in 1908–9. The various propositions and course of the discussion is shown in Naval War College, International Law Situations, 1910, pages 108 to 128.

The rules adopted at the Naval Conference and the official report in regard to these rules is as follows :

CHAPTER V.—TRANSFER OF FLAG.

An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is spared. It may therefore be understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or for the purpose of shielding the vessel from the risks to which she would have been exposed if she had retained her former nationality. This question naturally arises when the transfer is of a date comparatively recent at the moment at which the visit and search takes place, whether the transfer may actually be before, or after, the opening of hostilities. The question will be answered differently according as it is looked at more from the point of view of commercial or more from the point of view of belligerent interests. It is fortunate that agreement has been reached on a rule which conciliates both these interests so far as possible and which informs belligerents and neutral commerce as to their position.

ARTICLE 55.

The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than 60 days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than 30 days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than 60 days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary legal requirements relative to validity have been fulfilled. It is for the captor, if he wishes to have the transfer annulled, to prove that the object of the transfer was to evade the consequences of the war in prospect. There is one case which is regarded as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than 60 days before the opening of hostilities. The presumption of validity set up by the first paragraph in favor of the vessel is transposed in favor of the captor. It is presumed that the transfer is void, but proof to the contrary may be admitted. With a view to establishing the contrary, proof may be given that the transfer was not made in order to evade the consequences of the war. It is unnecessary to add that the ordinary legal requirements relative to validity must have been fulfilled.

There was a wish to give to commerce a guaranty that the right to regard a transfer as void on the ground that it was made in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been made more than 30 days before the opening of hostilities, it can not be assailed on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show its character is genuine and final. These are as follows: The transfer must be absolute, complete, and in conformity with the laws of the countries concerned, and its effect is to place the control of, and the profits earned by, the vessel in other hands. When once these conditions are established, the captor is not allowed to contend that the vendor foresaw the

war in which his country was about to be engaged and wished by the sale to shield himself from the risks which he would incur in respect of the vessels he was transferring. Even in this case, however, if the vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if the change of nationality has taken place less than 60 days before the opening of hostilities; that circumstance renders her suspect. But if before the prize court she furnishes the proof specified by the second paragraph, she must be released, though she can not obtain compensation, inasmuch as there was sufficient reason for capturing the vessel.

ARTICLE 56.

The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void.

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

Respecting *transfer after the opening of hostilities*, the rule is more simple; the transfer is valid only if it is proved that it has not been made in order to evade the consequences which the enemy character of a vessel would involve. This is the opposite solution from that admitted for the transfer before the opening of hostilities; in that case there is a presumption that the transfer is valid; in the present, that it is void, subject to the possibility of furnishing proof to the contrary. It might be proved, for instance, that the transfer had taken place by inheritance.

Article 56 mentions cases in which the presumption of nullity is absolute, for reasons which can be readily understood. In the first case, the connection between the transfer and the war risk run by the vessel clearly appears; in the second, the transferee, one merely in name, is to be regarded as owner during a dangerous period, after which the vendor will recover his vessel; lastly, the third case might strictly be inferred, since the vessel which claims a neutral nationality must naturally prove that she has a right to that nationality.

Provision was at one time made for the case of a vessel which was retained after the transfer in the trade in which she had previously been engaged. This would be a circumstance in the highest degree suspicious; the transfer has a fictitious appearance, since nothing is changed as regards the vessel's trade. This would

apply, for instance, in case the vessel maintained the same line of sailing before and after the transfer. It was, however, objected that the absolute presumption would sometimes be too severe, as certain vessels, for example, tank ships, could, on account of their build, engage only in a definite trade. To recognize this objection the word "*route*" was added, so that it would have been necessary that the vessel should be retained *in the same trade and on the same route*; it was thought that in this way there would be given to the contention sufficient consideration. However, in consideration of the insistence on the suppression of this case from the list, its suppression has been conceded. Consequently the transfer now comes within the provision of the general rule; it is certainly presumed to be void, but proof to the contrary is admitted.

Résumé.—The discussions in *International Law Situations*, 1910, pages 108 to 128, showed that while the rules of the Declaration of London differed somewhat from the form proposed by the plenipotentiaries of the United States, yet the effect of the rules in operation might not differ in any marked degree.

Under the provisions of the Declaration of London the presumption in case of a transfer made before the war is wholly in favor of the one to whom transfer has been made unless the transfer has been made within 60 days and the bill of sale is not on board. The burden of proof is in the main upon the captor when the transfer is made before the opening of hostilities. In case of transfer from a belligerent to a neutral flag after the outbreak of hostilities the burden of proof is shifted to the one to whom the transfer is made to establish its validity. The rules of the Declaration of London in regard to transfer of flag have been favorably received and while their form may be somewhat involved it would seem that they should be generally approved.

Conclusion.—The articles 55 and 56 of the Declaration of London, 1909, in regard to transfer of private vessels from a belligerent to a neutral flag are in accord with modern ideas and safeguard rights of neutrals and the rights of belligerents.

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