

International Law Studies—Volume 6

International Law Topics

TOPIC II.

What restrictions should be placed upon the transfer of flags of merchant vessels during or in anticipation of war?

CONCLUSION.

(a) The transfer of vessels, when completed before the outbreak of war, even though in anticipation of war, is valid if in conformity to the laws of the state of the vendor and of the vendee.

(b) 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.

DISCUSSION AND NOTES.

General practice as regards commerce.—Any restriction on the sale of vessels in the time of war would be a restriction on commerce. As a general rule a citizen of a neutral state may carry on commerce in the time of war as in the time of peace. It is generally admitted also that a belligerent has a right to take reasonable measures to bring his opponent to terms. It has been held that a neutral may be under obligation to use "due diligence" in order that acts hostile to either belligerent may not be undertaken within its jurisdiction. The arbitrators in case of the Alabama declared that "due diligence" should be "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part." Citizens of neutral states can not perform certain services for a belligerent without rendering themselves or their property liable to treatment as hostile. How far the neutral state is bound to interfere in order to prevent its citizens from engaging in certain transactions is not fully determined.

Ordinary commercial transactions which can not affect the issue of the war are permitted.

In certain respects the purchase of goods belonging to a belligerent by a neutral may be a most effective method of freeing them from liability to capture. In the case of vessels sold by a subject of one state to a subject of another state, the transfer to the flag of the nation of the new owner ordinarily follows.

A vessel purchased from a subject of a belligerent by a subject of a neutral state would then pass under the protection of the neutral state and be exempt from capture. There is a great probability, therefore, that transfers will be made solely for the purpose of obtaining the protection of a neutral flag. Such transfers might not be of the nature of a valid sale. The opposing belligerent has therefore exercised the right of testing the validity of the transfer before the prize court. The Continental practice has been more in the direction of regarding all sales made with a knowledge of the existence of war as invalid. There have been many cases before the American and British courts. In these courts the neutral purchaser is generally under obligation to establish the validity of his claim to the ownership by abundant proof. The attitude of the courts under various circumstances may be seen in the following opinions:

Opinions of courts on transfers.—In the case of *The Jemmy* in 1801, Lord Stowell maintained that—

When an enemy ship has been transferred to a neutral owner, but is left under the same management and in the same trade as before the transfer, the conclusive presumption is raised that the transfer is not genuine. (4 C. Robinson's Report, 31.)

In the case of the *Sechs Geschwistern* Lord Stowell supports the position that a transfer is void if the enemy still retains any interest in the transferred property. He says:

This is the case of a ship asserted to have been purchased of the enemy, a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is that property so transferred must be bona fide and absolutely

transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether. This is the rule which this country has always considered itself justified in enforcing; not forbidding the transfer as illegal, but prescribing such rules as reason and common sense suggest to guard against collusion and cover, and to enable it to ascertain, as much as possible, that the enemy's title is absolutely and completely divested. (4 C. Robinson's Admiralty Reports, 100.)

In 1805 Lord Stowell said:

The court has often had occasion to observe that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade not all the swearing in the world will convince it that it is a genuine transaction. (*The Omnibus*, 6 C. Robinson's Admiralty Reports, 71.)

In the case of the *Ernst Merck* in 1854, Doctor Lushington says:

This being a sale by a merchant, now become an enemy, very shortly before the war, is a transaction requiring to be very narrowly investigated, and respecting which the court must exercise great vigilance lest the property of the enemy should be sheltered under a fictitious sale. A real bona fide sale is, no doubt, within the bounds of lawful commerce—of commerce lawful to the neutral; but if a neutral merchant chooses to engage for the purpose of extraordinary profit in dangerous speculations of this kind, he must be bound to satisfy the court of the fairness of the transaction by the clearest evidence, complete in all legal form, and not only in legal form, but in truth and reality. If he does not produce such proof, or produces it in part only, when the *res gestæ* show that better proof might have been adduced, he must not expect restitution upon such incomplete evidence. (Spinks' English Prize Cases, 98.)

The law requires, where a vessel has been purchased shortly before the commencement of the war or during the war, clear and satisfactory proof of the right and title of the neutral claimant, and of the entire divestment of all right and interest in the enemy vendor. The onus is put upon the claimant to produce this proof; if he does not do so the court can not restore. The court is not called upon to say that the transaction is proved to be fraudulent; it is not required that the court should declare affirmatively that the enemy's interest remains; it is sufficient to bar restitution if the neutral claim is not unequivocally sustained by the evidence. (*Ibid.*)

In the case of the *Sally Magee*, the decision of the district court was affirmed by the Supreme Court of the United States. It was maintained that—

The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo. (3 Wallace, Supreme Court Reports, 451.)

The case of the *Benito Estenger*, which was captured during the war with Spain by a United States war vessel, was appealed to the Supreme Court.

Mr. Chief Justice Fuller stated that—

The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa & Co., subjects of Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, corn meal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock a. m., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect to the alleged Cuban sympathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which preceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property

from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all the circumstances of the case. (176 U. S. Supreme Court Reports, 568.)

The Supreme Court, however, affirmed the decree of the district court condemning the vessel as prize, maintaining—

1. The trading to a stronghold of the enemy, of an enemy vessel carrying provisions, constitutes, under the laws of war, illicit intercourse with the enemy, subjecting the property to capture as a prize.

2. The individual acts of friendship of a subject of one nation at war, toward the other nation, will not affect his status as an enemy.

3. A United States consul has no authority by virtue of his official station to grant any license or permit to exempt a vessel of the enemy from capture and confiscation.

4. A colorable transfer of a ship from a belligerent to a neutral is in itself ground for condemnation as prize.

5. The burden of proving neutral ownership of a vessel in a prize case is on the claimants. (Ibid.)

Transfer of vessels adapted for war use.—The sale of a vessel of war or of a vessel so constructed as to be easily adapted for war uses would be open to greater objections than the sale of an ordinary vessel primarily suited for commercial use only. At the present time many vessels are constructed under government subsidy or with some agreement by which they pass to government use at the outbreak of war. The sale by a belligerent to a neutral of a vessel of a character to be especially serviceable in war would only in rare cases be regarded as valid.

Lord Stowell held in 1807 in the case of the Minerva, that—

The sale of an enemy ship of war lying in a neutral port to a neutral is invalid, and if such vessel after such sale be captured, she will be condemned. (6 C. Robinson's Reports, 396.)

During the civil war in America the Georgia, a vessel which had been used as a war vessel by the Confederate States, was taken into Liverpool, the armament was removed, and the vessel sold to a neutral at public sale. Mr. Adams maintained that—

The Georgia might be made lawful prize whenever and under whatever colors she should be found sailing on the high seas,

and instructed the United States cruisers accordingly. It was stated that the purchase by neutrals of ships of war belonging to enemies would be invalid if made during hostilities. The Supreme Court of the United States said:

It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as the *Georgia*, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up bona fide for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again re-joining the naval force of the enemy. The removed armament of a vessel, built for war, can be readily replaced, and so can every other change be made, or equipment furnished for effective and immediate service. The *Georgia* may be instanced in part illustration of this proof. Her deck remained the same, from which the pivot guns and others had been taken; it had been built originally strong, in order to sustain the war armament, and further strengthened by uprights and stanchions beneath. The claimant states that the alterations, repairs, and outfit of the vessel for the merchant service cost some £3,000. Probably an equal sum would have again fitted her for the replacement of her original armament as a man-of-war.

The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals in a neutral port, is founded on reason and justice. It prevents the abuse of the neutral by partiality toward either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy. (*The Georgia*, 7 Wallace, 32.)

Transfers in transitu.—At times belligerents have endeavored to free their ships from danger of capture by transferring them to a neutral while *in transitu*. The courts of all states seem to be uniformly opposed to the toleration of such a practice.

The case of the *Vrow Margaretha* was an early case involving transfer, *in transitu*. Admitting that such transfers may be legitimate in time of peace, Lord Stowell says:

When war intervenes, another rule is set up by courts of admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. 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. It is on that principle held, I believe, as a general rule, that property can not be converted *in transitu*, and in that sense I recognize it as the rule of this court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and can not be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war it must be judged according to the ordinary rules of commerce. (1 C. Robinson, Admiralty Reports, 336.)

Further, in the case of the *Jan Frederick*, Lord Stowell says:

That a transfer may take place *in transitu*, has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract, being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. (5 C. Robinson, Admiralty Reports, 128.)

When an absolute transfer of title to a vessel is made while the vessel is *in transitu* there is no means of delivery of the vessel to the purchaser until it comes into the hands of the purchaser. In the case of the *Baltica* in 1857 the question was raised as to the duration of *transitus*.

The court held that—

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale

which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee can not be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the *transitus* ceases when the property has come into the actual possession of the transferee is a doctrine perfectly consistent with the decisions in the *Danckebaar Africaan*, and in the *Negotie en Zeevaart*, on the authority of which the former case was decided * * *

In the case of the *Vrouw Margaretha*, it is distinctly stated by Lord Stowell that the *transitus* ceases by the actual delivery of the property. After stating that, by the usage of merchants, a transfer of property *in transitu* may be made by the execution of proper documents, he proceeds: "When war intervenes, another rule is set up by courts of admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He then assigns the reason for the rule, namely, that if it were otherwise, "all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect," and adds: "It is on that principle held, I believe, as a general rule, that property can not be converted *in transitu*, and in that sense I recognize it as the rule of this court." (11 Moore, Privy Council, 141.)

Methods of establishing nationality.—Although certain principles seem to have been generally accepted by the

courts, yet there are still many possibilities of complications because of lack of uniformity in regard to the method of establishing the nationality of a vessel.

The method by which the nationality of a vessel is determined is now often provided by treaty. The provisions between various states and the United States are not uniform.

Argentine Republic, 1853—

ART. VII. The contracting parties agree to consider and treat as vessels of the United States and of the Argentine Confederation, all those which, being furnished by the competent authority with a regular passport or sea letter, shall, under the then existing laws and regulations of either of the two Governments, be recognized fully and bona fide as national vessels by that country to which they respectively belong.

Belgium, 1875—

ART. IX. The high contracting parties agree to consider and to treat as Belgian vessels, and as vessels of the United States, all those which being provided by the competent authority with a passport, sea letter, or any other sufficient document, shall be recognized, conformably with existing laws, as national vessels in the country to which they respectively belong.

Bolivia, 1858—

ART. XXII. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the two contracting parties, they agree, that, in case one of them should be engaged in war, the ships and vessels belonging to the citizens of the other must be furnished with sea letters, or passports, expressing the name, property, and bulk of the ships, as also the name and place of habitation of the master and commander of said vessel, in order that it may hereby appear that said ship truly belongs to the citizens of one of the parties; they likewise agree, that such ships being laden, besides the said sea letters or passports, shall also be provided with certificates, containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without such requisites, said vessels may be detained, to be adjudged by the competent tribunal, and may be declared a legal prize, unless the said defect shall prove to be owing to accident, and supplied by testimony entirely equivalent.

Brazil, 1828, article 21, similar to Bolivia.

Columbia, 1846, article 22, similar to Bolivia.

Italy, 1871—

ART. XVII. All vessels sailing under the flag of the United States, and furnished with such papers as their laws require, shall be regarded in Italy as vessels of the United States, and reciprocally, all vessels sailing under the flag of Italy and furnished with the papers which the laws of Italy require, shall be regarded in the United States as Italian vessels.

The late treaty with Japan in 1894 provides:

ART. XII. All vessels which, according to the United States law, are to be deemed vessels of the United States, and all vessels which, according to Japanese law, are to be deemed Japanese vessels, shall, for the purposes of this treaty, be deemed vessels of the United States and Japanese vessels, respectively.

The latest treaty with Spain in 1902 contains the following article:

ART. XI. All vessels sailing under the flag of the United States, and furnished with such papers as their laws require, shall be regarded in Spain as United States vessels, and reciprocally, all vessels sailing under the flag of Spain and furnished with the papers which the laws of Spain require, shall be regarded in the United States as Spanish vessels.

French regulations.—The provision of the early law of France in regard to transfer still holds good for that country. Article 7 of the Regulations of July 26, 1778, provides:

Les bâtimens de fabrique ennemie, ou qui auront eu un propriétaire ennemi, ne pourront être réputés neutres ou alliés s'il est trouvé à bord quelques pièces authentiques, passés devant des officiers publics, qui puissent en assurer la date, et qui justifient que la vente ou cession en a été faite à quelqu'un des puissances alliés ou neutres avant le commencement des hostilités, et si ledit acte translatif de propriété de l'ennemi au sujet neutre ou allié n'a été dûment enregistré par-devant le principal officier de départ, et signé du propriétaire ou du porteur de ses pouvoirs.

The French "Instructions Complémentaires" of July 25, 1870, regard particularly the transfer of vessels to a neutral flag. Article 7 provides:

Lorsqu'il résulte de l'examen des pièces de bord que, depuis la déclaration de guerre, la nationalité du navire antérieurement ennemi a été changée par une vente faite à des neutres; que

celle des propriétaires a été modifiée par naturalisation ou que l'équipage d'un bâtiment neutre comprend une proportion notable de sujets ennemis, il y a lieu de procéder avec la plus grande attention et de s'assurer que toutes ces opérations ont été exécutées de bonne foi et non dans le seul but de dissimuler une propriété réellement ennemie.

United States regulations.—A citizen of the United States may purchase and employ abroad a foreign ship and may fly the flag of the United States "as an indication of ownership and for due protection of his property." Such a vessel while entitled to the protection of the United States as the property of a citizen is not entitled to be registered in the United States.

Section 4132 of the Revised Statutes describes vessels which may be registered in the United States:

Vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this title.

As to the right of a vessel purchased in a foreign country by a citizen of the United States to fly the United States flag, the Consular Regulations provide that—

The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it should be used only by regularly documented vessels. No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts. (No. 347.)

Transfers of vessels not entitled to United States registry to citizens of the United States in order to obtain the protection of the United States have been made. Sales of vessels under consular certification have been quite frequent and sometimes for the distinct purpose of avoiding

capture. Ordinarily such transfers are from a belligerent to a neutral.

In 1898, during the Spanish-American war, however, certain vessels owned by the Spanish *Compañia Maritima*, a corporation under Spanish laws, but largely foreign owned, had a large number of steamers under the Spanish flag engaged in inter-island trade. It was known that the natives would no longer respect this flag. The officer exercising the functions of United States consul at Manila certified a bill of sale of these vessels to an American citizen long resident in Manila and the Captain of the Port issued a "provisional register" giving the vessels a right to carry the American flag and to receive protection as American *property*. This did not entitle such vessels to American registry, but did afford them the protection of the flag. This case of transfer of vessels from the flag of one belligerent to the flag of the other seems to be without precedent.

Transfers *en bloc* of large numbers of vessels from a belligerent to a neutral flag have also been made. Such transfers were made during the Chile-Peruvian war in 1879, in Franco-Chinese troubles in 1885, and at other times. Such transfers have come to be considered of much importance in determining the result of the war.

Recent English discussions.—In the Report of the Royal Commission on Supply of Food and Raw Material in Time of War, presented to the British Parliament in 1905, there were various references in the "Minutes of Evidence" (Vol. II) to the transfer in time of war of the flag of merchant vessels of a belligerent to a neutral.

Among these questions are the following:

In the examination of Sir A. L. JONES, of Messrs. Elder, Dempster & Co.—

5966-5967. Q. (Professor HOLLAND.) As to a transfer to a neutral flag; do you contemplate that as a possible thing in the case of difficulty?—A. Certainly; I am quite prepared to do so tomorrow, if there was a war with America; I think that I would at once transfer my ships to some neutral flag, and I would transfer them to the flag which is most convenient.

5968. Q. Suppose war broke out suddenly; do you imagine that you would be quite able to do it?—A. I could do it in a day or two.

5969-5970. Q. On a transfer to any neutral flag, have you considered whether the enemy's cruiser would recognize that as a bona fide transfer, if it took place after the outbreak of war?—A. I think it is very likely she would; we had plenty of transfers of shipping during the American war.

5971. Q. We will not, I think, go further into it now, if you please.—A. Why do you think the neutral power would not respect it?

5972. Q. I am not here to give information, but to try to get it. You have said that a war with the United States—which Heaven forbid—might lead to the transfer of our ships to a neutral flag, partly on account of American privateers?—A. Or men-of-war; you see we have such an enormous lot of ships that it would be very easy for the Americans to catch one or two of them.

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5986. Q. (Lieutenant Colonel MONTGOMERY.) At the risk of repetition, would you be good enough now to tell us what would be your first consideration with regard to this large fleet that you control in the case of a serious apprehension of war?—A. If we had war to-morrow, I should begin to inquire at once at what rate I could insure outside. I might think that the risk was too much for our concern to take it all on its own account. Many of our ships are not insured for a penny, and none of them is more than half insured. Then if I found that the risk was more than I could pay, I should advance my rates of freight to enable me to pay the risk that was demanded by the underwriters.

5987. Q. You would first look to your insurance, and then, having effected the insurance, you would look to get reimbursed by the freight you would charge; is that it?—A. Certainly.

5988. Q. Then, also, as I have gathered from the questions that have been put to you, you would take into consideration the subject of the transfer to a neutral flag?—A. I would consider any fair means by which I could make money and carry on my trade. I certainly would not care to have three or four millions sterling lying up in the docks if I could insure my ships and get a rate of freight to compensate me. If I could put my ships under a neutral flag, so that I could take the risk myself and get a higher rate of freight under the neutral flag, I would do so. It would be a question of how to make the most money.

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6040. Q. (Sir JOHN COLOMB.) I understood you to say that in the event of war you could transfer your ships in a couple of hours?—A. Did I not say a couple of days? I think you could do that.

6041. Q. A vast proportion of your ships would be at sea?—A. That would not alter it.

6042. Q. The conditions are these: The overwhelming proportion of your ships is now at sea, we have an outbreak of war,

and you say within to-day and to-morrow you could transfer these ships?—A. Yes, I think I can. You do not want to have a ship in port in order to transfer her.

6043. Q. Any of those ships within the next three days may be taken, and if one of them was taken by an enemy's cruiser, not knowing that she had been transferred, what would happen?—

A. It would be bad for me. You are quite right; the enemy might come up and catch my ship before I got her into port and transferred her on the port register; but I could transfer my ship while she was at sea.

6044. Q. Putting your previous answer together with your present answer it comes to this, does it not, that the whole of your British ships at sea on the outbreak of war may be covered by this transfer, but the ships themselves would not even know it and would not have their papers?—A. There is no question about that. Until the ship comes into port we might have a little difficulty if she had been caught in the meantime. But we could transfer her.

6045. Q. (Professor HOLLAND.) Are you aware that a transfer at sea before possession is taken would be entirely invalid, and would be disregarded by a prize court afterwards, and that the ship would be condemned?—A. I think it is very likely, if the ship was seized before she got a legitimate transfer in port. Of course the man at sea would not know that she was transferred, and the man who catches him would say, "Here is a British ship," and off she goes.

6046. Q. Are you aware that after she got into port subsequent to capture, and if the purchaser was ready to take possession, and so forth, the whole thing would be invalid, the transfer would be thrown aside, and the ship would be condemned?—A. I am not aware of that. If I got my ship, for instance, into Antwerp, and I had a regular transfer to another company, and the steamship company received consideration in some way, then, if that ship went to sea, I should consider that she was properly a Belgian ship.

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6150. Q. (The DUKE OF SUTHERLAND.) Supposing no arrangement has been made beforehand, what would be the actual process of transfer to a neutral flag; how long would it take?—A. I say we would do it in a couple of days. We have done it before in a couple of days.

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6156. Q. (Mr. ROBERTSON.) I gather that you are familiar with the laws of certain foreign countries, at all events as to ship-owning?—A. A little.

6157. Q. The Company Law more particularly?—A. A little.

6158. Q. I suppose it is the same in various foreign countries as here that the owner of a share in a shipowning company may be a foreigner, the ship itself bearing the flag of the nation to which

the company belongs—I do not know whether you follow me?—A. I quite understand; you are putting to me whether we might have as a shareholder what would be called a foreigner in Belgium—that is, an Englishman.

6159. Q. A foreign shareholder in Belgium, or Spain, or France?—A. I am not quite sure that you can have a foreign shareholder there.

6160. Q. But you can have a foreign shareholder in this country?—A. Yes; I think you can not have an Englishman as a shareholder in a Belgian shipping company, but I am not sure about that.

6161. Q. Can not a foreigner hold a share in a company registered in Belgium owning a ship, which ship is bearing the Belgian flag?—A. I do not know whether you can do that in Belgium, but you can do that in Germany. For instance, you can buy a share in the North German Lloyd here.

6162. Q. I understood you to say that it was the case in Belgium also, but at any rate it is the case in this country?—A. Yes.

6163. Q. I want to know whether your experience enables you to say how far that is a general feature of foreign company laws relating to the owning of ships?—A. I think that a foreigner can hold shares in companies.

6164. Q. In this country?—A. Yes; you can, of course; there are lots of foreign shareholders.

6165. Q. And such a ship would fly the British flag?—A. Certainly.

6166. Q. Therefore the British flag is a mere phrase so far as the beneficial ownership of the property in the ship is concerned?—A. Yes; but by taking the foreigner's money we get the use of it.

6167. Q. Still the flag of any nation like ours offers no guarantee as to the nationality of the ownership of the shares of the ships?—A. None whatever.

6168. Q. So that “a British ship” is a mere phrase?—A. Yes, of course.

In the examination of Mr. DOUGLAS OWEN—

6516. Q. (Lord BALFOUR, chairman.) You see some special danger to our shipping industry in the present state of international laws, as I understand it?—A. Yes; I see very great dangers to our shipping from that. I may summarize my reply to that question thus: The danger to our shipping industry is undoubtedly great, for the reason that “neutrals” will naturally avoid shipping by British vessels, liable to capture, so long as neutral vessels are available not liable to capture. This is inevitable so long as private property—shipping—at sea remains liable to capture. But the declaration of Paris has introduced a new danger to our shipping, inasmuch as it makes neutral shipping a sanctuary for

the owner in such a case for the purposes of prize law is the registered owner; and he could not go behind that and inquire what shareholders constitute the corporate registered owner.

6755. Q. Is not that in one aspect rather a serious state of matters for us?—A. I think it is.

6756. Q. In this way, to put it a little more plainly, one of the checks upon a real bona fide sale would be the want of neutral capital to purchase our great shipping?—A. Yes.

6757. Q. If they were registered abroad that would be a transfer which, as you say, the captor could not go behind; but might not that transfer mean a very large and serious loss of our shipping after the war was over; or do you think the ships would be retransferred to ourselves?—A. I had not come to that question; I had not considered that probability of retransfer; I think that is rather for shipping authorities to say. I was merely dealing with this question of the company which might really be a sort of cloak for a number of enemy shareholders, and yet might protect the ships from being captured.

6758. Q. Should not the shareholders' list be looked into and brought into the prize court?—A. That might not be possible.

6759. Q. What is the security that some isolated prize court might not give a decision suitable to itself under existing circumstances, just as you told us a moment ago that the Americans had done in one case of theirs about private property?—A. It is quite possible, but I think there might be practicable difficulties in the way. I do not see how a visiting cruiser could look into the list of the shareholders of the company owning the ship, which probably would not be there—it certainly would not be there.

6760. Q. Would not they detain the whole thing until they got the shareholders' list, and would they not say "You must produce the shareholders' list before we let you go"?—A. I should not think so. They would look at the register, and if the register and the other papers were all in order they would dismiss the ship. But it is a practical difficulty which, as you say, would have to be looked into. Then as to the transfer from one flag to another. That was touched on in evidence. I was surprised to hear a witness treat it as a very light matter, that you can transfer from one flag to another in a few hours. Of course you can not if the ship is *in transitu*—till possession is delivered. There is the case in the Crimean war relating to the *Baltica*, which I mention in my memorandum, where all that is thoroughly discussed. It is very old law that as long as the *transitus* of the vessel continues you can not transfer her to a new flag unless the *transitus* is broken and the neutral purchaser takes possession.

6761. Q. You therefore brush away the suggestion that a company with two domiciles can transfer its ships while they are on voyages in all parts of the world?—A. It certainly can not.

British goods. The declaration is in effect a "declaration of transfer of belligerent commerce to neutral shipping." So far, in short, as neutral ships will be available, and neutral owners will doubtless seek to buy British shipping, our own merchants will inevitably and by force of competition be driven to seek the safety of neutral ships and to avoid the danger and expense of British ships. So that the more we rely under the treaty of Paris on neutral vessels to bring us our national supplies, the more we shall be, under the treaty of Paris, driving a "nail into the coffin of our own shipping trade." That is the dilemma, which seems to me to be unanswerable.

6517. Q. You will bear in mind, I am sure, that the reference to this Commission is as to the supplies of food and raw material in time of war; and, therefore, these issues which you are raising are, to some extent, side issues to our particular inquiry. I should be the very last person to wish to limit unduly our inquiry, and I certainly recognize as fully as anybody can, and I am sure the commission recognizes, the danger of the present state of matters in the respect that it might lead to a transference of ships in time of war from our flag to another flag. That obviously is a thing which we ought to take reasonable measures to guard against, and I think you are quite right to bring it before us, and I have no doubt we shall take notice of it. But I do not think we should go at length into great schemes for the purpose of curing that until Parliament was to decide, or the Government was to go to Parliament and say, that this is a thing that ought to be cured. Do you follow that?—A. I am quite with you, only I thought it my duty, as I was dealing generally with the question, to bring it forward. I hold very strongly the views I have expressed, but I recognize the justice of what you have said.

In the examination of Professor HOLLAND—

6753. Q. (Lord BAIFOUR, chairman.) May I pass now to the questions affecting the nationality of ships?—A. Yes; as to the nationality of ships, as against the vessel visited, the flag and pass are conclusive; but a visiting cruiser may not be satisfied in every case with these *indicia*, but will go behind them and inquire into the ownership of the vessel; that is the real test.

6754. Q. Who do you mean by the "owner"—the registered owner or the real beneficiary owner?—A. The registered owner; and if there is a single registered owner who is an alien the vessel is enemy property and may be taken in. Then comes the difficulty, which was touched upon in evidence, I think, the other day, of a company being registered in a neutral country and yet being composed of enemy shareholders. That is a new question, and I do not think the visiting cruiser could go behind the registration of the ship. The captor could not look into the beneficiary ownership, because it has been decided several times that

6762. Q. And that transfer would not for a moment be looked at by any competent prize court?—A. No, certainly not. Beyond that, the prize court would scrutinize with the utmost severity the evidence of transfer, quite apart from the question of *transitus*. I refer to the Admiralty Manual upon that, which I dare say is otherwise accessible. The rules which are laid down by Lord Stowell are very minute and careful.

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6829. Q. (Sir JOHN COLOMB.)—As regards the registration of a ship as determining her nationality, do I understand your view to be that the nationality of a vessel may be determined by the country in which the ownership is registered?—A. Yes.

6830. Q. Do I understand, then, that a company running ships under the British flag, and with British subjects, if they registered those ships in a foreign country, would thereby cause all of them to be of that nationality?—A. They would have to fly the flag of the country where they were registered; they would be part of the mercantile marine of that country, and they could not fly the flag of any other country.

6831. Q. The mere fact of the ownership being registered in a foreign country would not affect the question?—A. No. If a ship belong to a company registered in a foreign country, it must fly the flag of that country, and is part of the mercantile marine of that country.

6832. Q. You, perhaps, will remember, that a case of this sort has been brought before us?—A. Yes. There is a real difficulty here, of course.

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6841. Q. I presume that as international law is really for the protection of neutrals it would be rather to the interest of the neutral under whose flag the ships would be transferred to wink at any irregularities?—A. Yes; there is no reason, I suppose, why they should be very scrupulous about it.

6842. Q. Therefore, really, it is not likely that the neutral powers would object to the transfer of ships to their flag as being irregular?—A. Not at all; it is for the belligerent to do that.

6843. Q. And the ultimate decision would depend upon whether the belligerent was the stronger; in fact, it would become a matter of force?—A. I do not admit that. It is for the belligerent prize court to decide whether it is lawful capture or not. The belligerent seizes the vessel, takes her in, and then eventually the Prize Court decides whether it is a proper capture or not.

6844. Q. Whether she was duly transferred or whether she was not?—Yes; whether it was an illusory transfer or not.

6845. Q. Speaking generally, it is not likely that the neutrals would raise the point of transfer of our ships being irregular or not?—A. No, it is no business of theirs.

6846. Q. It would rather be to their advantage?—A. Yes.

6847. Q. (Mr. EMMOTT.) You state that the presence of even one alien among the owners of a ship would disqualify her from being registered as British?—A. Yes.

6848. Q. Would that be the case in other countries, *mutatis mutandis*, of course?—A. On that I would rather refer, because I can not remember all the facts, to an article by Mr. Louis de Hart (which I think I quote in my memorandum) in the Journal of the Society of Comparative Legislation. He has an article there on the comparative law of different countries about the registration of shipping.

6849. Q. At present it is the case, is it not, that if there was a ship, one of the owners or part owners of which was an alien, she could not be registered under a foreign flag or under the British flag?—A. She could not be registered here, but a belligerent cruiser which came across her would, if one of her owners was an enemy, capture her, and the prize court would confiscate her.

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6884. Q. (Sir GERARD NOEL.) With regard to the changing of the flag, I have a little experience which I might quote. When I was on the Board of Admiralty it was part of my duty to do the transport business; on one occasion we wanted to take up a transport for some service, and there were two transports that we knew of which had been fitted for carrying horses or whatever was required; I asked about these and I found that they were sailing under the Spanish flag. I thought it was very extraordinary that two of our British ships which we had quite recently employed were sailing under the Spanish flag. They were carrying troops at the time to Cuba. This was seven or eight years ago, and before the war. I got the Admiralty to make inquiries at the board of trade as to whether we had any knowledge of these things or any means of preventing it, and I am afraid I can not tell you what the answer was; but it seemed to me that it was quite possible for an owner of a line of steamers to transfer his ships to another flag, practically without asking by your leave or with your leave?—A. It is a question for the capturing or visiting belligerent.

6885. Q. This was in peace time?—A. Yes, I know; and therefore the question which we have been discussing hardly arose. We have been discussing the question of the right of a belligerent cruiser when she visits a ship with suspicious documents on board, showing a doubtful change of nationality. I think that is a different question from the one you are considering as to the right of a Government in time of peace to prevent the transfer of its own vessels to another flag.

6886. Q. It might be the day before the war that you might have all these vessels transferred if it can be done in that easy manner. Do you think it was a legal act?—A. I think it was all

right, unless done in anticipation of war. If it was found to be in immediate anticipation of war, and a belligerent had captured the vessel, she would have been confiscated.

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In the examination of Professor WESTLAKE—

6911. Q. (Lord BALFOUR, chairman.) Do you think you have anything to add as to the question of the transfer from British owners of a ship flying the British flag to a neutral flag in time of hostilities? Do you regard the possibility of the transfer of a ship from the British flag to a neutral flag as a proximate danger, and a danger which you would apprehend would take place?—A. Yes, it would be a danger which would take place, but perhaps not in the early part of the war to the extent which has been often supposed, because the transfer of a ship from a belligerent flag to a neutral one, if it is to have the effect intended in the prize court, must be a genuine out-and-out transfer. If there is reason to suspect its genuineness, the prize court would inquire into it, and it might take a ship which was apparently neutral-owned as being substantially still in British ownership. Especially at the commencement of war, there would be great difficulty in finding sufficient neutral capital to pay for genuine out-and-out transfers of British ships on a very large scale. I think that especially in the early part of a war the number of ships so transferred or apparently transferred, which would be brought in for adjudication in the hope that an inquiry by the prize court might discover the transfer not to be genuine, would be very great; and in such cases even if transfers were declared genuine, and the ships escaped condemnation, there would be great delay and expense to their owners. Consequently, I doubt very much whether in the early part of a war the rate of insurance upon the transferred ships would be so much lower than the rate of insurance upon British ships, as is commonly supposed. But if the war continued, that effect would of course wear away, and after two or three years of war, the rates of insurance on British ships and neutral ships would no doubt be very different indeed.

6912. Q. You referred just now to the prize court inquiring into the genuineness of a transfer. Do you think the prize court would go behind the actual nominal papers which are in the vessels? If the papers were correct, would they go into the question of bona fide ownership?—A. Undoubtedly they would—they would go into all the circumstances attendant on the sale.

6913. Q. Would you agree with the expression of opinion which I think I am not misrepresenting Professor Holland in saying he put before us to-day, that if all that they found was a single owner belonging to the nation—a British owner in this case—with which the other country was at war, the whole vessel would be condemned?—A. The French principle is not to look at the nationality of the owners, or the proportion in which they are

owners, but at the right to carry the flag. The nationality of the owners might come in incidentally in this way, that the country might make the right to carry its flag dependent upon the ships which are to enjoy that right being owned wholly, or in a given proportion, by subjects of that country. But directly as a motive of condemnation, the French courts would not regard the circumstances of ownership, but they would regard the right to carry the flag. The right to carry the flag must, of course, be a genuine one, and if the sale was found not to be a genuine one, that would impair the right to carry the flag, and the flag would be held then to be carried fraudulently.

6914. Q. By what machinery would the prize court get at the register of owners; would it not have to take the transfer papers as valid; how could they go behind them?—A. They might put interrogatories to the parties concerned as to the existence of any agreement attending the transfer.

6915. Q. Naturally; and there would be some hard swearing, no doubt?—A. Yes.

6916. Q. Could the prize court effectively get at the documents which would prove the want of bona fides?—A. I think they would in a great many cases. A great number of ships in different wars have been condemned upon that ground.

Such a discussion shows that opinion varies upon many points. In another part of the same report is the following statement:

Nationality of vessels.—Before leaving the topic of the treatment to be accorded to different classes of ships, it may be well to add a few observations as to the tests which are decisive in respect of a ship's nationality, and as to the requisites for the valid transfer of a ship from one nationality to another. It appears that, as a general principle, believed to prevail on the Continent, as well as in Great Britain and the United States, the flag, pass, and certificate of registry with which a ship sails are, as evidence of nationality, conclusive against her, but not in her favor. A belligerent is, however, entitled to go behind these *indicia*, and to inquire into the nationality of the owner, or owners, of the vessel; or, according to the British system, into their *commercial domicile*, i. e., the country in which they, or any one of them, trades, or resides while trading elsewhere. It would seem that, should the ship belong to a company, her nationality will be that of the country in which the company has its corporate existence. A visiting cruiser will not, indeed perhaps can not, inquire into the nationality of the shareholders in the company, who, as was held in the old case of *R. v. Arnaud*, are not in law the "owners" of the ship. Although, therefore, the presence of even one alien among the owners of a ship would disqualify her for being regis-

tered as British, she might be registered if owned by a British company every shareholder of which is an alien. (Report of the Royal Commission on Supply of Food and Raw Material in Time of War, Vol. I, p. 24, sec. 104.)

Conditions requisite to nationality.—The conditions under which a vessel may gain full nationality vary in different states according to local laws and regulations. Most states place little or no restriction upon national construction as an essential for the acquisition of nationality. The United States, with few exceptions, requires national construction for ownership. Some other states impose somewhat similar restrictions, as in case of Portugal and Mexico. The United States statute prescribes in general that vessels must not only be built in the United States but must belong wholly to citizens thereof. National ownership in some form is quite generally required for national registry. Some countries require, however, that only a greater part of the vessel, or a certain proportion, as five-eighths, shall be owned by citizens. The regulations in regard to the nationality of the crew vary greatly. Some states impose no conditions; others require that officers and all the crew be of the nationality of the flag. Between these extremes are regulations such as the following: Captain, national; captain and one-fifth of the crew, national; one-fourth of all, national; the captain and one-third of the crew, national; the captain and the greater part of the crew, national; the captain and two-thirds of the crew, national; the captain and three-fourths of the crew, national, etc.

Such variations make evident the need of some regulation of the method of transfer in order that the validity of the right to fly the flag may be sustained. Some states admit the right of the vessel to fly the national flag even though the vessel may not be allowed national registry.

Existing regulations.—Certain states have issued regulations in regard to the treatment of vessels in regard to whose right to fly the flag there may be any doubt. The regulations issued by Great Britain are the most complete and definite.

The British Manual of Naval Prize Law states that—

The commander will be justified in treating as an enemy vessel—

* * * * *

4. Any vessel apparently owned by a British, allied, or neutral subject, as hereinafter defined, if such person has acquired the ownership by a transfer from an enemy made after the vessel had started upon the voyage during which she is met with, and has not yet actually taken possession of her.

5. Any vessel apparently owned by a British, allied, or neutral subject, if such person has acquired the ownership by a transfer from an enemy made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was bona fide and complete. In the event of such transfer being alleged, the commander should call for the bill of sale, and also for any papers or correspondence relating to the same. If the bill of sale is not forthcoming, and its absence is unaccounted for, he should detain the vessel. If the bill of sale is produced, its contents should be carefully examined, especially in the following particulars:

(a) The name and residence of the vendor; (b) the name and residence of the purchaser; (c) the place and date of the purchase; (d) the consideration money and the receipt; (e) the terms of the sale; (f) the service of the vessel and the name of the master, both before and after the transfer. (P. 6.)

The British regulations also state that—

The commander will be justified in treating as a British vessel—

Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made after the vessel had started upon the voyage during which she is met with, and has not yet actually taken possession of her.

Any vessel apparently owned by a person having a neutral commercial domicile, if such person has acquired the ownership by a transfer from a British subject made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was bona fide and complete. (Manual of Naval Prize Law, 1888, p. 13.)

Of neutral vessels the British Manual of Naval Prize Law (1888) says:

A vessel apparently owned by a neutral is not really so owned if acquired by a transfer from an enemy, or from a British or allied subject, made after the vessel had started on the voyage during which she is met with, and the transferee has not actually taken possession of her.

A vessel apparently owned by a neutral is not really so owned if acquired by a transfer from an enemy, or from a British or allied subject, made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was bona fide and complete. (P. 16.)

The Japanese regulations resemble the British:

ART. VI. The following are enemy vessels:

* * * * *

4. Vessels, the ownership of which has been transferred before the war, but in expectation of its outbreak or during the war, by the enemy state or its subjects to persons having residence in Japan or a neutral state, unless there is proof of a complete and bona fide transfer of ownership.

In case the ownership of a vessel is transferred during its voyage, and actual delivery is not effected, such transfer of ownership shall not be considered as complete and bona fide. (Japanese Regulations Governing Captures at Sea, 1904.)

The rules in regard to maritime prize, adopted by the Institute of International Law in 1888, provide in regard to the transfer of an enemy's vessel in time of war:

SEC. 26. L'acte juridique constatant la vente d'un navire ennemi faite durant la guerre doit être parfait, et le navire doit être enregistré conformément à la registration du pays dont il acquere la nationalité, avant qu'il quitte le port de sortie. La nouvelle nationalité ne peut être acquise au navire par une vente faite en cours de voyage.

Summary.—The nature of the decisions of the courts, the temptations to make transfers *in transitu*, the lack of uniformity in treaty provisions, the variation in practice as to what is necessary to constitute nationality or requisite for registry, the importance of transfer of flag on the conduct of war, the existing rules in regard to transfer of flag in time of war, all show the necessity of some regulation which shall be generally binding. It would seem that the following regulations would accord with reasonable demands for restrictions.

Conclusion.—(a) The transfer of vessels, when completed before the outbreak of war, even though in anticipation of war, is valid if in conformity to the laws of the state of the vendor and of the vendee.

(b) 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.