

THE LATEST CHAPTER OF THE AMERICAN LAW OF PRIZE AND CAPTURE.

With the distribution of a small prize fund in the case of *Charles H. Davis, Captain, U. S. N., et al. v. The Paz, Ventura and other vessels and property*, under a decree of the Supreme Court of the District of Columbia, entered April 24, 1905, the law of naval prize in the United States became a purely historical and academic subject. That decree was the last to be entered in regard to property captured by the American naval forces in the Spanish war, and Section 13 of the Act of March 3, 1899,¹ had repealed "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war." Hereafter, in whatever wars the United States may be engaged, the property of the enemy's government and of its citizens may be subject to capture, but the captors will have no personal interest in such capture as long as the law remains as it is to-day. Theoretically speaking, of course, Congress may at any time restore the old prize system, but such action on its part is most improbable. With the advance of civilization, war has gradually been losing its predatory character, and the abolition of prize rights is but one of many steps in that advance. It naturally follows the abandonment of privateering (a practice which, though recognized by the Constitution, will presumably never again be permitted under the American flag), and it will probably lead in time to the immunity of all private property from capture on the high seas, except for breach of blockade or in the case of goods contraband of war.

¹ 30 Stats., 1004, 1007.

While the Act of 1899 narrows somewhat the field of future legal proceedings in cases of capture, it does not put an end to them, and hence it may not be wholly a waste of time to consider the additions which the Spanish war made to the case law on this subject, as well as to contrast the advanced position of the United States, in abolishing the prize rights of captors, with that of England, content, as regards this matter, with "the good old rule, the simple plan." Moreover, as the rights of private property on the seas, and the rules of blockade and contraband, will be among the matters discussed at the next Hague Conference, it is evident that the subject still presents many points of general interest.

Some of the Spanish war cases concerned the law of prize in the strict sense of the term, while others concerned the law of capture generally, and the value of the latter as precedents is of course entirely unaffected by the abolition of the prize rights of captors.

Of the former, the prize cases pure and simple, the most important were those in which the scope of the prize law was involved. From 1800 until 1864 the prize law was concerned only with "ships and vessels and the goods taken on board of them,"² but the language of the Act of June 30, 1864, Section 33,³ afterwards reenacted as Section 4613 of the Revised Statutes, was less precise, and the words, "the provisions of this title shall apply to all captures made as prize by authority of the United States," were sure, sooner or later, to call for some definition. After June 30, 1864, there was so little Confederate property left for the United States Navy to capture, that no case then occurred in which a definition was required, but the victory of Manila Bay supplied the necessary grist for the judicial mill.

Inasmuch as, prior to 1864, the prize law of the United States, unlike that of England, had never made any provision for captures on land, there was some reason for

² Act of April 23, 1800, Section 5, (2 Stats. 52); Act of July 17, 1862, Section 2, (12 Stats. 600).

³ 13 Stats., 315.

supposing that Congress had not intended, merely by failing to use the precise language of the earlier statutes, to change the policy that had prevailed from the days of the Revolution; and hence the latest edition of Halleck's International Law contained the positive statement that "property captured on land by a naval force of the United States is not a 'maritime prize' even though it may have been a proper subject of capture generally."⁴ In *The Manila Prize Cases*,⁵ however, it was held that the stores and supplies of the Spanish naval establishment were the subject of maritime prize, even though captured on land in a naval arsenal, and this decision was necessarily followed in the case of some coal, kept by the Spanish Government for the use of its vessels and captured at Ponce, Porto Rico.⁶ *The Manila Prize Cases* did not hold that all property captured on land by a naval force was prize, but only naval stores and supplies, and hence the ultimate decree of condemnation, confirming the auditor's report, uniformly excluded from consideration not merely the actual plant of the arsenal itself, erected and in use, but also all supplies and material which were obviously intended for use in or about the arsenal, as occasion might require, and were not such as would regularly be provided for use on board ship or for the construction and repair of ships.

It was also held that the status of an enemy's vessel of war, as sunk or otherwise destroyed within the meaning of Section 4635 of the Revised Statutes, was not necessarily determined by her condition at the close of the battle or immediately afterwards, but that if some time later a sunken vessel was raised, reconstructed and refitted, so as to be again available as a vessel, she was to be regarded as a prize, and not as the subject of bounty under Section 4635.⁷ The mere raising of a sunken vessel of war,

⁴ 2 Baker's Halleck's Internat. Law, 81.

⁵ 188 U. S., 254.

⁶ *Davis v. The Paz*, S. C. of Dist. Col., 1905, not reported.

⁷ *The Manila Prize Cases*, 188 U. S., 254. During the Civil war the *Albemarle*, sunk by Lieut. Cushing and afterwards raised, was condemned as a prize, no question being raised as to her status.

however, did not change her status, and it was necessary to bring her safely to some port where she could be completely repaired and refitted. Until that was done the act of the Government in having such a vessel raised and floated, and in attempting to bring her to such a port, was merely the act of a salvor, and was not an appropriation of prize property, so that when such a vessel was wrecked before reaching such a port, no prize money was due for her capture, but only bounty for her destruction.⁸

The words "ship or vessel of war belonging to an enemy," as employed in Section 4635, were held to cover armament, outfit, and appurtenances, including provisions, money to pay the crew or for necessary expenditures, and everything to be used for the purposes of the vessel as a vessel of war; and hence it followed that when such a vessel was "sunk or otherwise destroyed," such property, if removed from it, would not be the subject of prize, but could all be appropriated by the Government without accountability to the captors.⁹

As already stated, the prize law applied to "all captures made as prize by authority of the United States," but it had been settled law in England that there could be no prize money unless the authority given by the Crown to take prizes not only covered the capture but continued unrevoked during every step that should be taken in regard to the property until condemnation, so that if, prior to condemnation, the Crown should restore the property or order its restoration, the captors' authority over it was at an end. It was therefore held that where certain captured property had been appropriated to the use of the United States, but the treaty of peace provided that it should remain the property of Spain, all the captors' prize rights in such property ceased on the exchange of ratifications of the treaty, and the Government was no longer responsible to the captors for the value of such

⁸ *The Infanta Maria Teresa*, 188 U. S., 283.

⁹ *The Infanta Maria Teresa*, 188 U. S., 283; *The Manila Prize Cases*, id. 254, 267.

property, although it would have been so liable had it not bound itself to restore it.¹⁰

Under the British Statutes, in the case of captures made by a conjoint expedition (*i. e.*, a naval and a military force actively coöperating in the prosecution of a common purpose, such as the capture of a seaport town or fortress), the prize money was divided between the two forces,¹¹ but as the American prize law contained no reference whatever to the army's participation in any captures, it had been held in 1872 that where the army's coöperation had aided in bringing about the capture, no prize rights could attach, even though the captured vessel was actually taken possession of by the naval force alone.¹² The expedition to Porto Rico was undoubtedly conjoint, but it was held that where a portion of the naval force was sent ahead to reconnoitre and prepare for the disembarkation of the land forces, so that the latter had no part whatever in bringing about the captures, which were made by the former exclusively, the mere fact that the expedition as a whole was a joint one would not prevent property so captured from being condemned as prize.¹³

As to the right to share the prize money, vessels more than five miles away from those actually making the capture were held not to be within signal distance, and hence not entitled to participate.¹⁴ Colliers, not intended to act aggressively, and armed merely for the purpose of their own defence, were also excluded from participation.¹⁵

As to the relative strength of the capturing force and the enemy (a matter of importance in the distribution of the fund, the captors, if of superior force, being only entitled to one half), it was held that the statute contemplated a comparison of naval force only, and that land batteries could not be taken into account,¹⁶ and a similar

¹⁰ *The Manila Prize Cases*, 188 U. S., 254, 278.

¹¹ *Booty in the Peninsula*, 1 Haggard, 47.

¹² *The Siren*, 13 Wall., 389.

¹³ *Davis v. The Paz*, S. C. of Dist. Col., 1905, not reported.

¹⁴ *The Mangrove Prize Money*, 188 U. S., 720.

¹⁵ *The Manila Prize Cases*, 188 U. S., 254, 283.

¹⁶ *The Manila Prize Cases*, 188 U. S., 254.

view was taken in the analogous case of claims for bounty for the destruction of the enemy's vessels of war.¹⁷ In estimating relative strength, it was held that the armament of the captured vessel should be considered, rather than the use actually made of such armament.¹⁸

As already stated, the Spanish war gave occasion for several decisions of more permanent importance, in that they concerned the law of capture, as distinguished from prize. Following the approved modern custom the President's proclamation accorded very liberal treatment to Spanish merchant vessels in American ports when the war broke out, as well as to such as had sailed for American ports before that event, except, of course, vessels carrying Spanish official despatches, or military or naval officers or any contraband goods. The former vessels were allowed a month, from the outbreak of the war, for loading their cargoes and departing, while the latter could enter, discharge their cargoes and depart, and in both cases there was complete exemption from capture until after such vessels had reached a Spanish or neutral port.¹⁹ Under this proclamation it was held that a Spanish merchant vessel which had left an American port shortly before the war broke out, was entitled to continue its voyage without molestation, its case coming clearly within the intention of the proclamation, so that the capture of such a vessel was unauthorized and the decrees of condemnation should be reversed. Peckham, J., said:

It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage, but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

An intention to include vessels of this class in the exemption from capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this Government on the subject and which it is to be presumed were the views of the Executive. The vessel when captured had violated

¹⁷ *Dewey v. United States*, 178 U. S. 510.

¹⁸ *The Mangrove Prize Money*, 188 U. S., 720.

¹⁹ Proclamation of April 26, 1898, 30 Stats., 1770.

no law, she had sailed from Ship Island after having obtained written permission in accordance with the laws of the United States, to proceed to Norfolk in Virginia, and the permission had been signed by the deputy collector of the port and the fees therefor paid by the ship. She had a cargo of lumber, loaded but a short time before the commencement of the war, and she left the port but forty-eight hours prior to that event. The language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case.²⁰

The proclamation did not, however, extend any protection to a Spanish vessel on its way from one Spanish port to another, even though it was under contract to proceed ultimately to a port of the United States,²¹ nor to a mail steamer belonging to the Spanish naval reserve, though sailing from a port of the United States.²²

While the proclamation made no reference to fishing vessels, it was held to be a rule of international law, established by the general consent of the civilized nations of the world, that unarmed coast fishing vessels, whose crews were honestly pursuing their peaceful calling of catching and bringing in fresh fish, were, with their cargoes, exempt from capture. The opinion in this case,²³ by the late Mr. Justice Gray, is extremely interesting, and contains an elaborate historical sketch of the treatment of fishermen in time of war for very nearly five hundred years, showing conclusively that while their vessels were sometimes captured, such captures were exceptional and contrary to the prevailing humane custom of exempting fishermen from capture, a custom which American naval commanders had themselves followed during the Mexican war.

A further application of the same doctrine was made in the case of certain cascoes, or small native boats, and also some floating derricks or wrecking boats, all belonging to private citizens. The former vessels were of from thirty to sixty tons capacity, propelled by sweeps and by poling, and neither they nor the wrecking boats were in

²⁰ *The Buena Ventura*, 175 U. S., 384, 391.

²¹ *The Pedro*, 175 U. S., 354; *The Guido*, id., 382.

²² *The Panama*, 176 U. S., 535.

²³ *The Paquete Habana*, 175 U. S., 677.

any sense seagoing vessels, nor available for use except in comparatively smooth water. It was accordingly held that they were not subject to condemnation²⁴.

As regards nationality, a case arose where a Spanish vessel engaged in trading between Cuba and Jamaica had been transferred by bill of sale, some time after the war broke out, to a British subject, and had been registered as British in the port of Kingston, Jamaica. From the various circumstances of the case, it was concluded that the transfer was merely colorable, and that she had been properly captured as an enemy's vessel.²⁵ In the same case it was contended that even if the transfer was ineffectual, yet the vessel should not be condemned, because the owner was a Cuban and sympathized with the insurrection, but it was held that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. In another case it was held that the cargo of an enemy's vessel was presumed to belong also to the enemy, unless the contrary were clearly proved.²⁶

During the Spanish war a number of neutral vessels were captured on account of real or supposed violation of blockade, and the importance of the decisions rendered in these cases, as precedents in regard to the right of capture, was not directly affected by the abolition of prize rights. Still it is possible that some captures were made which might not have been made had the hope of prize money not furnished a motive, and in any future war both courts and commanders of vessels may very probably take more liberal views of the rights of neutrals. As was said in a dissenting opinion:

This is no time, in the history of international law, for the courts of the United States, in laying down rules to affect the rights of neutrals engaged in lawful commerce, to extend and apply harsh decisions made a hundred years ago, in the stress of the bitter wars then prevailing, when the rights of the comparatively feeble neutral states were wholly

²⁴ *The Manila Prize Cases*, 188 U. S., 254, 279.

²⁵ *The Benito Estenger*, 167 U. S., 568.

²⁶ *The Carlos F. Roses*, 177 U. S., 655.

disregarded. . Still less should our courts, as it seems to me was done in this case by the District Court, adopt strained and unnatural constructions of facts and circumstances, in order to subject vessels of nations with whom we are at peace to seizure and condemnation."²⁷

The majority of the court did not hold this view, but it is one in which very many judges, as well as a large part of the public, are probably disposed to concur. The case was certainly a peculiar one. The vessel was British, but was chartered by a Cuban for the purpose of bringing Cuban refugees to Jamaica, and the ship's agent at Kingston had instructed the captain to stop immediately if signalled by any vessel of the blockading fleet, to inform the commanding officer of the object of the voyage, and, upon arrival in a Cuban port, not to make any observations or sketches, nor to allow any provisions to be landed, or do anything which could be interpreted as a breach of faith on being allowed to pass the blockade. On approaching Guantanamo, the vessel was stopped by the U. S. S. *Vixen*, but allowed to proceed, whereupon she entered the bay and came to anchor, and was then seized as prize by the *Marblehead*. The court admitted that the vessel's mission was not unfriendly, but held that as she was not a cartel ship, privileged from capture, but was employed in a commercial enterprise, primarily for profit, and only secondarily for the purpose of humanity, her attempt to pass the blockade was unlawful, and hence that she was properly captured.

In this instance the Supreme Court undoubtedly took a rather technical stand, and hardly seems to have displayed the same liberal spirit that was shown in the fishing-smack cases. The non-technical side of the story was told some years later by Mr. Everett P. Wheeler, the claimant's counsel, and deserves to be given here:

All experience shows that the object of war can best be accomplished on land by defeating and capturing, if possible, the enemies' armies, and on the sea by overwhelming his fleet. A recent instance that occurred during the Spanish war will illustrate, perhaps better than any argument, the truth of my proposition. The American forces besieged Santiago. Not only at sea did our fleet blockade it, but the city was beleaguered from land, and the American forces had already

²⁷ *The Adula*, 176 U. S., 361, 398.

taken the neighboring port of Guantanamo. The American commander had given notice to the inhabitants to leave the city of Santiago, because a bombardment was intended. There were at that period in Santiago more than one thousand persons who were not Spanish citizens. Among them was the British consul, one of the best and noblest of men, who did more, let me say, for American citizens in Cuba than any American resident ever did. He was there, and his wife and children were there. There were many non-combatants, men, women, and children, people of wealth, who had everything but the necessaries of life, and the American troops had given them, in effect, orders to leave the city. A British ship-owner in Jamaica, which is only a few hours distant, sought to take advantage of this opportunity to furnish these non-combatants with the means of escape to that neighboring friendly island. His vessel started from Jamaica, went to the port of Guantanamo, and asked permission to go to Santiago and to take away those non-combatants. The naval commander should have said: "Go, by all means, to Santiago and take them away. Our troops have given them notice to go, and we want them away. We have neither food nor shelter for them, and for God's sake take them." That is what he would have done if he had had an eye single to the success of the military operations against Santiago. But, on the other hand, the law held up before him the opportunity to add to his prize money. So he took possession of the vessel, as the Supreme Court held (four judges dissenting) he had the legal right to do. He sent it to Savannah, and one thousand neutrals were left at Santiago. In the hot July sun they wandered, some of them with infants in their arms, some women in feeble health, with feet torn and bleeding, to the American camp. What could we do with them? We had hardly provisions for our troops. They were on short rations. Many of these neutrals lost their lives on account of the unavoidable failure of our army to care for them. Yet, in the harbor of Guantanamo, only fifteen miles distant, was a British vessel with an owner anxious to take them away, but the prize law was such that this offer, I will not say kindly (although it was a kindly and friendly offer), but this helpful offer to our military expedition was not accepted. You can study the history of the world in its military and in its naval operations and you will find that the law of plunder, the law of loot, is an obstacle to the effectiveness of all military or naval operations.²⁸

The use of steam and of long-range guns has necessarily changed the conditions of blockading from what they were in Lord Stowell's days, and it is now held that if a single modern cruiser, blockading a port, renders it in fact dangerous for other craft to enter, that is sufficient to make the blockade effective.²⁹ The intention to violate a blockade must be clear,³⁰ to warrant condemnation, although if the actions of a vessel raise doubts and suspicions, so as to indicate a probable intention to vio-

²⁸Report of the Universal Congress of Lawyers and Jurists, 1904, pp. 248-250.

²⁹*The Olinde Rodrigues*, 174 U. S. 510, 518.

³⁰*Ibid.*

late, capture will be justified, and no damages or costs will be allowed even though restoration be decreed.³¹ The sailing of a vessel with a premeditated intention to violate a blockade, is *ipso facto* a violation, and renders her subject to capture from the moment she leaves the port of departure.³²

While provisions are not, in general, contraband of war, yet they may become so, even though neutral property, if destined for military use; and in reaching the conclusion that they are so destined, the fact that they are found on board a vessel engaged in trading with the enemy, especially in supplies necessary for the enemy's forces, is of well nigh decisive importance.³³

Where restoration was decreed, it was held that even when damages ought to be awarded, they should be merely compensatory, not punitive, and that they should be paid by the Government, not by the individual captors. The Government had filed the libel and had never ordered a release, as it might have done, had it disapproved the capture.³⁴

The abolition of prize and bounty in the United States Navy, by the Act of March 3, 1899, already referred to, was a very serious violation of old traditions. It was easy to condemn the practice as "legalized piracy" and as demoralizing to officers and men, but there can be little doubt that the opinion of the Navy at large was accurately voiced by the officer who said that he had rather get a hundred dollars in prize money than a thousand dollars made in any honest way. In the British Navy this ultra-conservative sentiment is at least as strong, and probably more influential, for in England there is certainly no indication as yet of any intention to follow the example of the United States in abolishing prize. If our recent decisions in regard to prize are destined to be hereafter of only historical importance at home, they

³¹ *The Newfoundland*, 176 U. S., 97.

³² *The Adula*, 176 U. S., 362.

³³ *The Benito Estenger*, 176 U. S., 568, 573.

³⁴ *The Paquete Habana*, 189 U. S., 453.

may possibly be of use in British prize courts in some future war.

The present British prize statutes are the Naval Prize Act, 1864, and the Prize Courts Act, 1894. When in the winter of 1902-1903 the British Government, acting in conjunction with that of Germany, blockaded the ports of Venezuela, in order to enforce the claims of British subjects, and obtain reparation for injuries to British shipping, quite a number of Venezuelan vessels were captured and taken to Port of Spain, Trinidad, under the provisions of these statutes, and proceedings in prize were begun; but the vessels were all restored before condemnation, it having been decided to settle the dispute by arbitration.³⁵

During the Parliamentary session of 1905 a bill was introduced "to consolidate, with amendments, the enactments relating to naval prize of war." This bill was not passed, but the mere fact that it was considered indicates an intention to maintain the prize system as a permanent feature of British law. The principal points of difference between the British prize law and what was until recently the American law on the subject are, first, that under the former prize bounty depends on a special grant from the Crown in any war, and that it applies to the capture of an enemy's ships of war as well as to their destruction, the rate being five pounds for each person on board such a ship at the beginning of the engagement; secondly, that all goods on land belonging to the enemy's government or to a public trading company of the enemy, exercising powers of government, may be condemned as prize, when captured either by a naval force or by naval and military forces acting together; and thirdly, that in all captures made by a joint naval and military force, both branches of the service share in the prize money. Under the bill above mentioned, an enemy's ships of war were apparently

³⁵ The costs incurred in these cases, all of which were ultimately paid by the British Government, amounted to quite a little sum. The Sheriff of Trinidad, who had the custody of all the vessels, told the writer that his own fees came to about £1000.

no longer to be condemned as prize, and prize bounty was to be the only reward for their capture. This would be a very reasonable change in the law, since a modern ship of war is of no commercial use whatever, and the Government would be the only purchaser at a sale under a decree of condemnation. The decree and the sale would therefore be alike superfluous, and it would be much simpler to dispense with them altogether, giving instead a direct reward for the capture, and allowing the Government to retain the captured vessel for its own use. Such was in fact the law in this country under the Act of March 2, 1799, section 5.³⁵

At the Congress of Lawyers and Jurists at St. Louis, in 1904, the exemption of non-contraband private property from capture on the seas in time of war was discussed, but no resolutions were adopted. An Austrian delegate and two Americans favored the exemption, while an English and an American delegate opposed it. What action the next Hague Conference will take in regard to the matter remains to be seen, but in any event the abolition of prize rights by the United States was a long step towards such exemption, in that it removed all personal motive for making captures.

Charles Chauncey Binney

³⁵ 1 Stats., 709.