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THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

BY

HAROLD SCOTT QUIGLEY

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
THE UNIVERSITY OF WISCONSIN
1916

MADISON, WISCONSIN
1918

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INTRODUCTION

A proposal of immunity from capture at sea for all private property not subject to the law of contraband or blockade was seriously debated by a Commission of the Second Hague Conference. The proposal originated with the Government of the United States which has, from its foundation, advocated complete inviolability for commerce in time of war. Contemporary publicists have given considerable attention to the question, and various bodies, both public and private, have within recent years passed resolutions in favor of immunity. The war now in progress furnishes an unparalleled criterion of the value of existing legal limitations upon the right of capture and an index of the prospect for complete immunity.

This conjunction of circumstances favorable to an investigation of the status of private property in maritime warfare occurs at a time when no historical presentation of the subject in English exists. The treatise of Professor Charles de Boeck, *De la propriété privée ennemie sous pavillon ennemi*, published at Paris in 1882, is an exhaustive exposition of the material available up to that date. The rarity of this scholarly work as well as the valuable store of fact and opinion which it contains have appeared to justify a considerable number of references to it. The majority of writers, however, tend to treat the subject either theoretically or from the viewpoint of the present advantage of immunity to a particular country. Both methods of approach lack the essential background of history. Considerations of theory, history and policy all enter into any sound conclusions upon the present question.

Immunity means the freedom of enemy ships and of enemy goods on board from liability to confiscation. The significance of the problem which is involved in the effort to establish im-

munity in international law becomes clearer after examination of the stages through which the right of capture has passed from the time when limitations upon it began to be introduced. Practice under the existing rules calculated to protect neutral ships, neutral goods and enemy goods on neutral ships affords reliable guidance to those who would determine the value of proposed rules to protect enemy ships and their enemy cargoes.

The writer's principal aim is to explain the tendencies of both the practice and theory of the law of private property in war at sea: to determine how far belligerent states observe the law and how far the exponents of immunity are warranted in anticipating an accomplishment of the reform they desire. It goes without saying that the material for a proper treatment of the present war on commerce is as yet unavailable. The main lines of the systems devised by the Allied and by the Central Powers for the *control* of enemy trade were discernible by July, 1915, and they are presented as developed up to that time. But the conclusions reached rest upon an investigation of practice since 1856.

The phrase, "Freedom of the Seas", has borne different meanings in different periods. Today its meaning varies with the country in which it is discussed. The treatment of private property is a necessary element in any conception of the phrase, and the importance of any endeavor to give unbiased, non-propagandist consideration to this vital subject is manifest.

THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

CHAPTER I

THE EARLY HISTORY OF THE LAW OF CAPTURE

"Dans l'antiquité, les règles de la guerre sur mer sont d'une simplicité élémentaire; la force regne seule . . . rien ne met obstacle au déchaînement des passions et à la violence de leurs manifestations."[1] Previous to the fourteenth century, regulations of maritime warfare were few and scattered. The *Tables of Amalphi*, compiled about the sixth century A. D., are regarded by certain authorities as the first attempt at a code of maritime law.[2] The *Rooles d'Oleron*, dating from the thirteenth century, did not deal with the usages of war at sea.[3] Not until the latter part of the next century did there appear at Barcelona the famous compilation known as the *Consolato del Mare*, upon which any study of the customs and laws of maritime war must depend for its references to origins.[4] Containing provisions derived from Greek and Roman law, from French, Spanish, Syrian, Venetian, and Genoese practice, and from observances of the island states of the Mediterranean, the *Consolato* was accorded a general recognition amongst the commercial powers.

[1] Nys, Ernest, "Une page de l'histoire de la mer" in *Revue de droit international*, 2e série, T. II, 1900, p. 62.

[2] Verraes, F., *Les lois de la guerre et la neutralité* (Brussels, 1906), I. The laws of the Rhodians dating from the second century A. D. contain no mention of the rules of capture.

[3] Twiss, Travers, *Law of Nations* (Oxford, 1863), II. p. 146.

[4] Although not drawn up in the form known today until the fourteenth century, it was the expression of usages dating back several centuries. Different authorities date the *Consolato* as early as the twelfth century.