TRANSFER OF FLAG AND THE DECLARATION OF LONDON

It happens not infrequently when international legal conventions, designed to harmonize or recodify conflicting rules of law, are drafted, that the resulting convention is so broad or indefinite that confusion rather than agreement is effected, each party reading into the convention its own preconceptions. This was neither the purpose nor the necessary result of those articles of the Declaration of London, 55 and 56, which deal with the transfer of flag; yet in two important prize cases in which article 56 was applied, the prize courts of France and England came to diametrically opposite conclusions as to the meaning of the article, each interpreting the convention in the light of its own pre-existing law.¹ It must be admitted that the section which particularly required interpretation in these cases was not so clear as it might have been. It reads:

"The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed."

The "consequences" contemplated are, of course, capture and condemnation. The question in the most important of the war cases, that of *The Dacia* before the French prize court and of *The Edna* before the British prize court was, can a *bona fide* sale made while a vessel is in a neutral port be regarded as made "in order to evade the consequences" of capture. The French court said yes, the British court, no. An examination of the section, in the light of its history and contemporary interpretation, may clarify its meaning.

It will be recalled that the traditional view of England and the United States on the transfer of flag was to the effect that the validity of transfers of flag from belligerent to neutral ownership was determined by the criterion of *bona fides* of the transaction. The law was directed to sustaining the freedom of commerce in ships even after the outbreak of war, in so far as this did not illegitimately impair the customary belligerent privilege to capture enemy merchantmen. It was natural that a belligerent would not permit his claim to capture to be defeated by a transfer which was colorable merely, or whose colorability was so probable or possible that an attempted transfer under the circumstances was to be irrebuttably presumed to be void. In establishing the tests of colorability of the transfer and determining the circumstances when transfers could not be legitimately effected, the prize courts sought to lay

¹ Case of *The Dacia*, 1915, French Council of State, 1916, *Journal Officiel*, January 14, 1917, p. 498; the case below in the prize court is reported in *Journal Officiel*, Sept. 28, 1915, p. 6914. See Scott, *Cases on International Law* (1922) 1033. *The Edna* [1919] P. 157, 167, affirmed by the Privy Council [1921] 1A. C. 735, 746. In the earlier case of *The Colonia* (1915) 22 *Revue Générale de Droit Int. Public* (1915) *Jurisprudence* 45, the French prize court in holding invalid, under article 7 of the prize regulation of July 26, 1778, a transfer of flag effected after the outbreak of war, stated that this rule was substantially in accord with article 56 of the Declaration of London. See also 1 Garner, *International Law and the World War* (1920) 183.

down rules which would reconcile the traditionally conflicting interests of the belligerent captor and the neutral trader, but which above all would protect the belligerent against an evasion of his legitimate claims. The tests established, which through a century of war have commended themselves as appropriately designed to effect the object thus in view, are embodied in a few leading cases, of which *The Sechs Geschwestern*² is usually regarded as fundamental. In that case, Sir W. Scott declared:

"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."³

The Department of State has uniformly adhered to this position,⁴ as has the Supreme Court of the United States. In the case of *The Benito Estenger*⁵ the court adopted from Hall the statement of the rule and the criteria established to carry it into effect:

"In England and the United States [in contrast to the French rule] the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war."⁶

In addition, transfer effected while the vessel was in a blockaded port⁷ or *in transitu*⁸ would so obviously defeat the belligerent's "inchoate" claims

² (1801) 4 C. Rob. Adm. 100.

³ *Ibid.*, p. 100. See the similar rule affirmed in *The Baltica* (1857) 11 Moore P. C. 141, and in *The Ariel* (1857) 11 Moore P. C. 119. This is also the rule of the *British Manual of Naval Prize Law* (1888), § 53. See the comment of 1 Garner, *op. cit.*, § 128 and authorities there cited.

⁴ See the quotations from state papers in 7 Moore, *Digest of International Law* (1906) 416-421.

⁵ (1900) 176 U. S. 568, 578, 20 Sup. Ct. 489.

⁶ Story in his *Notes on the Principles and Practice of Prize Courts* (Pratt's ed. 1854) 63, also quoted by the court, adds:

"In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim, . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

⁷ *General Hamilton* (1805) 6 C. Rob. Adm. 61.

⁸ When the new owner takes possession in the first port of arrival, the voyage is deemed terminated. *The Vrouw Margaretha* (1799) 1 C. Rob. Adm. 336; *The Jan Frederick* (1804) 5 C. Rob. Adm. 128; see also *The Tommi* and *The Rothersand* (1914) 1 Trehern, *British and Colonial Prize Cases*, 16 *et seq.*

that the law regards them as invalid,⁹ refusing to admit evidence to prove them valid.

It is evident from these statements of the Anglo-American law, which it seems unnecessary to fortify by additional authority, that the end which the law seeks to reach is to prevent transfers which fraudulently or unfairly defeat the belligerent's privilege of capture. The law looks to the nature of the transaction, and if this is not in conflict with the established criteria for determining *bona fides*, it is not concerned with the motive either of seller or buyer in entering into the transaction.¹⁰

The French rule, on the other hand, in order to cut off all possibility of "ruses," as Dupuis declares,¹¹ asserts that all transfers after the outbreak of war are null and void. The rule is simple, at least, but it serves effectively to prevent all transactions in merchant ships of belligerent nationality under any circumstances. It has had the full support of only one great Power, Russia, and has either been condemned or deprecated by several other countries. The United States has refused to recognize the enforceability of the French rule when the neutral purchaser affected was an American citizen;¹² it was characterized in the Austro-Hungarian memorandum submitted at the London Naval Conference of 1908 as "an exaggerated restriction upon neutral commerce since this commerce ought to be free even in time of war;"¹³ Kleen, the Swedish international authority, condemned it as "superannuated." Whether or not it can be deemed contrary to international law, as Secretary Marcy affirmed, it is at least true that the rule is out of harmony with the practice of the great majority of the maritime Powers.

⁹ The reason for this conclusion as to transfers *in transitu* is stated by the Privy Council in *The Baltica*, *supra*, footnote 3, p. 146 as follows:

"Such transactions during war, or in contemplation of war, are so likely to be merely colorable, 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."

Westlake takes the position that the prohibition of transfers during war of the Declaration of London, unless it is proved not to have been made to escape capture, has reference to transfers *in transitu* and not to those made in neutral ports. 2 Westlake, *International Law* (2d ed. 1913) 149. See also *International Law Topics*, Naval War College (1910) 111; and 1 Garner, *op. cit.*, p. 196.

¹⁰ Mr. Garner, summing up the British cases and practice, states:

"In no instance, it appears, was it ever asserted that the motive of the vendor or the purpose of the sale should be regarded as a test of validity. In short, the essential condition of validity was to be found in the character of the transaction, and not in the motive underlying it." *Op. cit.*, Vol. 1, p. 191.

This is affirmed in the very able reasoning of the Privy Council in *The Edna*, *supra*, footnote 1, p. 746.

¹¹ Dupuis, Charles, *Le droit de la guerre maritime* (1899) §§ 96, 97, who states the French practice under the prize regulation of July, 1778.

¹² Mr. Marcy, Sec'y. of State, to Mr. Mason, Feb. 19, 1856, in 7 Moore, *op. cit.*, p. 416, protesting the French view in the case of a Russian vessel purchased during the Crimean War by an American citizen in the United States. Mr. Marcy quoted the French publicist, Hautefeuille, who declared that "it is impossible to recognize such a right as that claimed by the regulation of France."

¹³ *Proceedings of the International Naval Conference*, Parl. Pap. Misc. No. 5 (1909) Cd. 4555, p. 112.

This was the respective position of the representatives of the principal opposing views at the London Naval Conference of 1908. This conference met for the purpose of drafting a code of rules of international maritime law operative in time of war that would harmonize equitably the conflicting claims of neutrals and belligerents and above all, would bring about uniformity in the divergent practice of maritime Powers. With respect to the transfer of flag it is evident from the instructions of Sir Edward Grey, Secretary of State for Foreign Affairs to Lord Desart of the British delegation, that the British Government not only adhered to its view of the propriety of the British rule, but desired to see it adopted by the Conference as the conventional rule of international law. In view of the fact that the British delegation assumed the initiative in proposing the rules which ultimately became articles 55 and 56 of the Declaration of London, it is not without interest to examine this Instruction:

"The point of difference between the Powers on the question of the transfer to a neutral flag is, broadly, whether *bona fide* transfers after the outbreak of war, or within a fixed period before the war, are or are not permissible. Some Powers hold such transactions to be invalid. Great Britain, and several other Powers, adopt the view that, subject to certain conditions, such transfer is legitimate, but that it is for the purchaser to establish the *bona fides* of the transaction. A rule excluding altogether the right of transfer after the commencement of war appears to His Majesty's Government to be too serious a burden to impose on any country which carries on a large trade in building and selling ships. The equity of the case seems to demand that transfer should be permissible, but that the belligerent should be entitled to inquire closely as to the *bona fides* of the transaction, and that the onus should be on those concerned therein to establish that the transfer was complete and the transaction was genuine. His Majesty's Government think that the British Delegates should maintain this view at the Conference. They hope that it may be possible to convince the Representatives of the other Powers of its justice, and that an agreement may be arrived at on the subject."¹⁴

The views of the other Powers attending the Conference were submitted in the form of memoranda by their respective delegations. Those submitted by Austria, Hungary, Holland, Japan and Spain accepted in substance the Anglo-American rule. France and Russia seemed to be agreed that all transfers after the outbreak of war were to be deemed void, whether *bona fide* or not. The Germans approximated this view closely by recommending that a ship flying a neutral flag should be regarded as an enemy ship if it carried an enemy flag up to two weeks prior to the opening of hostilities.¹⁵

The British memorandum, which was submitted in accordance with the Instructions of Sir Edward Grey, and which ultimately became the basis for the rule adopted by the Conference, reads as follows:

"1. The transfer either by sale or by gift to a neutral of a hostile ship other than a war vessel is not made invalid merely by reason of the fact that it took place during or in anticipation of hostilities.

¹⁴ *Proceedings of the International Naval Conference*, Parl. Pap. Misc. No. 4 (1909) Cd. 4554, p. 22.

¹⁵ These memoranda appear in Misc. No. 5 (1909) Cd. 4555, pp. 112-114.

2. Such transfer, however, is not valid—
 - (a) If it takes place in a blockaded port;
 - (b) If it takes place during a voyage;
 (In this respect a voyage is ended the moment the ship reaches the port where it can effectively be taken possession of by the transferee.)

- (c) If the vendor retains any interest in the ship, or if a clause stipulates the return thereof at the end of the war.

3. The burden of proof that the transfer is *bona fide* is upon the plaintiff, and the transfer must be complete, in good faith and for an adequate price.

A ship transferred to a neutral flag is therefore still liable to condemnation by a Prize Court, should the conditions of the transfer give rise to suspicion of which the plaintiff does not clear himself, as for instance—

- (a) If no written evidence of the transfer is found on board at the time of the seizure;
 - (b) If the transferor has any control over the ship, a share in the profits, or the privilege of revoking the transfer;
 - (c) If the supposed transferee or his representative (the latter not being an enemy) has not taken possession;
 - (d) If the ship is subject to the control of an enemy;
 - (e) If the captain or person in command is in the service of an enemy.”¹⁶

It will appear from this proposal that the British delegation wished to have the validity of transfers during hostilities recognized, providing they were made in good faith, and they laid down certain presumptions of bad faith which the British courts had evolved in the course of a century of judicial decision. These presumptions were to attach to transfers in blockaded ports, during a voyage, and to those in which the vendor retained an interest. Moreover, they threw upon the shipowner the burden of proving the *bona fides* of the transfer. It will appear from a subsequent examination of the Declaration of London that the tests of good faith and *bona fides* are the same in transfers made both before and after the opening of hostilities but that the burden of proof varies, lying on the captor before hostilities and on the shipowner after commencement of hostilities. The memorandum is informed by a design to maintain the validity of transfers effected in good faith and to formulate acceptable tests of good faith. Motive for the sale in the mind of the vendor does not appear as a test of the validity of a sale.

That good faith was the criterion of the validity of a transfer, subject to the conclusive presumptions of invalidity which the Conference adopted, would seem to be indicated in the bases for discussion formulated by the Conference and the debates and votes thereon.

Bases 35 to 37 adopted for discussion read:

“35. A ship may not be transferred to a neutral flag to escape the consequences of its character as a vessel of the enemy.

“36. A transfer effected before the outbreak of hostilities is valid if it was made regularly, that is, if it is not brought under suspicion by any fictitious or irregular feature.

“37. After the outbreak of hostilities there is a conclusive presumption of nullity in the case of a transfer effected during a voyage.”

¹⁶ *Ibid.*, p. 113.

Sir Eyre Crowe, in the session of December 11 1908, in the discussion of these bases, explained:

"That the principle which it was sought to express in rule 35 of the Basis for discussion is one which, in the view of the British Government, could be derived from the Memoranda; namely, that the subject of a belligerent country cannot evade the consequences of war by transferring his ships to a neutral flag. It is hard to find in the Memoranda a clear and generally recognized rule for the application of this principle. If the principle is once accepted, with its consequences, it would not be difficult, after a thorough study, to find rules for putting it into practice. For example, rule 37 of the Basis for discussion formulates a valuable presumption which seems to be almost universally accepted.

"In the course of each war the prize courts will certainly have to pass upon a number of sales made in good faith, since there will always be a legitimate commerce in ships, as in other things. The legitimate or illicit character of such a sale is naturally a pure question of fact. Transactions of this sort should be protected by the formulation of rules which will leave this commerce entirely free so far as it is carried on in good faith; and if, as the British Government believes, the Powers desire to draw up such rules, it will do all in its power to help."¹⁷

It would seem that the British delegation sought to formulate rules which would distinguish a legitimate from an illicit transaction. Perhaps the best evidence that "good faith" was in the minds of the Commission dealing with this subject is afforded by the remarks of the President of the Commission, December 18, 1908, explaining why the word "escape" (*échapper*) in the phrase "to escape the consequences of its character as a vessel of the enemy," was replaced by the word "evade" (or elude) (*éluder*), which would, he said, "better express the idea of a transaction of doubtful genuineness."¹⁸ The law makes clear distinctions between escaping a public obligation, for example investing in tax-exempt securities to escape income tax, and evading a public obligation, for example, the concealment of income to avoid income tax. The one is legitimate, the other not; and while "escape" and "evade" (or "elude") may not be the best words to express the difference, it seems clear that the substitution of words was made designedly with the purpose of preventing transactions which by fraud or deception deprived the belligerent of his inchoate privilege of capture.

In the session of December 16, 1908, both the German and American delegations presented drafts for the formulation of these presumptions of good faith. At the same session the British delegate presented a modified proposition which conformed closely to the provisions of articles 55 and 56, ultimately adopted by the Conference. The new bases of discussion were intended to afford more specific criteria of good faith. They read as follows:

¹⁷ *Ibid.*, p. 167.

¹⁸ *Ibid.*, p. 183. The Privy Council in *The Edna*, *supra*, footnote 1, p. 746, makes this comment on the distinction: "Transfers are effected by the combined action of two parties, the seller and the buyer, and the word 'evade' suggests something more than 'escape,' for the latter is a result, while the former is a means by which a result is brought about."

"Substitute for Article 35, 36 and 37 of the Basis for discussion the following:

"35. The transfer of a ship to a neutral flag in view of hostilities must be made in good faith.

"36. A transfer before the outbreak of hostilities is presumed to have occurred regularly, that is, to have nothing fictitious or irregular about it to bring under suspicion. Proof to the contrary is admissible.

"37. After the outbreak of hostilities, the transfer is conclusively presumed void:

- a. If it is made during a voyage or in a blockaded port;
- b. If the right to redeem or recover is reserved;
- c. If the ship continues, after the transfer, to engage in the same service as before the transfer;
- d. If the conditions on which, in the law of the flag flown, the right to fly the flag depends have not been complied with.

"37a. When a ship has lost the nationality of a belligerent during hostilities or less than two months before the outbreak of hostilities the transfer is presumed void if the bill of sale is not on board. Proof to the contrary is admissible."¹⁹

The British delegate, in supporting the proposal, added:

"But now that the representatives of the different Powers are about to discuss the question, the British delegation feels justified in submitting the present proposed articles. In them the delegation has formulated rules which it is hoped the governments represented may regard as sufficiently embodying the common principle.

"If these rules, taken together, are calculated to produce good practical results sought by the conflicting rules at present in operation, the delegation hopes that, although taken from different sources and representing the usage of different nations, they may be treated as generally recognized rules of law."

In order more clearly to fix the presumptions of law arising out of transfers made prior to hostilities, the time was divided into two periods, the one the thirty day period preceding the outbreak, and the other, the period anterior to this thirty day period. This proposal was presented by the British delegation and became, with slight changes, the rules ultimately adopted by the Conference in Articles 55 and 56 of the Declaration.²⁰ With respect to a transfer made after the outbreak of hostilities, this proposal reads:

"The transfer of an enemy vessel to a neutral flag after the outbreak of hostilities is valid if it is proved that such transfer was not made to evade the consequences to which an enemy vessel as such is exposed.

"There is, however, a conclusive presumption that the transfer is void:

1. If the transfer is made during a voyage or in a blockaded port;
2. If a right to redeem or recover the ship is reserved;
3. If the conditions on which, in the law of the flag flown, the right to fly the flag depends have not been complied with."

It will be observed that the only difference between the rule presented and the rule finally adopted is in the wording of the first sentence. Instead of the

¹⁹ *Proceedings of the International Naval Conference*, Parl. Pap. Misc. No. 5 (1909) Cd. 4555, p. 180.

²⁰ Exhibit 64, *ibid.*, p. 252.

transfer being "valid if" it is proved that it was not made to evade the consequences of capture, the final draft provided that it should be presumed to be "void unless" it was proved that the transfer was not made to evade the consequences of capture. The effect is identical, leaving the shipowner to prove that a transfer after hostilities was made in good faith.

Some doubt upon the meaning of good faith has been created by a memorandum introduced by the German delegate, Herr Kriege.²¹ It reads as follows:

"I wish to call the attention of the Commission to a difference which seems to exist between the proposition of the United States of America on the one hand and the propositions of Great Britain and Germany on the other hand.

"The question turns on the meaning of the term 'good faith.' All three propositions agree in requiring that the transfers effected during or immediately before a war should be made in good faith, but it seems that, in the view of the American delegation, good faith would be present if the agreement for the transfer was genuine and final and contained no pretense or irregularity. On the other hand, the German and British propositions mean by good faith that the intention to protect the ship from capture should not have been among the motives for the sale. In the sense in which 'good faith' is used in these propositions, as in the original text of rule 35 of the Basis for discussion, a transfer would be null and void if it had been induced by a desire on the part of the seller to protect himself from the loss which confiscation of his ship would inflict upon him; on the other hand, the transfer would be valid if there was reason to believe that it would have taken place just the same if war had not broken out or been imminent.

"It seems to me that this latter view of the question is the one which should be adopted. By so doing we should preserve rule 35 of the Basis for discussion, as it now appears in the summary. We should add to it the presumptions *juris tantum* of good faith before the outbreak of hostilities and bad faith thereafter. In this way we should preserve the conclusive presumptions of rule 37 of the original text as well as the other conclusive presumption proposed in numbers 37 and 37a of the British proposition."

In view of the fact that the case of *The Dacia*²² was decided largely on the construction of "good faith" advanced by Herr Kriege, it may be well at this point to state the facts in that case. The *Dacia* was a merchant vessel of the Hamburg-American Line which sought asylum on the outbreak of the European war in August, 1914 in the harbor of Port Arthur, Texas. In December, 1914 an option to sell her was given by the owners to a certain ship-broker who also had made an agreement to ship on an American vessel for a Texas firm a cargo of cotton from Galveston to Bremen. The broker sought to dispose both of his option and his freight contract. Through another ship-broker, a purchaser for both was found in an American citizen, who made it a condition, however, that American registry for the "interned" ship could be obtained. This was possible under the Panama Canal Act of 1914. Before making the purchase, the buyer sought the opinion of the Department of

²¹ Exhibit 73, *ibid.*, p. 260.

²² *Supra*, footnote 1.

State and was advised by the Solicitor for the Department that the sale was valid.²³ The Commissioner of Navigation, before according American registration, required from the buyer an affidavit to the effect that the transfer was *bona fide*, unconditional and complete, that there was no agreement or understanding reserving to the vendor any interest in the vessel, that the transfer was to be executed without right of re-purchase, that the transfer was not made during the voyage or in a belligerent port, and that the vendee was an American citizen.

The transfer of flag was thereupon effected and the buyer assumed the freight contract. Cotton was then non-contraband and the voyage was legal. In order, however, to enable the shippers to obtain war risk insurance and possibly to strengthen the position, the ship's destination was changed to Rotterdam. Early in February, 1915, she was captured off the English Channel by the French cruiser, *Europe*, brought into a prize court and condemned. The cargo, however, was paid for.²⁴

The political situation at the time may serve to throw some light upon the condemnation. The planters of the South were demanding their customary German market and had the support of their representatives in Congress both in sustaining the freedom of this trade and in seeking to provide means of transportation. The Allied Governments, on the other hand, although cotton had not yet been declared contraband, were anxious to prevent the cotton trade with Germany and were particularly anxious to prevent the "interned" ships from being sold to American citizens and American registry.²⁵ It was generally realized that the *Dacia* would constitute a test case and, fortified by the best available legal opinion, the vessel set out. It was commonly believed and asserted that the British would capture her, but it was confidently believed that the British view of the validity of transfers, both prior to and under the Declaration of London, could not but sustain the validity of the transfer. It has only recently become known why the British left her capture to the French. This appears to have been done on the suggestion of the American Ambassador in London, Mr. William H. Page, and affords probably the first instance in American diplomatic history of an American diplomat conniving with a foreign power for the seizure of an American ship.²⁶ Presumably he was actuated by what he deemed the larger national good of avoiding a controversy with Great Britain, for it is not certain that it was then believed that the French courts would interpret the Declaration of London, which for this case was conveniently deemed to be in force, any differently than the British courts. At all events, the French Prize Court condemned the vessel on the principal ground, which is here alone of interest, that the transfer was

²³ Opinion of Cone Johnson, Solicitor, Senate Document 563, 63rd Cong. 2nd Sess. (1914), also printed in *Congressional Record* (August 11, 1914) 14758-14759.

²⁴ See *Owens v. Breitung* (C. C. A. 1920) 270 Fed. 190.

²⁵ The political and economic motives then in operation are well discussed by Professor Edwin J. Clapp in his book, *Economic Aspects of the War* (1915) cc. 7 and 8.

²⁶ 1 Burton Hendricks, *Letters of W. H. Page* (1922) 392 *et seq.*; *ibid.*, Vol. 2, pp. 4 *et seq.* Mr. Hendricks' information as to the other facts in the *Dacia* case appears to be uncommonly inaccurate.

not effected in "good faith," in the sense that the seller would not have sold the ship but for the intervention of war and that by such sale he had sought "to evade the consequences" to which the vessel, as an enemy vessel, would have been exposed.²⁷ The court regarded the transfer as having been made with the object of carrying on "enemy trade" and of "protecting the ship from capture." The question arises whether a ship at anchor in a neutral port and hence in no danger of capture can be regarded, when sold to a neutral, as sold "in order to evade the consequences" of capture.²⁸

The French Prize Court in its reliance upon Herr Kriege's definition of "good faith" appears to have regarded it as the opinion or conclusion of the Conference.²⁹ Possibly the court found some justification for its position in the explanation of article 56 given by M. Louis Renault who, in his General Report to the Conference, suggested an illustration of a case in which a transfer would be valid as not made to evade the consequences of capture, namely, that "it might be proved that the transfer had taken place by inheritance." Just what authority M. Renault had for this illustration it is not easy to find, except in the *ex parte* remark of Herr Kriege, presently to be examined. The Report, if it can be deemed to have been adopted by the Conference, was not debated, and it seems to be at variance with the reports made by various delegations to their respective Governments, especially the British, whose initiative in the formulation of articles 55 and 56 has already been noted. The illustration of M. Renault is not referred to.

Herr Kriege in the remarks which later assumed so important a character, stated that the German and British propositions, in respect of the definition of "good faith" were identical and in contrast to the American proposition. This would seem to indicate unfamiliarity with both the British and American criteria of good faith, which have in fact always been identical. The test of motive, in the sense of *inducement* for a *bona fide* sale has never entered

²⁷ Numerous other grounds were advanced by the court to support its conclusion, but few of them appear to be relevant. The most important of these collateral grounds was that the ship was left in the same trade in which she operated as an enemy vessel and that the sale was therefore invalid within the authority of *The Jemmy* (1801) 4 C. Rob. Adm. 31 and *The Benito Estenger*, *supra*, footnote 5. Neither of these cases is in point. In both, the operative fact which defeated the validity of the transfer was that the vessel remained under its previous management and in the second case the seller admittedly retained an interest in the vessel sold. The fact that it was "left in the trade" was merely a cumulative evidential fact to prove the colorability of the transaction. This also was the view of the London Naval Conference. See *The Declaration of London*, edited by James Brown Scott, Oxford, 1919, p. 173. Standing by itself, this circumstance has never been exactly defined or legal consequences drawn from it. The *Dacia* was a tramp steamer, with no definite trade. Even had she, as the court erroneously assumed, been chartered for the Galveston-Bremen berth while lying in the harbor under the German flag, her subsequent sale to an American citizen who assumed the contract would not, it is believed, have impeached the *bona fides* of the transaction. As a matter of fact, she was never considered or chartered, it seems, except on the express condition that she could legally obtain American registration.

²⁸ See the opinion of Westlake, *supra*, footnote 9.

²⁹ It does appear to have been the construction adopted by Germany, German Prize Regulation, Sept. 30, 1909, art. 12, Reichsgesetzblatt, Aug. 3, 1914, p. 275, in which it is stated that the transfer is valid only when the captor is convinced "that the transfer would have been made even had the war not broken out, for example, through inheritance or building contract." See Schramm, G., *Das Prisenrecht in seiner neuesten Gestalt* (1913) 522. The legislation of other countries where the Declaration was ratified merely restates for the most part articles 55 and 56.

into the judgment of a British or American prize court, although certain operative facts or presumptions have been regarded as establishing that a sale was not *bona fide* and therefore necessarily that it was made for the purpose of deceiving a captor as to the real nationality of the captured vessel. That is quite a different thing from examining the question whether the vendor sold his ship for the purpose of replacing it by money or of getting rid of it for any other reason. These ordinary motives of a commercial transaction, it was not the design of either the old law or its reformulation in the Declaration of London to investigate. The ordinary inducements to a commercial transaction could hardly be the subject of investigation by any judicial tribunal; but the illicit intention to deceive a captor may very properly be investigated. It is *deception* that would seem to be looked to by the Declaration of London and the pre-existing law, and not the economic or other *inducement* for entering into a commercial transaction. Articles 55 and 56 are therefore framed with the view to laying down rules from which such deception will in some cases be conclusively presumed, and in other cases be open to proof, the burden of proof before hostilities lying on the captor and after hostilities open, on the shipowner. If the construction which the French Prize Court gives to Article 56, namely, that it is the vendor's motive which governs the determination of the validity or invalidity of the transaction, is correct, then the right of neutrals to buy the merchant ships of belligerents is, as a practical matter, abolished. It is hard to see how a vendee could know the motive which induced the vendor to make the sale. It might be the need of money, it might be the desire to be rid of the ship, it might be any one of a hundred motives, disclosed and undisclosed. The vendee would be required under the French rule to search the conscience of the vendor and apprehend the dominant motive in his mind. Such a rule could not possibly be a practical working rule for commercial transactions. No business man would take the risk of having a sale avoided by the disclosure of a latent motive on the part of a vendor. Neutrals would thus be forced to abandon entirely the purchase of belligerent ships, and the Declaration of London, in apparently sanctioning what it effectively prevents, might not unfairly be regarded as a trap for the unwary.³⁰

This distinction between the inducement for making a sale, which no court can investigate and which is immaterial to the question of legality, and the intention to deceive a captor, which may be the subject of judicial investigation and upon evidence thereof invalidates the sale, appears to be fundamental. Mr. Kriege's memorandum, therefore, is confusing, and as affecting the final authoritative interpretation of the section is believed to be immaterial. It is not believed that any one ever inquired whether a sale would have been made, as Mr. Kriege suggests, "if war had not broken out or been imminent." It may be that the outbreak of war so affected prices or the usefulness

³⁰ This view is confirmed by the opinion of the Privy Council in *The Edna*, *supra*, footnote 1, p. 747, where Lord Sumner said: "If pressed to its logical results, it would in practice invalidate most transfers to neutrals, for how could a neutral command the evidence of his transferor, who alone could make a clean breast of his motives and object in entering into the transaction?"

of a ship as to induce the owner to sell it. He might not have sold it if the war had not created new conditions which provided new inducements, but it has never been contended that by acting upon such inducements and making a *bona fide* sale a vendor or a vendee was thereby guilty of bad faith so as to invalidate the sale. Nor is the cited example of a good faith transfer, namely, a transfer by inheritance, suggested by Reporter Renault, necessarily exclusive of other good faith transfers of title.

The distinction between the period before and after the outbreak of hostilities, which was proposed by the British delegation, was adopted finally by the Conference in Articles 55 and 56. They laid down certain tests of good faith which were to be applied in both cases. They laid down certain conclusive presumptions, some applicable to transfers made before hostilities, others to those made after commencement of hostilities. Except for such conclusive presumptions the other presumptions as to good faith were subject to rebuttal; but the burden of proof, which before hostilities lay upon the captor, was shifted after the opening of hostilities to the shipowner. The general report presented to the Naval Conference on behalf of the drafting committee warrants reprinting:

"An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is immune. It can therefore be readily understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or merely in order to shield the vessel from the risks to which she would have been exposed had she retained her former nationality. This question naturally arises when the transfer has taken place a comparatively short time before the moment at which the ship is searched, whether the actual date be before or after the outbreak of hostilities. The answer will be different according as the question is looked at from the point of view of commercial or belligerent interests. Fortunately, rules have been agreed upon which conciliate both these interests as far as possible, and which at the same time tell belligerents and neutral commerce what their position is.

"Article 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the law of the countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages."

"The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary requirements of the law have been fulfilled. It is upon the captor, if he wishes to have the transfer annulled, that the onus lies of proving that its

object was to evade the consequences entailed by the war in prospect. There is one case which is treated as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than 60 days before the outbreak of hostilities. The presumption of validity which has been set up by the first paragraph in favor of the vessel is then replaced by a presumption in favor of the captor. It is presumed that the transfer is void, but the presumption may be rebutted. With a view to such rebuttal, proof may be given that the transfer was not effected in order to evade the consequences of the war; it is unnecessary to add that the ordinary requirements of the law must have been fulfilled.

"It was thought desirable to give to commerce a guaranty that the right of treating a transfer as void on the ground that it was effected in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been effected more than 30 days before the outbreak of hostilities, it can not be impeached on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show that it is genuine and final. These conditions are as follows: The transfer must be unconditional, complete, and in conformity with the laws of the countries concerned and its effect must be such that both the control of, and the profits earned by the vessel pass into other hands. When once these conditions are proved to exist, the captor is not allowed to set up the contention that the vendor foresaw the war in which his country was about to be involved, and wishes by the sale to shield himself from the risks to which a state of war would have exposed him in respect to the vessels he was transferring. . . .

"Art. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

Provided that there is an absolute presumption that a transfer is void—

- (1) If the transfer has been made during a voyage or in a blockaded port.
- (2) If a right to repurchase or recover the vessel is reserved to the vendor.
- (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.'

"The rule respecting transfers made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which an enemy vessel, as such, is exposed. The rule accepted in respect of transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present, that it is void—provided always that proof to the contrary may be given. For instance, it might be proved that the transfer had taken place by inheritance. [This is the sentence which has been commented on].

"Article 56 recites cases in which the presumption that the transfer is void is absolute, for reasons which can be readily understood. In the first case the connection between the transfer and the war risk run by the vessel is evident. In the second, the transferee is a mere man of straw, who is to be treated as owner during a dangerous period, after which the vendor will recover possession of his vessel. Lastly, the third case might strictly be regarded as already provided for, since a vessel which lays claims to neutral nationality must naturally prove that she had a right to it."³¹

³¹ Misc. No. 4 (1909) Cd. 4554, pp. 39-40; Scott, *The Declaration of London* (1919) 170-173.

It is important to present the rules with respect to transfers made prior to hostilities because they bear such an intimate relation to Article 56. The tests of good faith mentioned in Article 55 are preserved for Article 56, each Article, however, providing its own conclusive presumptions, which were not subject to rebuttal. The principal difference between the two Articles lies in the burden of proof, as already pointed out. The committee says that the rule of Article 55 is inverted. In Article 55 there is a presumption that the transfer is valid. In Article 56, that it is void, "*provided always that proof to the contrary may be given.*" The propositions and the report of the committee indicate that certain risks run by the vessel could not be avoided by a sale, for example, if made during a voyage, or in a blockaded port. The presumptions clearly look to the risks encountered by a vessel and tend to nullify certain arrangements to evade them. In the case of *The Dacia* it would seem that she was not in the slightest danger of capture and was subject to no risk whatever. She was safely anchored in the harbor of Port Arthur and could have remained there indefinitely. The sale, therefore, could only by a forced construction be regarded as having been made to evade the consequences of capture or the risk to which she was "exposed."

It has already been shown that the British delegates were the authors of the proposal which ultimately found expression in Articles 55 and 56 of the Declaration of London. In making these proposals they considered themselves as having carried out the instructions of Sir Edward Grey, Secretary of State for Foreign Affairs, who instructed them to obtain, so far as possible, recognition for the existing rules of international law as adopted by the courts of Great Britain. That the English delegates felt that they had succeeded in the endeavor to obtain general approval of the rules adopted by the English courts appears from their report, after the Conference, to Sir Edward Grey.³² This report, which is believed to be exceedingly important in arriving at a correct interpretation of such an international document as the Declaration, reads as follows:

"V. *Transfer of Merchant-vessels from a Belligerent to a Neutral Flag.*

"27. The point of view which we were directed, in section 26 of our general instructions, to maintain in dealing with the question of the transfer of merchant-vessels from a belligerent to a neutral flag, *has substantially prevailed in the agreement arrived at on this subject.* The effect of the rules embodied in articles 55 and 56 of the Declaration is, first, to distinguish broadly between two periods; that preceding, and that following, the outbreak of hostilities. *The general principle laid down is that bona fide transfers are valid, whether effected in one period or the other.* But the burden of proof of such *bona fides* is differently distributed; it falls on the belligerent in respect of transfers made before the outbreak of war, and on the neutral in respect of transfers made subsequently. . . .

"29. The provisions respecting transfers made during a war are less complicated. The general rule is that such transfers are considered void unless it be proved that they were not made with a view to evade the consequences

³² Misc. No. 4 (1909) Cd. 4554, p. 99; Scott, *The Declaration of London* (1919) 247.

which the retention of enemy nationality during the war would entail. *This is only another way of stating the principle already explained that transfers effected after the outbreak of hostilities are good if made bona fide, but that it is for the owners of the vessels transferred to prove such bona fides.* In certain circumstances, specified in the second paragraph of Article 56, *mala fides* is presumed without possibility of rebuttal. The provisions under this head are *practically in accord with the rules hitherto enforced by British prize courts.*" [Italics ours.]

It is believed that this Report, made, so to speak, by the movers and draftsmen of the article and conveying their understanding of its meaning, is entitled to considerable weight. They assert that the point of view they were directed to maintain "has substantially prevailed in the agreement arrived at." They add that the general principle laid down is that *bona fide* transfers are valid whether effected before or after the outbreak of war, but that the burden of proof in these two periods is "differently distributed." The delegates specifically add, in referring to the wording of Article 56, namely, that "such transfers are considered void unless it is proved that they were not made with a view to evade the consequences" of capture, that "this is only another way of stating the principle already explained, that transfers effected after the outbreak of hostilities are good if made *bona fide*, but that it is for the owners of the vessels transferred to prove such *bona fides*." This, it is believed, is the correct interpretation of Article 56 of the Declaration of London, which was not designed to make an epoch-making change in the law theretofore prevailing.

It is interesting to observe that the British courts have given to Article 56 an interpretation quite different from that of the French court, in a case where in fact the decision involved the release of a captured vessel. In the case of the *Edna*,³³ a vessel owned on the outbreak of the war by a German subject was sold *bona fide* in 1915 to an American citizen and transferred to the American flag. She was captured and her condemnation sought as an enemy vessel, the transfer to a neutral flag after the outbreak of hostilities being alleged to have been illegal. Lord Sterndale, President of the Prize Court, construing Article 56 of the Declaration of London, said that the Article, instead of invalidating all sales made after the outbreak of war, "is really aimed at what may be called colorable transfers." It was his view that "if the sale is made *bona fide* because the purchaser wishes to get the ship for his own purposes, the transfer in my opinion is not made in order to evade the consequences to which an enemy vessel is exposed. It does no doubt put an end to the consequence that follows on her being an enemy vessel, namely, that so long as she is an enemy vessel she may be seized. But it is not made in order to evade those consequences. I think that Article 56 is really aimed at what may be

³³ *Supra*, footnote 1. Although the vessel was registered as Mexican and was nominally owned by a Mexican corporation, the prize court deemed the ownership to have been German, because the corporation was owned and controlled by a German. She assumed the German flag to avoid requisitioning by the Mexicans. She subsequently assumed the Mexican flag and actually was used to supply coal to a German cruiser at sea. She was then requisitioned by Carranza and by Villa and was sold in 1915 to an American citizen. She was captured by a British cruiser.

called colorable transfers." Lord Sterndale claimed support for this view in the words of Article 56 that follow: "Provided there is an absolute presumption that a transfer is void. . . . (2) If a right to repurchase or recover the vessel is reserved to the vendor . . . giving one instance of it being colorable." ³⁴ He added:

"I can find nothing to show that if [she is German-owned] she cannot be *bona fide* bought and transferred to a neutral flag, *i.e.*, American, as this vessel was during the war. On the contrary, I find a distinct statement that she can, by the Privy Council in *The Baltica*, and the only argument I have heard to the contrary is that such a transfer is prohibited by art. 56 of the Declaration of London. Art. 56 is as follows: 'The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.' That must be read, of course, in conjunction with the previous article, art. 55; 'The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed.' The difference between the two is this: Before the war, *prima facie*, the transaction is good; but it may be shown to be bad because it may be shown that it is made in order to avoid the consequences to which an enemy vessel, as such, is exposed; after the war, *prima facie*,—this is the highest degree to which it seems to me this article can be put—it is invalid, but it may be shown to be valid if it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. It was argued—at least, I think this was what the argument came to—on behalf of the Crown, that an enemy vessel, by reason of being an enemy vessel, is always exposed to certain consequences and therefore she never can be transferred validly because the transfer always will evade the consequences of her being an enemy vessel. I think the Solicitor-General rather disclaimed the wish to put the argument as high as that; but if it is not to be put as high as that it seems to me to come to nothing so far as this case is concerned. . . . I do not think that this article was intended to interfere with the general principle of law as laid down by *The Baltica* at all, except so far as it might throw the onus of proving the *bona fides* of the transaction upon the purchaser. Here *bona fides* is shown, and I think that this transaction was a perfectly valid one and there was nothing in the circumstances to prevent the Lloyd Mexicano passing a perfectly good title to the claimant."

Thus we have two prize courts, one French and one British, interpreting Article 56 in diametrically opposed senses. If the French interpretation were the sound one, it would have practically constituted an adoption of the traditional French view of the invalidity of transfers during war. One might then reasonably expect to find that view embodied in the report made to the French Government by the French delegates at the Conference. That report, however, which it may be of interest to quote, hardly justifies this expectation and may, on the contrary, be regarded as sustaining the British view of the effect of Article 56. It reads as follows:

³⁴ *The Edna* [1919] P. 157, 168. Said Lord Sumner for the Privy Council [1921] 1A. C. 735, 746, in affirming the conclusion of Lord Sterndale: "the article deals only with colorable or fictitious transfers, devised by both parties in combination."

"The naval conference of London also studied the question of the transfer of enemy ships to a neutral flag, at the beginning of hostilities or during hostilities, and that of the determination of the enemy or neutral character of ships and merchandise. The declaration, in laying down rules on this subject, sought to secure respect for the rights of belligerents, while at the same time protecting purely commercial and peaceful transactions. As is said in the Reasons for the bill, it desired to give to warships and to commerce a sort of international civil status in conformity with modern economic life and easy to prove. Without doubt, not all questions were answered; but the declaration 'gave prominence to generally recognized principles' and established some fixed and certain rules which threw light on the subject.

"Chapter V.

Change of Flag

"A neutral merchant ship is safe (provided it does not carry contraband, etc.) but an enemy merchant ship is subject to capture. A belligerent warship which meets a merchant vessel under a neutral flag must ascertain whether the neutral nationality is *genuine*, or a means of protecting the merchant vessel from the dangers to which it would have been exposed in flying the flag of its country. To change the flag for the purpose of *deceiving* the belligerent is obviously easy. The general report tells us that 'the question naturally arises when the transfer is relatively recent at the time of the visit, regardless of whether the transfer took place before or after the beginning of hostilities. It is decided differently according as the interests of commerce or those of the belligerents are chiefly considered.'

"The delegates worked out regulations which reconciled as far as possible the two opposing interests. Neutrals and belligerents may learn their position from these regulations. I shall not enter in detail into these special rules, which are contained in articles 55-56; they are of too technical a character."³⁵ [italics ours]

Thus it would seem that even the French delegates understood the rules to look to a deception of the belligerent and regarded them as designed to furnish tests for circumventing such deception. The report states that it is the danger to which a ship at sea is exposed, namely, the danger from capture, which the belligerent is justified in preventing a ship from evading.

Finally, it is of interest to quote the Report of the American delegates to the Secretary of State, March 2, 1909, embodying their understanding of what was effected by the articles of the Declaration on the transfer of flag. They state:

"It has been decided that commerce in ships in time of war, is, in general, not legitimate unless it is *bona fide* commerce and not undertaken to evade the consequences to which the ship would be liable if it retained the enemy flag. The burden of proof of validity of the transfer is placed on the vendor. In all such cases commerce would be regarded as illegitimate when the transfer is made (1) *in transitu* or in a blockaded port, (2) with the right of repurchase or return, or (3) contrary to the laws of the flag which it bears.

³⁵ Translated from: France: Assemblée nationale, 1871. Chambre des Députés, Annales. Documents parlementaires. Tome 83, Sess. ordinaire de 1912. Première partie. Paris, 1913, pp. 233-237.

"It would also be possible, and to some extent has been the practice, for ship-owners anticipating war to make transfers just before the outbreak of war. Such transfers, when made with the view to evading the consequences of the war *and not as commercial transactions*, are not regarded as legitimate, but the burden of proof rests upon the captor, except when the papers in regard to the transfer, which has been made within sixty days before the outbreak of war, are not on board. In this exceptional case the burden of proof of the validity of the transfer is placed on the vessels, as there is not sufficient evidence at hand in the ship's papers to enable the captor to release the ship. . . .

"These provisions establish much more definite rules, where formerly there had been great diversity of practice among States, or even diversity in the same State at different periods. Commerce in ships is recognized as legitimate under such restrictions as seem necessary in order to safeguard belligerent rights."³⁶ [italics ours]

That the Declaration of London was not designed to make any violent changes in the rules theretofore existing appears from a decision of the Italian Prize Court in the case of *The Aghios Georgios*, a Turkish vessel flying the Greek flag, arising during the war of 1912 between Turkey and Italy. In that case,³⁷ the Italian Court stated that "the Declaration of London was not designed to create a new law of international warfare, but rather to collect, to interpret, and to codify the law in existence." They based this conclusion upon

"(a) the Circular of Sir Edward Grey of February 27, 1908; (b) upon the fact that the invitation, instead of being addressed to all maritime powers was addressed only to the great powers; (c) upon the mode of work which was followed (with preliminary memoranda); (d) upon the title 'Declaration'; (e) upon the introductory provision, by the terms of which the signatory powers agree in declaring that the rules contained in the following chapters correspond in substance to the generally recognized principles of international law."

While the court says that "the Declaration of London was not designed to create a new law of international warfare, but rather to collect, to interpret, and to codify the law in existence," it is obvious that when two nations, as for example, France and England, had adopted different rules on a given subject like the transfer of flag, the effort at harmonization must have resulted in the modification of one or the other or both of the preëxisting rules. The question, therefore, is, has Article 56 established the previous French or British rule as the codified law or is the latter a qualification of both. If so, what is its meaning? To determine that, the evidence adduced above may be of

³⁶ Scott, *The Declaration of London* (1919) 203, 204. The American delegation stated that they had advocated the adoption of a rule to the following effect:

"A transfer effected before the outbreak of war is invalid if it is absolute, *bona fide*, and conforms to the legislation of the States interested, and if it has for its effect that neither the control of the ship, nor the profits arising from its use, remain longer in the same hands as before the transfer.

"If the captor can establish that the above conditions have not been fulfilled, the transfer is presumed to have intervened with the intention to evade the consequences of war, and is null." The Delegation adds: "This rule, practically as above, was adopted," and concludes, perhaps with too great assurance, "Thus the rights of belligerents and of neutrals are defined and safeguarded."

³⁷ 21 *Revue Générale de Droit International Public* (1914) 105, 111.

aid. To the effect that the codified rule favored the preëxisting French view as to the invalidity of transfers during war, we have the comments of Herr Kriege and the German Prize Code of 1909, the gloss of M. Renault in his Report to the Conference and the opinion of the French Prize Courts in the case of the *Dacia*. To the effect that the British view of the validity of *bona fide* transfers prevailed, we have the Reports to their respective governments of the British, French and American delegations, the comments of various delegations and the President of the Commission during the proceedings of the Conference and the decision of the British Prize Courts in the case of the *Edna*. Possibly, also, the fact that the decision of the French court may be regarded as not dissociated from the national self-interest in invalidating transfers during the late war, whereas the decision of the British court in releasing a captured vessel was manifestly contrary to self-interest is deserving of special consideration in reaching a conclusion.

The commentators upon the Declaration of London are not very helpful in their analysis of Articles 55 and 56. For the most part, they content themselves with a restatement of the terms of these articles.³⁸ Professor von Liszt, in discussing the effects of the Declaration of London, assumes that the transfers it was designed to invalidate were those made in *mala fides*. He says, in differentiating Article 55 from Article 56:

"On the contrary, a transfer made after the beginning of the war is null and void in case it should not be proved that it had not been undertaken in *fraudem legis*. In the latter case, under certain preliminary conditions, there arises a conclusive presumption against the validity of the transfer."³⁹

Professor Garner, one of the few writers who has commented on the decision in the case of the *Dacia*, has this to say of it:⁴⁰

"It is quite clear that the *Dacia*, with other German vessels, took refuge in American ports in order to escape capture and that they remained there for the same reason. Therefore, if they were sold by their owners to neutral purchasers and transferred to neutral registries, the motive was to withdraw them from the liability to capture, to which they would have been exposed if they had [been] left under a belligerent flag.⁴¹ On the other hand, it may have been, and was so argued, that the purpose of sale in such cases was not to withdraw the ship from the risk of capture, since there was no danger of capture so long as it remained in a neutral port, but rather to realize immediately upon property which was idle and unproductive."⁴²

³⁸ 2 Hyde, *International Law* (1921) 552-553. Dr. H. von Ferneck, associate delegate of Austria-Hungary at the Conference, in his work *Die Reform des Seekriegsrechts durch die Londoner Konferenz*, in 4 *Handbuch des Völkerrechts* (1914) part 3, 172-179, while explaining the articles at some length is not very helpful in deciding the issue between the French and British view.

³⁹ *Das Völkerrecht* (9th ed. 1913) 331.

⁴⁰ 1 Garner, *op cit.*, pp. 195-197.

⁴¹ Mr. Garner cites on this point the remarks in the Senate of Senator Norris, *Congressional Record* (Jan. 29, 1915) pp. 2745, 2748, of Senator Root, *ibid.* (Jan. 25, 1915) p. 2455, and of Senator Lodge (*ibid.*, pp. 3782 *et seq.*).

⁴² Citing the remarks in the Senate of Senator Walsh. *Congressional Record* (Jan. 28, 1915) p. 2667. See, as to the validity of sales in neutral ports, the opinion of Westlake, *supra*, footnote 9.

"This latter view is undoubtedly more in accord with the modern theory of freedom of trade and with practice in the past. Certainly it was not the intention of the Naval Conference to prohibit transfers during war under all circumstances. . . ."⁴³

"The Declaration of London forbids transfers only during a voyage or in a blockaded port; it recognizes inferentially the right to make transfers in other places, although it creates a presumption of invalidity. Yet if a transfer made in a neutral port is unlawful because the purpose could only be to elude capture, we may well ask, where and under what circumstances, would transfers be lawful? The only possible conclusion is that if the transfer of the *Dacia* was invalid (assuming, of course, that the legal formalities required by the Declaration were complied with) there are apparently no conceivable circumstances under which transfers from belligerent to neutral flags can be made after the outbreak of war."⁴⁴

Thus we find the attempt at codification to have resulted in a rule so apparently broad and indefinite as seemingly to have justified varying constructions of its meanings by the municipal authorities of the participating countries and hence to have substituted confusion and uncertainty for what theretofore had been frank disagreement but certainty. In our view, the uncertainty is not as obvious as the conflicting decisions of the French and British prize courts might make it appear, for it is believed that the French interpretation is erroneous and the British interpretation correct. For an authoritative settlement of the question, we shall have to await the decision of an international tribunal passing upon the case of *The Dacia* or of some other vessel in similar circumstances.

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⁴³ Mr. Garner here refers to the statement of Lord Crowe, British delegate, to the effect that "there will always be a regular traffic in ships as in other objects."

⁴⁴ Mr. Garner does not refer to the unexplained illustration of a valid transfer suggested by M. Renault, namely, by inheritance, or to the additional illustration embodied in the German Prize Regulations, namely, by building contract.