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Prohibition Amendment and International Law

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THE PROHIBITION AMENDMENT AND INTERNATIONAL LAW

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"THE eighteenth amendment," said Justice Holmes of the Supreme Court, in the *Grogan* and *Anchor Line Cases,* "meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books."[1] It is not surprising that the reconciliation of the amendment with time honored principles of public law has proved a difficult process. With the claim that the amendment overthrew individual and states rights more fundamental than the constitution, and with the efforts of the bootleggers to shelter themselves under the unreasonable search and seizure clause the international lawyer is not concerned.[2] When, however, the Supreme Court follows the statement just quoted, with the announcement that the amendment "did not confine itself in any meticulous way to the use of intoxicants in this country," he may well prick up his ears or even raise his voice as did three justices of the court, who, though almost ashamed to criticize "the attractive spectacle of a people too animated for reform to hesitate to make it as broad as the universe of humanity," nevertheless did so with an admonition to their brethern of the majority.

"I put my dissent," writes Justice McKenna, speaking also for Justices Day and Clarke, "upon the inherent improbability of such intention—not because it takes a facility from intoxicating liquor, but because of its evil and invidious precedent, and this at a time when the nations of the earth are assembling in leagues and conferences to assure one another that diplomacy is not deceit and that there is a security in the declaration of treaties, not only against material aggression but against infidelity to engagements when interest tempts or some purpose antagonizes. Indeed I may say there is a growing aspiration that the time will come when nations will not do as they please and bid their wills avouch it."

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[1]Grogan v. Walker, Anchor Line v. Aldrich, (1922) 42 S.C.R. 423.

[2]See Abbott, Inalienable Rights and the Eighteenth Amendment, 20 Col. L. Rev. 183.

The admonition, however, has proved of no avail. The majority opinion in this case, delivered by Justice Holmes on May 15, 1922, held that liquor could not be transferred from one British vessel to another in an American port for shipment to a foreign country and that Great Britain could not ship liquor under bond from Canada via Detroit though transit of bonded goods without customs seemed to be guaranteed by article 29 of the Treaty of Washington of 1871. On October 6th, Attorney General Daugherty[3] deduced from this opinion a prohibition upon the "possession and transportation of beverage liquor on board foreign vessels while in American territorial waters, whether such liquors are sealed or open," and on October 23rd, Justice Learned Hand of the federal court of the southern district of New York[4] refused to enjoin the secretary of the treasury from putting this interpretation into effect except with reference to ship's stores for the use of the crew. Pending final review of this decision by the Supreme Court, and in consideration of the informal complaints of foreign governments as well as the difficulty of perfecting enforcement regulations, the executive officials have temporarily withheld enforcement.[5]

Aside from the questions of the (1) sanctity of treaties and (2) the immunities of foreign merchant vessels in port here involved, the zeal of officers enforcing the eighteenth amendment and the Volstead Act has raised the question of (3) the right to seize suspicious vessels beyond the three mile limit.

1. Impairment of Treaties.

On the question of treaty violation, international law has but one answer. Treaties are made to be kept.

"It is an essential principle of the law of nations," asserted the London Protocol of 1871, "that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."[6]

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[3]Daugherty, Att. Gen., Opinion Oct. 6, 1922. Text printed in New York Times, Oct. 7, 1922. In an opinion of July 7, 1921, Attorney General Daugherty had denied the right of transit to intoxicating beverages, thereby agreeing with Acting Attorney General Nebeker's opinion of Feb. 4, 1921. 32 op. 419.

[4]Cunard Line v. Mellon, Oct. 23, 1922. Text printed in New York Times, Oct. 24, 1922, p. 2.

[5]Press Reports, Oct. 25, 1922.

[6]2 Satow, Diplomatic Practice 131; Hall, International Law, 7th ed., 365.

The only international defense is that the treaty was not binding and in this case something can be said on that score. Article 29 of the treaty of Washington which provided for reciprocal transit of goods through the United States and Canada without customs duties, was to continue only for the term of years mentioned in article 33. This in turn provided that articles 18 to 25 inclusive and article 30 would continue for ten years and further until the expiration of two years after notice of termination by either party. Under this article the United States denounced articles 18 to 25 and article 30 in 1883 and though the act of denunciation failed to mention article 29, Presidents Cleveland and Harrision subsequently expressed the opinion that it had been terminated.[7] Though referring to these opinions the Supreme Court proceeded on the assumption that the treaty was binding.[8]

So far as American law is concerned, there is no doubt but that a constitutional amendment or a later act of Congress will prevail over a treaty[9] though such provisions are interpreted to save the treaty if possible.[10]

"Zeal," said the dissenting justices, "takes care to be explicit in purpose and it cannot be supposed that sec. 3005 and the treaty were unknown and their relation—harmony or conflict—with the new policy, and it must have been concluded that there was harmony, not conflict."

"We appreciate all this," said the majority, "but are of opinion that the letter is too strong in this case."

2. Foreign Private Vessels in Port.

The same rule of interpretation applies to customary international law.[11] The courts apply it as part of the law of the

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[7]8 Richardson, Messages and Papers of the President 623-625; vol. 9, p. 340.

[8]The dissenting justices give the existence of the treaty as the leading reason for their opinion, yet the precedents would seem to require the Supreme Court to follow the president's decision in such a political question as treaty termination. Doe v. Braden, (1853) 16 How. (U.S.) 635, 14 L. Ed. 1090; Terlinden v. Ames, (1902) 184 U.S. 270, 46 L. Ed. 534, 22 S. C.R. 484; Wright, Control of American Foreign Relations 172.

[9]The Chinese Exclusion Case, (1888) 130 U.S. 581, 32 L. Ed. 1068, 9 S.C.R. 623; The Cherokee Tobacco Case, (1870) 11 Wall (U.S.) 616, 20 L. Ed. 227; The Head Money Cases, (1884) 112 U.S. 580, 28 L. Ed. 798, 5 S.C.R. 247; 5 Moore, Digest of Int. Law, 167, 356-370.

[10]Whitney v. Robertson, (1887) 124 U.S. 190, 31 L. Ed. 306, 8 S.C.R. 456; In re Dillon, (1874) 7 Sawy. (C.C.) 561, Fed. Cas. 3,914.

[11]The Paquette Habana, (1900) 175 U.S. 677, 44 L. Ed. 320, 20 S.C.R. 290.

land unless a constitutional provision, statute or treaty conflicts.[12] But since foreign nations are not barred from presenting claims by such provisions of domestic law[13] the courts and executive officials have always endeavored to interpret them in accord with international law. if possible.[14] Especially is this true with reference to constitutional provisions. Thus the compulsory process for obtaining witnesses guaranteed to accused persons by the sixth amendment has always been construed in accord with the usual exemption from such process enjoyed by resident diplomatic officers.[15] The eighteenth amendment itself has not been allowed to impair the immunity of diplomatic baggage. Under date of April 29, 1922, the department of state informed the writer:

"No change has been made with respect to the privilege of entry free of duty without examination of the baggage and other effects of diplomatic officers accredited to this government, which privilege is accorded to them under articles 376 and 377 of the Customs Regulations of 1915."

There seems to have been no question of the immunity from search for liquor of foreign public vessels in port. Foreign private vessels in port, however, have been held within the prohibition by appeal to the words of the statute, to the requirements of administrative efficiency and to the duty of protecting American vessels from unfair competition.

The Supreme Court based the decision already cited on the prohibition by the eighteenth amendment of "transportation of intoxicating liquors . . . within the United States and all territory subject to the jurisdiction thereof for beverage purposes." It is to be noticed that the other prohibitions, "manufacture and sale within," "importation into" and "exportation from" the United States, are not involved and that "transportation within" is given a somewhat broad interpretation. The attorney general, however, was influenced by the Volstead Act which also prohibits "possession," though that term is not found in the amendment. He also fortified himself by Justice Holmes' argument that the makers of the amendment "reasonably may have thought that if they let it (liquor) in, some of it was likely to stay," in spite of

[12]Wright, 11 Am. Jnl. Int. Law 5, 8, 575.
[13]Borchard, Diplomatic Protection of Citizens Abroad 181; Wright, Control of American Foreign Relations 17-18.
[14]Murray v. The Charming Betsey, (1804) 2 Cranch (U.S.) 64, 118, 2 L. Ed. 208; Wright, 11 Am. Jnl. Int. Law 10, 575.
[15]4 Moore's Digest, 643-645; vol. 5 pp. 167-168.

Justice McKenna's insistence that this "presented the United States in an invidious light," and his doubt whether even if the "watchfulness of the government may be evaded . . . such petty pilferings can so determine the policy of the country as to justify the repeal of an act of Congress, and violation or abrogation of its treaty obligation by implication." An additional arrow in the attorney general's quiver was supplied by his own opinion barring carriage of liquor by American ships on the high seas. With that opinion "the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests."

The Supreme Court based its decision on a literal reading of the amendment with but scant attention to the rule of international law on which the foreign ships claimed immunity, yet with Chief Justice Marshall's rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[16] such consideration would seem appropriate in determining the true meaning of the amendment and the Volstead Act. For determining the international responsibilities of the United States, it is of course fundamental.[17] In appreciation of these facts Attorney General Daugherty cited several authorities on the completeness of territorial jurisdiction,[18] to indicate conformity of his opinion to international law, but refrained from an exhaustive examination of the question.

Does international law permit the United States to make and enforce laws prohibiting intoxicating beverages from foreign private vessels in port?

Several theories have been advanced with reference to the exemption of private vessels in port, the British view in general holding against such exemption, and the French holding for it,

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[16]Murray v. The Charming Betsey, (1804) 2 Cranch (U.S.) 64, 118, 2 L. Ed. 208; Wright, 11 Am. Jnl. Int. Law 10, 575.

[17]Supra note 13. France has informally suggested submission of the question to the permanent court of international justice, which would be bound only by treaty and international law. (Statute of the court, art. 38, 22 Col. L. Rev. June No.). Judging from the nationality of a majority of its judges the continental European view of international law would be likely to prevail in this court.

[18]United States v. Diekelman, (1875) 92 U.S. 520, 525, 23 L. Ed. 712; 2 Moore's Digest 275 et seq.; Bayard, Secretary of State, 2 Moore's Digest 308; Wildenhus Case, (1887) 120 U.S. 1, 11, 12, 30 L. Ed. 565, 7 S.C.R. 385; The Exchange, (1912) 7 Cranch (U.S.) 116, 135, 143; 3 L. Ed. 287; The Eagle, (1868) 8 Wall. (U.S.) 15, 22, 19 L. Ed. 365.

as to certain matters.[19] In practice, however, all states refrain from exercising jurisdiction in certain matters pertaining to foreign ships,[20] so the question is really whether such practice is a concession from courtesy and convenience or an obligation of international law. The majority of text writers,[21] including many of British[22] and American[23] nationality and the Institute of International Law,[24] hold the latter view, they, however, disagree as to the extent of the exemption. This can only be ascertained by appeal to reason and practice.[25] Hall, though asserting the British view, recognizes the reasonableness of the exemption in certain cases: "To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so is of advantage to no one."[26] This logic seems to have been recognized by municipal courts of the port state in practice.[27] They have generally refrained from exercising jurisdiction in civil disputes involving merely the ship's personnel,

[19]Charteris, The Legal Position of Merchant Men in Foreign Parts, 1 British Year Book of Int. Law, 1920-21, 45; Wilson International Law, 8th ed., 129.

[20]Charteris, loc. cit., particularly exemptions given in British practice, p. 66, and in German port regulations, p. 80, though according to the writer, p. 56, both of these countries deny any obligation to accord exemptions.

[21]See authorities cited by 1 Halleck, Int. Law, 4th ed., 246, and Hall, op. cit., pp. 212-214. The latter, though recognizing that the rule of exemption "is in course of imposing itself upon the conduct of states" thinks "it can not as yet claim to be of compulsory international authority." In his Foreign Jurisdiction of the British Crown, however, Hall says, "the usage is sufficiently established in its broad lines to render it a fair subject for international complaint if local authorities interfere in questions of discipline which involve offenses criminal by British law; and generally abstention from interference goes considerably further." p. 81.

[22]See 1 Westlake, Int. Law, 2nd ed., 272.

[23]Wheaton adheres to the British view in his International Law but in a review of Ortolan, Diplomatie de la Mer, 2 Revue de Droit Francaise et Etrangère, 206-207 he accepts the French. See Dana ed., of Wheaton, p. 153, note 58, and Charteris, op. cit., p. 59. See also, 1 Halleck, Int. Law, 4th ed., p. 245; Davis, Int. Law, 3rd ed., p. 71; Wilson, Int. Law, 8th ed., p. 129.

[24]Resolution of Aug. 23, 1898, arts. 29-32, 17 Annuaire, 231, Scott, Resolutions of the Institute of Int. Law 151-152.

[25]See 1 Westlake, op. cit., p. 216.

[26]Hall, op. cit., p. 216.

[27]This has often been provided by treaty. See The Ester, (1911) 190 Fed. 216; The Bound Brook, (1906) 146 Fed. 160; Tellefsen v. Fee, (1848) 168 Mass. 188; The Koenigin Luise, (1910) 184 Fed. 170. See also The Reliance, 1 Abbott (D.C.) 317, Fed. Cas. 10,521; Willendson v. The Forsoket, (1801) 1 Pet. Adm. 197, and complaint by Secretary of State Fish on British exercise of jurisdiction in the case of the Anna Camp, Nov. 8, 1873, 2 Moore's Digest, 293; Scott, Cases on International Law, 1st ed., p. 233.

though under the LaFollette Seamen's Act of 1915 American courts are obliged to take cognizance of cases of seamen's wages.[28] Patent laws have generally been held inapplicable to ships in port[29] and in exercising criminal jurisdiction the peace of the port rule, first laid down by the French Conseil d'État in 1806[30] has been followed in most countries.[31]

"The principle which governs the whole matter is this:" said Chief Justice Waite; "disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case."[31a]

Administrative officials have likewise generally refrained from interference in the ship's discipline and when they have made arrests on board it has usually been in pursuance of the port's legitimate jurisdiction.[32] Liberation of prisoners held on board for offenses committed at sea, or for breach of ship's discipline,

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[28]The courts have construed the act so far as possible as not applying to contracts made abroad. See The Rindjani, (1919) 254 Fed. 913; Sandberg v. McDonald, (1918) 248 U.S. 185, 63 L. Ed. 200, 39 S.C.R. 84; Neilson v. Rhine Shipping Co. (1918) 248 U.S. 205, 63 L. Ed. 208, 39 S.C.R. 89. This was not possible however, of the contract involved in Strathearn S. S. Co. v. Dillon, (1920) 252 U.S. 348, 64 L. Ed. 607, 401 S.C.R. 350. See also F. K. Neilsen, 13 Am. Journ. Int. Law, 12, Stowell, Intervention in International Law, pp. 261-268.

[29]Brown v. Duchesne, (1857) 19 How. (U.S.) 183, 15 L.Ed. 595. A British court held the reverse in Caldwell v. VanVlissingen, (1851) 9 Hare 415, 21 L. J. Ch. 97, but Parliament promptly passed a statute recognizing the exemption, 46-47 Vict. c. 57 sec., 43, now in 7 Ed. VII c. 29, sec. 48. The British Plimpsoll act of 1876, which regulated with criminal penalties the loading of foreign vessels in British ports, caused some discussion (2 Moore's Digest 282-283) but was incorporated in the consolidated shipping act of 1894 and in 1906 amendments further regulated foreign ships in British ports in respect to loading and life saving appliances. (1 Stowell and Munro, International cases 434-445). The LaFollette seaman's act, passed by the United States in 1915 goes even farther, in regulating the composition and care of the crew and the life saving appliances on foreign vessels clearing from American ports.

[30]Text printed in 1 British Year Book of Int. Law 1920-21, 50 and Perels, Das Int. Offent. Secrecht der Gegenwart, 2nd ed., p. 62.

[31]See Charteris, loc. cit.

[31a]Wildenhus Case, (1886) 120 U.S. 1, 30 L. Ed. 565, 7 S.C.R. 385, which thoroughly reviews American and Foreign Precedents. See also Legare, Att. Gen., 4 Op. 98, 102, Cushing, Att. Gen., 8 Op. 73 and Secretary of State, Webster in Creole Case, Aug. 1, 1842, 2 Moore's Digest 353-354.

[32]See case of L'Ocean, 2 Moore's Digest 856. Incarceration of free negroes on foreign vessels in ports of South Carolina before the civil war

has been successfully protested by the flag state;[33] and in the *Creole case* Great Britain was held liable in an arbitration for liberating slaves on board an American ship in one of her West Indian ports.[34] Here, however, the forced entrance of the Creole was a primary basis of the decision. In the similar case of the Maria Luz, a later arbitration held otherwise.[35] A moral disturbance of the peace may be caused by the presence of slavery in the port of a state. Consequently this also accords with the principle suggested by other cases, that foreign private vessels in port are exempt from port jurisdiction except insofar as the local authorities are obliged to act in defense of the safety and peace of their territory and the civil rights of their own citizens and foreigners not of the ship's company.[36]

Thus it would seem in accord with international law to hold foreign merchant vessels exempt from the operation of American prohibition laws in respect to liquor which cannot reach shore or intoxicate any one who will reach shore. This would obviously permit the United States to prohibit service to passengers on board. With respect to liquor carried as cargo in transit to foreign ports, the danger of leakage into a market offering top prices is so great that prohibition would seem justifiable. With respect to liquor in the ship's stores the question would seem to depend on the adequacy of the assurances given that it will remain there during the ship's stay in port. As for that part of the ship's stores intended for the crew it would seem that the law and customs of the ship's flag with respect to service in seamen's rations may be observed, provided adequate precau-

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under authority of the port act, may be justified as a measure of necessary security in a state with a large slave population. Attorney General Berrien was of this opinion in 1831, 1 Op. 762, thereby reversing the opinion of his predecessor, Wm. Wirt, in 1824 1 Op. 430. The act is also sustained by 1 Twiss, Law of Nations, 230. Merchant vessels can not give asylum to refugees from local justice as the United States contented in the Barrundia case, 1890. 2 Moore's Digest, 855, 871 et seq; Scott, Cases in Int. Law, 1st ed., p. 275.

[33]See cases of John Anderson, (1879) The Venus, (1830), The Reindeer, (1856) The Atalanta, (1856) 1 Moore's Digest 932; vol. 2 p. 286 et seq. and the Admiral Hamelin, (1911), Charteris, op. cit. 82.

[34]The Creole, (1853) 2 Moore's Digest 358.

[35]This case (1873) involved the release of slaves by Japan from a Peruvian vessel at Kanagawa, Charteris, op. cit. 85; 5 Moore, Int. Arbit. 5034; Darby, Int. Tribunals, 4th ed., p. 798.

[36]Compare this with resolution by Institute of International Law, 1898, arts. 29-32, 17 Annuaire 231, and statement by Bonfils, De la Competence des Tribunaux Francais, sec. 326 endorsed by Wilson, Int. Law, 8th ed., p. 129.

tions are taken by the ship against sale on shore or disorder by drunken seamen.[37]

If, in fact, international law accords these exemptions to foreign private vessels in port, the term "transportation within the United States" of the eighteenth amendment, might, under recognized rules of construction, be held inapplicable to such liquor, since in law it would not be "within the United States."[38]

3. Seizure of Foreign Vessels Beyond the Three-Mile Limit.

A number of vessels suspected of rum smuggling have been seized by officers enforcing the eighteenth amendment beyond the three-mile limit, apparently under authority of an act of 1799 which authorizes revenue officers to visit vessels bound for the United States within four leagues (twelve miles) of the coast and penalize the masters thereof for failure to produce cargo manifests or for unloading without proper authority.[39]

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[37]The law of France and other countries requires the service of wine in seamen's rations on their ships. In Cunard Line v. Mellon, Oct. 23, 1922. Text printed in New York Times, Oct. 24, 1922, p. 2. Judge Hand said: "If the ration is cut off some, in any case, the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the eighteenth amendment. It appears to me just on a fair balance of the relative advantage to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations if honestly kept and dispensed for that purpose alone."

[38]Judge Hand said on this question in Cunard Line v. Mellon: "Cases like Brown v. Duchesne, (1857) 19 How. (U.S.) 183, Taylor v. United States, (1907) 207 U.S. 120, 52 L. Ed. 130, 28 S.C.R. 53, Scharrenberg v. Dollar Steamship Co., (1917) 245 U.S. 122, 62 L. Ed. 189, 38 S.C.R. 28 are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is sui generis, and I have only to follow any decision which is apt to the statute under consideration." Attorney General Daugherty expressed similar doubt of the Supreme Court's decision on principle: "Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases, it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the national Prohibition Act. Whatever doubts there may have previously existed have been swept away by the language of the majority opinion in those cases."

[39]U.S. Rev. Stat. 2760, 2813, 2814, 3067, 5770, Comp. Stat. 8459 ½ b (52), 5510, 5511, 5555, 5770; 1 Moore's Digest 725; 1 Hyde, Int. Law 418,

Seizure in such cases was sustained by Judge Morton in the United States district court at Boston in the case of the Schooner Grace and Ruby,[40] only in case actual communication of the vessel with the shore were established and on September 26, 1922, President Harding ordered confinement of search and seizure to these limits. Subsequent seizure of the Canadian schooner Emerald[41] twelve miles from the coast of New Jersey, presumably under these circumstances, was protested by Great Britain.

International law is as uncertain on this question as on that just discussed, and on this question also the British view which inclines to a rigid maintenance of the three-mile limit, differs from that of continental European countries which generally admit extensions for certain purposes to four leagues or more.[42]

The great majority of text writers and the law of most states recognize three miles as the normal limit of jurisdictional waters,[43] but text writers generally support,[44] and legislation generally provides, for a wider jurisdiction for certain purposes, and in certain circumstances.[45] Even Great Britain has such legislation. It is true that her hovering act of 1736, which suggested the American act of 1799, was repealed in 1876 because of doubt as to its international validity, but acts are still in force for quarantine and fishery protection beyond the three-mile limit.[46] Most other states authorize customs inspection of incoming vessels within the four league limit.[47]

Hershey, Int. Law, 1912, p. 198; Naval War College, Int. Law Topics, 1913, p. 18-19.

[40]The Grace and Ruby, Press notices, Sept. 26, 1922.

[41]The Emeral, Press notices, Oct. 18, 1922. The British Schooner, Henry L. Marshall was seized Aug. 1, 1921, (Stowell, 275.)

[42]Compare Hall, op. cit., p. 266 with Russian Memorandum to Japan, 1912, U.S. For. Rel. 1912, p. 1308.

[43]The Scandinavian countries recognize four miles, France, Spain and Portugal six, and the Institute of International Law recomended six in 1894. See N.W.C. Int. Law Topics, 1913, p. 24, 27. It may be doubted, however, whether a claim of general jurisdiction beyond the three mile limit would be sustained in an international controversy. See Hall, op. cit. 157, 1 Westlake op cit. 189, and exchange of notes in British hovering near American coasts while the latter was neutral, March 20, April 26, 1916, U. S. Dept. of State, White Books, Eur. War. No. 3, 1916, pp. 135, 139.

[44]1 Westlake, Int. Law, 176; 1 Hyde, Int. Law 420.

[45]See N.W.C., Int. Law Topics, 1913, p. 24, 34, and U.S. For. Rel. 1912, p. 1308.

[46]Holland, Studies in Int. Law, 1898, p. 182; N. W. C. Int. Law Topics, 1913, pp. 15-16. Hall, Foreign Jurisdiction of the Crown, 1894, p. 243 considers some of the British Hovering Acts as still in effect.

[47]See N.W.C., Int. Law Topics, 1913, p. 24 et seq, and U. S. For. Rel. 1912, p. 1308.

Decisions of municipal courts have generally sustained such assumptions of jurisdiction but these precedents are of little value for international law, because where they involved seizures beyond the three-mile limit by the court's own state, the courts have felt bound by municipal legislation.[48] On the other hand, where the seizure has been by a foreign state, the court has usually felt obliged to recognize a title created by a decree of condemnation by an established court of a recognized government without considering whether the original seizure was illegal or not.[49] The strongest municipal cases denying such jurisdiction are Le Louis,[50] a British case, which, however related to a seizure of a foreign vessel for slave trading and not for defense of the state's territorial jurisdiction and *Rose v. Himely*,[51] an American Supreme Court case, which was by a divided court and overruled two years later.[51a] *Church v. Hubbart*[52] is the case most frequently cited in support of a right to seize beyond the three-mile limit but this in fact turned on the illegality of the vessel's conduct in attempting to smuggle goods, thus the insurers were exempted by the exception in the policy, irrespective of the legitimacy of the seizure by Brazil (then under Portuguese sovereignty) beyond the three mile limit. It cannot be denied, however, that in this case Chief Justice Marshall in dicta supported the right under the circumstances:

"A nation's power to secure itself from injury may certainly be exercised beyond the limits of its territory . . . Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass

[48]In re Cooper, (1892) 143 U.S. 472, 36 L. Ed. 232, 12 S.C.R. 453; The Sylvia Handy, (1892) 143 U. S. 513, 36 L. Ed. 246; Mortensen v. Peters, (1906) 14 Scot. L.T.R., 227 (Moray Firth Case); Direct U.S. Cable Co. v. Anglo-Am. Telegraph Co., (1877) L.R. 2 App. Cas. 394, (Conception Bay Case.)

[49]Hudson v. Guestier, (1810) 6 Cranch (U.S.) 281; Williams v. Armroyd, (1813) 7 Cranch (U.S.) 423.

[50]Le Louis, (1817) 2 Dods. 210.

[51]Rose v. Himely, (1808) 4 Cranch (U.S.) 241, 2 L. Ed. 608.

[51a]Marshall, C. J. in Hudson v. Guestier, (1810), 6 Cranch (U.S.) 281, 285, 3 L.Ed. 224.

[52]Church v. Hubbart, (1804) 2 Cranch (U.S.) 187, 2 L. Ed. 249. Most of the above cases are discussed by L. L. Woolsey, Municipal Seizures beyond the Three Mile Limit, U. S. For. Rel., 1912, p. 1289 and by 1 Hyde, Int. Law, 418-419.

foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to."

In international controversies, however, seizures beyond the three-mile limit have generally been condemned either by diplomacy or arbitration,[53] but seldom has the question of a seizure within reasonable limits off the coast necessary for enforcement of local laws been squarely presented. The British protest at the Russian hovering law of 1909 seems most nearly in point, though here Great Britain seemed to be more directly concerned with the Russian laws creating fishery monopoly beyond the three-mile limit.[54] It should be noticed that the United States, although not protesting against this law, felt "constrained to reserve all rights of whatever nature", in a note of January 21, 1911.[55] It is not believed, however, that either of these governments intended a position contrary to that asserted by Sir Charles Russell, later Lord Chief Justice of England, in the *Bering Sea Arbitration case*:[56]

"No civilized state will encourage offences against the laws of another state, the justice of which laws it recognizes. It willingly allows a foreign state to take reasonable measures of prevention within a moderate distance even outside the territorial waters."

This seems to support the right to seize beyond the three-mile limit and within the twelve-mile limit where necessary for the enforcement of revenue and other laws of local application not violently offensive in themselves to other nations. Unless, however, there is clear evidence that the vessel intends immediately or proximately to violate the state's laws within its territory, the seizure is illegal. When pursuit of a guilty or suspected vessel has been begun within the three mile limit, it is generally admitted under the principle of "hot pursuit" that seizure may be made anywhere on the high seas provided the pursuit has been continuous until the seizure.[57]

Thus Judge Morton's opinion would seem in accord with international law.

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[53]Bering Sea Arbitration, 1 Moore's Digest 921; The Virginius, (1872), 2 Moore's Digest 895, 980; La Jeune Eugenie, (1821), 2 Moore's Digest 920; The Deerhound, (1873) 2 Moore's Digest 979.

[54]U. S. For. Rel. 1912, pp. 1287, 1304.

[55]Ibid. 1299.

[56]1 Hyde, op. cit. 419-420. This statement closely resembles that by Hall, Foreign Jurisdiction of the Crown, p. 244.

[57]1 Hyde, Int. Law, 420; Hall, Int. Law, 7th ed., p. 266; 1 Westlake, Int. Law, 177.