THE DOCTRINE OF HOT PURSUIT.

PART III.

CHAPTER III.

ANALOGIES TO HOT PURSUIT.

Analogies are reputed to be dangerous, and doubtless this is often true when they are employed in attempting to prove a proposition. However, here, I do not believe the danger is so great, since I do not propose to make use of analogy in order to establish either the existence or the provisions of the doctrine of hot pursuit, but merely to illustrate certain more or less parallel developments in the law that may point to possible origins of that doctrine, account for some of its limitations, and perhaps forecast future extensions. With such a purpose in view I am confident that resort to analogies to the doctrine of hot pursuit may be found not only harmless, but profitable as well.

In a foreword to a book by Lauterpacht,[1] Arnold D. McNair of Cambridge claimed the author had succeeded in his endeavour

> to vindicate the practice of resort to rules and conceptions of private law for the purpose of the development of international law, and to give to it the dignity of a scientific basis.

He, Lauterpacht, admitted that some modern writers, such as Bulmerincq[2] and Holtzendorff[3] opposed the scheme "as being at best an ingenious and empirical expedient for filling up a gap or getting out of an impasse." He retorted,

> But how after all, do conceptions of private law enter into the corpus of international public law and remain imbedded there while even the most sweeping positivism is unable to eliminate them?[4]

And it was suggested that,

> If the Permanent Court of International Justice, and the many other tribunals which will of necessity be influenced by its example, are to push

[1] Lauterpacht—Private Law Sources and Analogies of International Law, 1927 p.v.

[2] Bulmerincq—*Praxis, Theorie, und Codification des Völkerrechts*, 1874, p. 130.

[3] Holtzendorff—*Hanbuch des Volkerrechts*, 1885, i, p. 72.

[4] Lauterpacht—op. cit., p. 19.

forward with energy the frontiers of international law into territory not yet included in its domain it is essential that the resources of private law should be exploited ungrudgingly and to the full.[5]

Such a prophecy will encourage us in delving into the law for a few characteristic analogies to the doctrine of hot pursuit.

Analogies of hot pursuit are to be found both in the law relating to land and in laws relating to the sea. It is in the former branch that rules most closely resembling that of hot pursuit have been developed. Let us examine a number of situations on land similar to those in which the doctrine of hot pursuit might be invoked if they arose on the sea, to ascertain by what legal rules these are met.

Perhaps one of the first situations that would logically enter our minds as being one affording an opportunity for the application of a principle comparable to the international law doctrine of hot pursuit would be the case of the pursuit of wild animals and the taking of fish. However, the rules of law in this matter do not suit our purpose quite as well as might have been anticipated. Relying on our knowledge of the doctrine of hot pursuit we might have expected that the beginning of the chase after an animal or the bringing of a fish into one's control in such a way that the completion of its taking would seem highly probable would have invested the person with a sort of property right. But it is not all so delightfully simple.

The theory of taking fish and wild animals was reviewed at length by Mr. Justice Girouard in the case of *The Ship Frederick Gerring Jr.* v. *The Queen*,[6] an appeal taken to the Supreme Court of Canada from the Exchequer Court of Canada, Admiralty District of Nova Scocia. The Court dismissed the appeal and forfeited the ship and cargo, having decided that the removal of fish from a seine in which they had been enclosed and "pursed" was a part of the act of fishing referred to in a Convention between United States and Great Britain in 1818 and in R.S.C., ch 94.

The classic case of *Young* v. *Hichens*[7] was first discussed by Mr. Justice Girouard. That case had held that trespass for taking his fish could not be maintained by a person whose possession had not been absolutely complete, and Chief Justice Denman said that the necessary possession "is not attained until the plaintiff has brought the animals into his actual power." Various authorities were cited

[5] *Ib.*, p. v.
[6] [1897] 27 S.C.R. 271.
[7] (1844), 1 D. & M. 592; 6 Q.B.D. 106.

both from the civil and common law supporting this view,[8] thus demonstrating that there is no magic in the mere occurrence of a pursuit, a fact sometimes lost sight of in international law cases. On the contrary a less weighty group of authorities,[9] including a case decided by the Superior Court of the Province of Quebec to the effect that a property right is created if an animal be wounded and pursued, were cited as claiming that mere discovery and pursuit, with intent to capture, are sufficient. At page 305 of the Report the law as laid down in the well known case of *Pierson* v. *Post,*[10] decided in the Supreme Court of the State of New York in 1805 and reaffirmed in 1822[11] by the same Court, was set out. That case held that:

> Pursuit alone gives no right of property in animals *feroe naturæ;* therefore an action will not lie against a man for killing and taking one pursued by, and in view of, the person who originally found, started, chased it, and was on the point of seizing it. Occupancy in wild animals can be acquired only by possession, but such possession does not signify manucaption, though it must be of such a kind as by nets, snares or other means, so circumvent the creature that he cannot escape.

A somewhat similar situation, but one in which advantage has been taken of the theory of pursuit is in the case of an immediate and unremitting pursuit of an escaping thief,

> Such a present and earnest following of a robber as never ceases from the time of the robbery until apprehension.[12]

This old English rule of "fresh suit" seems closely analogous to the doctrine of hot pursuit. One of the effects of such "fresh suit" was to prevent the operation of the old common law principle of

[8] Cited, Angell—Tide Waters, 1847 ed., p. 157; Quoted, Gaius—Institutes of Justinian, *de rerum divisions;* translations of Sandars, Lib. 2, t. I, L. 13: "It has been asked, whether, if you have wounded a wild beast so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it ceases to be yours and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion because many accidents may happen to prevent your capturing it. D. xli, tit. I." Also cited, Domat—Liv. 3, tit. E, 2 par. 7 (Strahan ed.); Savigny—Jus Possessionis (Perry's ed.), p. 257; Puffendorf—Lib. 4, cap. 6, s. 9; Heinneccius—sect. 342; Grotius—Lib. 2, cap. 8, ss. 3 and 4.

[9] Barbeyrac; Pothier—Propriete, 1772, n. 26; *Charlebois* v. *Raymond,* 1867, 12 L.C. Jur. 55, decided by J. A. Berthelot, J.

[10] (1805), 3 Caine, 175.

[11] *Buster* v. *New York* (1822), 20 Johns. 74.

[12] Black—A Law Dictionary 1910, p. 525, citing: 1 Blackstone's Commentaries, by Thomas M. Cooley, 4th ed., p. 297; Staundeforde—*Les Plees de Coron,* Lib. 3, cc. 10, 12.

waifs or *bona waviata.*[13] Waifs, according to Blackstone, were goods carried away with him by a thief in his flight and "waived" or thrown away by him in order to avoid being apprehended. Now if these were seized by someone other than the party from whom they were stolen they were given to the king by the law as a punishment upon that party for having failed to pursue the felon himself and take his goods away from him. It was understood that it he diligently chased him immediately after the robbery, and caught him, which was called "fresh suit," or had him convicted afterwards or procured the evidence necessary to convict him, he should be given back his goods which had been stolen.

A kindred idea has been carried over into American jurisprudence under the same name, "fresh pursuit," in connection with reclaiming escaped animals or capturing thieves flying with stolen goods. A case illustrating the principle admirably is that of *The People* v. *Pool,*[14] and it may also serve as an indication as to what we may expect to be considered a reasonably immediate or hot pursuit under the doctrine of international law in which we are primarily interested in this study.

In that case the prisoner and others held up two stage-coaches at a place in California 12 miles from the Somerset House and 14 miles from Placerville. The coaches proceeded to the latter place, and the deceased, a deputy sheriff, was told of the robbery. He and a constable started out after the robbers, and came up with them at the Somerset House about seven hours after the robbery occurred. The prisoner shot the deputy sheriff, and the Court held this to be murder since that officer was not required to have a warrant or disclose his identity to the prisoner, since this was a case of fresh pursuit. Section 137 of the Statute applicable[15] provided that an officer arresting a person without a warrant had to inform him of his authority, and the reason for the arrest, except when he was found in the actual commission of a public offence, or "when he was pursued immediately after an escape." It was explained in the judgment[16] that immediate pursuit was designed to have practically the same signification as fresh pursuit, and that it was not to be so strictly interpreted as to defeat its reasonable operation.[17] Immediate and fresh are relative terms, and an interval which might

[13] Blackstone—loc. cit.
[14] (1865), 27 Cal. 573.
[15] Stat. 1851, p. 226, s. 134, and p. 227, ss. 140, 141.
[16] At p. 579 of the Report.
[17] Citing 1 Russell on Crimes, 606, 607.

have the effect of destroying the relation as immediate in time existing between two events might not have the same effect if it was placed between another pair of events. It was explained by way of illustration that if a person living near the post-office should go there for a letter and stay there an hour before going home again it could not be said that his return was immediate. Yet if a man journeyed to a foreign country, stayed there only a few days and returned, it might well be decided that his return was immediate. In the case before the Court it was held that by reason of the circumstances the interval elapsing between the robbery and the commencement of the pursuit had not severed the immediate connection between the two events. This case was approved and followed in the case of *White* v. *State*[18] by the Honourable S. H. Terral, Mississippi Judge, who held under section 3026 of the Code of 1880 that where a felony was committed at night and a pursuit begun in the morning it was a fresh pursuit. Similar provisions are to be found in the legislation of various other States.[19]

It has been stated as the law that neither the recapture of goods nor the pursuit of an offender is to be considered as a remedy, but only as a measure of defence. The problem as to retrieving stolen goods has been fully dealt with in Rhode Island in the case of *Kirby* v. *Foster*.[20] In that case it was expressly stated that the right of recapture was a right of defence only and not of redress. At page 438 of the Report Mr. Justice Stiness said:

> Unquestionably, if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake his property, by the use of necessary force.

In the case of *Porter* v. *State*,[21] the Supreme Court of Georgia declared that an officer is only justified in pursuing an offender and using the force necessary to effect his arrest in order to prevent "a failure of justice."

[18] (1892), 70 Miss. 253.

[19] E.g.; Georgia s. 896 of the 1895 Penal Code; Delaware, Rev. Code, 1852, s. 21, c. 128, p. 539: The law in the Dominion of Canada is contained in the Criminal Code: s. 31: "Everyone is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from and to be freshly pursued by those whom he, on reasonable and probable grounds, believes to have lawful authority to arrest that person for such offence;" and s. 649: "Anyone may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person . . ." 55 & 56 Vict. c. 29, ss. 29 and 552.

[20] (1891), 17 R.I. 437.

[21] (1905), 124 Ga. 297; 52 S.E. 283.

The effect of an arrest improperly made without a warrant and not after a fresh pursuit, or of an arrest outside the jurisdiction is that the arrest was illegal, and it has been held in some cases that the prisoner should be discharged and his trial discontinued.[22] However, sometimes statutes provide that when an offender being sought on a warrant in one county or jurisdiction flees across the line into an adjoining county he may be pursued and arrested there.[23]

Another rule providing for pursuit on land which at first sight appears remotely analogous to the doctrine of hot pursuit, but in which the analogy is, I confess, very faint and strained, is the common law principle enunciated in a number of decided cases[24] that a person on whom a felony has been attempted by another, or who is endangered in life and limb, need not retreat before that other, but may pursue him until he is out of danger. But it is consistently held that he should not take the life of the one he is pursuing unless the danger threatened may not be avoided by any other means within his power. An Iowa case[25] has extended this rule, for the Supreme Court of that State held that the pursuer under such circumstances may chase his adversary away not only until he finds himself out of apparent danger, but until he actually finds himself out of danger. Again it has been held in an Arkansas decision[26] that the pursuer was not obliged to abandon his defensive pursuit simply because the other party began to retreat, if it appeared that he was only withdrawing in order to take up a more advantageous position from which to renew the combat. Of course, in all these cases it is essential that the pursuit be bona fide believed necessary to protect one's safety,[27] and that the degree of force used should not be greatly in excess of that necessary to accomplish that purpose.[28]

It must be frankly admitted that this last analogy drawn between a common law doctrine and the international law doctrine of hot

[22] *Ex parte A. B. Crawford, Appt.* (1928), 148 Wash. 265; 61 A.L.R. 374; 268 Pac. 871; affirmed in 1929 in 273 Pac. 751.

[23] See *Kindred* v. *Stitt* (1869), 51 Ill. 401; *Krug* v. *Ward* (1875), 77 Ill. 603; *Ressler* v. *Peats* (1877), 86 Ill. 275.

[24] E.G., *State* v. *Thompson* (1893), 45 La. Ann. 969, 13 South. 392; *Pond* v. *People* (1860), 8 Mich. 150; *Commonwealth* v. *Daley* (1844), 2 Clark, 361, 4 Pa. Law J., 150; *West* v. *State* (1877), 2 Tex. App. 460; *Stoneham* v. *Commonwealth* (1889), 86 Va. 523; 10 S.E. 238.

[25] *State* v. *Linhoff* (1903), 97 N.W. 77; 121 Iowa 632.

[26] *McDonald* v. *State* (1912), 104 Ark. 317; 149 S.W. 95.

[27] *People* v. *Graham* (1923), 217 P. 823; 62 Cal. App. 758; *Taylor* v. *State* (1919), 213 S.W. 985; 85 Tex. Cr. R. 468; *Bayer* v. *State* (1924), 257 S.W. 242; 96 Tex. Cr. R. 310.

[28] *State* v. *Wright* (1897), 141 Mo. 333; 42 S.W. 934; see, also, *Hardin* v. *State* (1926), 283 S.W. 517; 104 Tex. Cr. R. 178.

pursuit is rather far-fetched. For though it might at first seem that the situations are very similar and that, therefore, we should anticipate finding in connection with the hot pursuit doctrine limitations corresponding to those appended to the other rule, on more careful investigation it is apparent that there is am important distinguishing feature of which account must be taken, though I do not believe it totally destroys the value of the comparison. I refer to this difference, that the common law rule is dealing with a situation where pursuit is a part of a plan of self-defence, of self-protection, whereas such a statement cannot be made with perfect accuracy concerning the doctrine of hot pursuit, since it is invoked largely in the interests of law enforcement, and not purely for protective purposes. Nevertheless, this distinctive element would not seem to render the limitations we have discovered in connection with pursuit on land irrelevant or superfluous, but simply inadequate; in other words, we would naturally expect, surely, having found limitations on a rule as to pursuit resting on necessity for the continuance of one's existence, even more rigid and comprehensive limitations on a doctrine based on convenience of enforcing laws.

Let us next assume that the offender we are considering flees across a land frontier into a neighbouring State. To follow him would involve an affront to the sovereignty of that State which might be deeply resented. For nations are very sensitive about unauthorized crossing of their boundaries. There is a familiar saying that "an Englishman's home is his palace," and it seems nations cherish the privilege of preventing entry within their borders as dearly as the Englishman values the privacy of his dwelling. So Daniel Webster, then Secretary of State, when Great Britain contended she had the right to cross the border into the United States in order to prevent the violation of her territorial sovereignty in Canada in *The Caroline* incident of 1837, claimed that to justify her conduct Great Britain would have to show a "necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberations."[29] This or a kindred idea has been expressed by Lee, who contends in his book on Captures in War, at page 123, that it is lawful to pursue the flying enemy into the territory of another State, the pursuing force being put in motion outside that State "while the matter is warm." But the usual insistence on the inviolability of national land frontiers is exemplified in the

[29] See Hershey—Incursions into Mexico and the Doctrine of Hot Pursuit, in American Journal of International Law, 1929, Vol. xiii, p. 557, at p. 562.

negotiations between the United States and Mexico with relation to the crossing of their mutual border.[30]

Both these countries have proclaimed the right to pursue marauding bands of Indians across the border into the other country for the purpose of dispersing such bands is not a violation of the law of nations, that the State should not be heard to protest such a step as a disregarding of its sovereignty, since had its sovereignty been adequate it could have avoided the situation by preventing the departure of the marauders from its own domain in the first place. And it was argued that there was a sort of doctrine of "fresh trail," a rule providing for hot pursuit on land. But the refutation of this proposition lies in the fact that before it became useful, the two nations found it necessary to embody it in a Treaty[31] agreed upon July 29, 1882, which permitted the crossing of the frontier by armed forces of either country in pursuit of hostile Indians. The fact that such an agreement was ultimately required shows that this right of pursuit is not a strict right under rules of international law, as contrasted with the usual treatment of the doctrine of hot pursuit onto the high seas. Of course, the glaring point of difference is that in this latter type of pursuit it does not lead directly to a violation of the sovereignty of another State, except in so far as the sovereignty of the State of the flag can be said to have been violated.

It is not only, however, when an armed force of considerable number crosses the border, possibly threatening the peace of the State entered, that ground for complaint arises. Even if the unauthorized entry is only made by a single person, say a police officer, chasing a fugitive offender, the State may exclude the would-be pursuer. The principle back of this power is explained by G. F. de Martens thus:[32]

> Chaque Etat ayant exclusivement le pouvoir criminel dans l'enceinte de son territoire, tout acte de juridiction criminelle exercé dans un territoire étranger est à considérer dans la règle, comme une grave violation du droit des gens. La poursuite armée d'un criminel, et à plus forte raison son arrestation et son enlèvement sur un territoire étranger, de même que sa transporta-

[30] This is outlined in an editorial comment by Hershey, on Incursions into Mexico and the Doctrine of Hot Pursuit, in American Journal of International Law, Vol. xiii. 1919, p. 557.

[31] See, I Malloy, Treaties, pp. 1144-5, 1157-8, 1162, 1170-1, 1177. And for the pertinent correspondence II Moore's Digest, pp. 418 ff., and I Wheaton's Digest, pp. 229 ff. See Foreign Relations, 1882, p. 396. For a similar treaty with Canada re the Western frontier, see *Ib.*, 1881, p. 577.

[32] de Martens—*Précis du Droit des Gens*, par M. Ch. Vergé, 2nd ed., 1864, Vol. I, s. 103, p. 287.

tion armée par le territoire, ne peuvent donc se justifier qu'en vertu d'une permission spéciale, d'une convention, ou d'une servitude de droit public. Aussi toutes les puissances de l'Europe s'accordent-elles a considérer comme une grave injure tout acte de ce genre qui, hormis ces cas, aurait été commis ou attenté.[33]

So the recovery of an escaped or fugitive offender from the other country to which he has gone can usually only be accomplished with the consent and co-operation of the State in which he has sought asylum, by the use of the process of extradition. The old view entertained by writers generally until about the middle of the last century was that the extradition of a fugitive from justice was a matter of comity or of international duty on the part of the surrendering State. But after the cases of *United States* v. *Davis*,[34] *Holmes* v. *Jennison*,[35] and the opinion of the Law Officers of the Crown (Sir John Campbell, A.-G., and Sir R. M. Rolfe, Solicitor-General) in 1830 in the *Spanish Convicts' Case*[36] the old view has been abandoned in America and England, and it is generally acknowledged that fugitives from justice can only be surrendered under the provisions of treaties or statutes.[37] Professor Norman Mackenzie, commenting on the recent case of *In re Incampe*,[38] in which the Dominion of Canada refused to consent to the extradition of Incampe at the request of the Republic of France, which it was held was not entitled to it, the offence being one against German criminal law and committed in the Saar Basin, German territory, has stated the development concisely thus:

> I agree that extradition 'was largely a matter of comity or of international duty and that it is now governed by the terms of treaties or statutes.'[39]

Perhaps the international law doctrine of hot pursuit, which is remotely analogous, in that it permits the bringing back for adjudication of offenders who have fled beyond the limits of the State,

[33] This paragraph may be freely translated as follows: 'Each State possessing exclusive power to deal with criminals within its own territory, any act of criminal jurisdiction done in foreign territory is considered usually as a serious violation of international law. Armed pursuit of a criminal, and *a fortiori* his arrest and removal to another country, as well as his armed transportation through the country, can only be justified, then, by reason of an express permission, of a treaty or of a servitude under international law. And all the Powers of Europe are agreed in considering as a serious affront any act of this kind which, with the exception of these cases, might have been done or attempted"—the writer's translation.

[34] (1837), 2 Sumner 482.

[35] (1840), 14 Peters 540.

[36] Referred to in letter mentioned in note (37), *infra*.

[37] See letter from His Honour Judge O'Hearn to the Editor, in 7 C. B. Rev. 343.

[38] [1928] 3 D.L.R. 240.

[39] *Ib.*, p. 344, at p. 345.

to the rule as to extradition, may be passing through the same development. For the very existence and the details of the doctrine of hot pursuit have been so uncertain and obscure that it would seem desirable that they be incorporated in international codes and conventions, a step which seems to be being taken at the present time.[40] The doctrine of hot pursuit may conceivably, I venture to surmise, be about to reach the stage when its effectiveness in international legal circles will be gauged by the frequency of the inclusion of its provisions in treaties.[41]

A comparison that brings out a further striking similarity between the two means of getting back an offender we have just been considering consists in observing the situation that arises when the appropriate method is ignored and the offender brought back in an irregular way.

The answer to this question concerning the rules of extradition is to be found admirably stated in an article by Ardemus Stewart, from which I wish to quote:[42]

> It is an elementary principle of criminal law that a court which has obtained jurisdiction of the person of the accused will not inquire into the means by which that jurisdiction was acquired; the mere fact of jurisdiction is all with which it is concerned. As was said above, a fugitive who has been kidnapped in a foreign country, and brought forcibly and against his will into the jurisdiction where he stands accused, will not be released on that ground, although the act of kidnapping is an offence against the government within whose territory he is found, as well as a plain violation of his personal right to freedom from arrest except by due process of law.

This excerpt from the article I have just reproduced was a recitation of the holding in the famous case of *Ker* v. *Illinois*,[43] the outstanding authority on the subject. In that case the prisoner took his case to the United States Supreme Court by a writ of error to the Supreme Court of the State of Illinois.[44] He complained that, prior to his indictment for larceny and embezzlement, he had been literally kid-

[40] Fulton—op. cit. p. 538.

[41] See, also, the case of *United States* v. *Rauscher* (1886), 119 U.S. 407, in which Mr. Justice Miller, delivering the opinion of the Supreme Court of the United States, declared at page 411 of the Report, that the delivering up of fugitives from justice, formerly depending on the discretion of the surrendering state and the comity of nations, though not even in modern times a strict obligation of international law, has been imposed by many states on themselves as a duty by treaties. The case held that the prisoner could not be tried for any offence other than that on which he had been extradited under the Treaty of 1842 between Great Britain and the United States.

[42] Stewart—article in American Law Review (1894), Vol. 28 p. 568, at p. 570.

[43] (1886), 119 U.S. 436.

[44] In which Court the case was unreported.

napped in Peru and brought forcibly to Cook County against his will, and that in his removal from Peru the requirements of the Extradition Treaty of 1870 between the United States and Peru had not been met. The Court held that this did not negative its jurisdiction. It was not alleged that Ker had been taken out of Peru under that or any other Treaty, but was admitted that he had actually been kidnapped by Julian, the United States' messenger to whom the warrant directing Ker's arrest had been given. It was pointed out by Mr. Justice Miller, who delivered the opinion of the Court, that the prosecution of Ker could be continued, and yet neither the Government of Peru nor the prisoner himself would be left without a remedy: for diplomatic protests would be available to the former, which could also, possibly, extradict Julian under the Treaty of 1870 for kidnapping; and the messenger could also be proceeded against in damages for the unauthorized seizure. Another American case arriving at the same result was *In re Ezeta.*[45] That case arose out of a revolution in Salvador, during the course of which the defendants, who were high military authorities in that republic, including the acting president, retreated, pursued by insurgents, to the port of La Libertad, where they sought refuge on the United States steamer Bennington. They sought their release, so that they might go to Panama, not desiring to reappear in their own country, where the successful revolutionists had charged them with various crimes, namely, murder, arson, robbery, and rape. They were forced to go to the United States by the captain of *The Bennington.* Application for their extradition was made under the United States—Salvador Treaty which provided for the mutual extradition of persons charged with certain specified offences committed within the one country who seek asylum in the other. In defence the defendants relied on the fact that they had not sought asylum in the United States, but had been taken there involuntarily. District Judge Morrow promptly dismissed this objection by the statement that[46] the prisoner himself cannot set up the mode of his capture by way of defence."

The same reasoning has been upheld in numerous cases in which ships and their crews have been seized on the high seas and brought into port for adjudication, and were the principle to be extended to its utmost possible application, the scope of the doctrine of hot pursuit would be considerably narrowed, to say the least. It was held

[45] (1894), 62 F. 964.

[46] At page 968 of the Report.

in the case of *The Underwriter,*[47] an American vessel seized by the United States Coast Guard 34 miles from shore for carrying liquor without a permit to do so, that the possession of the *res* in the collector of the port is sufficient to give the court jurisdiction, and the particular method of bringing the vessel within the jurisdiction need not be inquired into. However, in that case the seizure might have been authorized anyway, for it was an American vessel and she was seized on the high seas where no other jurisdiction attached to her. A somewhat similar view was given expression in the case of *The Panama,*[48] in which it was held even after the concluding of the 1924 Treaty with Great Britain, and in dealing with a British schooner, that the

> right of the executive to seize and search for violations of our laws is not limited by any particular distance from the shore.[49]

On the contrary, the District Court for the Northern District of California held two years later in the case of *United States* v. *Ferris et al,*[50] in which the defendants, charged with conspiracies to violate the Prohibition and Tariff Acts, objected to the jurisdiction of the Court since the seizure of the Panaman ship in question, *The Federalship,* had occurred 270 miles from the United States coast, that,

> In and by it (the 1924 Treaty between Panama and the United States) the right is 'conferred' and Panama concedes it, in consideration thereof the United States accepts and agrees to it as therein limited, and promises to comply with it. Hence, as the instant seizure was far outside the limit, it is sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to the defendants.[51]

The opinion went on:

> The prosecution contends, however, that courts will try those before it regardless of the methods employed to bring them there. There are many cases generally so holding, but none of authority wherein a treaty or other federal law was violated, as in the case at Bar.

And it was pointed out that though in the well-known case of *Ford et al.* v. *United States*[52] the Court did review this line of cases holding that the manner of seizure is unimportant and that the trial may proceed if the *res* is before the Court, the defendants had in fact actually raised no plea to the jurisdiction of the Court, a factor

[47] (1925), 6 F. (2d) 937; (1926), 13 F. (2d) 433; affirmed by the United States Supreme Court in 1927 as *Maul* v. *United States,* 47 Sup. Ct. Rep. 735.
[48] (1925), 6 F. (2d) 326.
[49] Hutcheson. District Judge, at page 327 of the Report.
[50] (1927), 19 F. (2d) 925.
[51] At page 926 of the Report.
[52] (1927), 273 U.S. 593.

which may have influenced the dicta. In an earlier decision, that in the case of *The Marion L. Mosher,*[53] Mr. Justice Woodrough, delivering the opinion in the District Court for the Eastern District of New York, reached virtually the same result as he would have had he reasoned that the case could go on since the *res* was before the Court, disposing of the matter simply by saying that the exercise of power outside the three-mile limit of territorial waters by executive officers is a political and not a judicial question. However, international complications which may arise must be taken into account if the municipal legislation or executive action is ambiguous. I do not believe that courts will generally go very far in holding they have jurisdiction to entertain actions against ships, more especially foreign ships seized on the high seas, simply because the *res*, the ship, happens to be before the Court. For this reason, I believe the doctrine of hot pursuit will continue to be found useful in numerous such cases, more especially if the matter is taken before an arbitral tribunal, and not merely before a municipal Court, which is in most instances, in spite of the fact that it may claim to be administering international law, very effectually bound to pay homage to the local law-making body.

On the sea I believe the most perfect analogy to the doctrine of hot pursuit is the kindred doctrine of constructive presence. John Bassett Moore says the classic example of this type of case is that of *The Araunah,*[54] a Canadian ship seized by the Russian authorities outside the three-mile limit, because its crew had been engaged in prohibited seal fishing by means of canoes within territorial waters. Lord Salisbury, on behalf of the British Government, admitted that

> even if The Araunah at the time of the seizure was herself outside the three-mile territorial limit the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters.

The same principle has been invoked in the United States. The District Court in Alaska made use of it in 1910 in the case of *The Tenyu Maru.*[55] *The Tenyu Maru,* a Japanese schooner, lay 11½ miles off the coast of Alaska, while her small boats engaged in illegal seal fishing closer in to shore. Two of her small boats were

[53] *United States* v. *United States Fidelity and Surety Company,* decided August 13, 1923, unreported, but summarized in Jessup—op. cit., p. 257.

[54] 1 Moore's Arbitrations, 824-825; Jessup—Op. cit., p. 111.

[55] (1910), 4 Alaska Reports, 129.

captured 1½ miles off the Pribilof Islands with a freshly-killed female seal in their possession. The Government cutter next proceeded to the schooner and libelled it, charging her, her officers and crew with illegal fishing within the three-mile limit. The crew were also indicted; and three men captured in the small boat taken within the three-mile limit were found guilty of illegal seal fishing and sentenced to a term in the federal jail, whereas the other members of the crew, even those captured in a small boat the pursuit of which had been commenced within the three-mile limit but which had not actually been arrested until it had succeeded in crossing the three-mile limit line, in which situation it would seem that the doctrine of hot pursuit might properly have been invoked and convictions secured, were acquitted and discharged.

In the suit on the libel, the owner denied the jurisdiction of the Court over the ship, and District Judge Overfield conceded the point that,

> if, in the present case, the libelled vessel did not violate the provision of the statute within three miles of the shore of the said Pribilof Islands the libel must be dismissed on the ground of lack of jurisdiction.[56]

But he called upon the doctrine of constructive presence and held that *The Tenyu Maru* was as thoroughly involved in illegal seal killing

> when the small boat was captured within the three-mile limit on July 9th (1909), as though she had been standing within the zone at the time, in the absence of any evidence showing extenuating circumstances.[57]

Reference was also made[58] to the principle, said to be recognized in the criminal jurisprudence of all countries, that a person who, from a point outside a country, wilfully puts in motion a force which takes effect within its boundaries, may be required to answer in the country where the evil was actually done. And, showing the similarity between the two doctrines, the Judge explained the doctrine of hot pursuit thus:

> The law is against the right of the United States to capture a vessel belonging to Japan when found sealing at a distance ever so close, but outside the three-mile limit. There can be no doubt that if actually discovered within the prohibited zone and engaged in illegal fur sealing, she could be followed, captured, libelled, and forfeited.[59]

The Court apparently gave the same effective recognition to the

[56] At page 135 of the Report.
[57] *Ib.*, page 136.
[58] *Ib.*, page 139.
[59] *Id.*

doctrine of constructive presence, and declared the ship forfeited to the United States.

The doctrine of constructive presence has also been called into play by the United States in justifying the seizure of vessels hovering outside the three-mile limit and attempting to smuggle liquor into the country by means of their own small boats or boats putting out from the shore for that purpose and controlled by the ship itself. Such a case was that of *The Grace and Ruby*,[60] a British vessel owned and registered in Yarmouth, Nova Scotia. She sailed from the Bahamas with a clearance for St. John in New Brunswick; however she did not go to that destination, but arrived at a point six miles off the Massachusetts coast, sent a man ashore who brought out a motor boat, loaded it with liquor and started to take this to land. It was seized by revenue officers, and a couple of days later *The Grace and Ruby* herself was seized by a revenue cutter, taken into Boston and libelled. Her owners disputed the jurisdiction.

District Judge Morton held that the conduct of *The Grace and Ruby* actually constituted an unlawful unlading by *The Grace and Ruby* at night within the territorial limits of the United States, in violation of Revised Statutes, sections 2872 and 2874; for though the process of unlading was commenced beyond the three-mile limit, yet it continued until the liquor had been actually landed in the United States, and the schooner herself took an active part in the unlading by means of her small boat and three of her crew who were put on board the motorboat for that purpose. So it was held that *The Grace and Ruby*, though in fact seized four miles from the shore, should be declared forfeited. The writer of a note in the *Yale Law Journal*[61] has said that the case of *The Grace and Ruby* satisfies the requirements of the rule as to hot pursuit, and that the same result might have been arrived at had that doctrine been invoked rather than the doctrine of constructive presence, another striking commentary on their similarity.

Of course, the validity of the doctrine of constructive presence has been questioned,[62] as has been the existence of the doctrine of hot pursuit; but the weight of authority seems to be in its favour. Its purpose is correlative to that of the doctrine of hot pursuit, its similarity to which has just been emphasized. Its object is to bring within the jurisdiction an offence committed by a ship which did

[60] (1922), 283 F. 475.
[61] Wesley A. Sturges—Note in 32 Yale Law Journal, p. 258.
[62] See, for example, *The Sagatind* (1926), 11 F. (2d) 673; *United States* v. *Archer* (1926), 12 F. (2d) 137.

not actually come physically within that jurisdiction, while the doctrine of hot pursuit seeks to retain jurisdiction over an offending ship after it has actually departed from the ordinary limits of jurisdiction.

PART IV.

CHAPTER IV.

CAUSES CELEBRES.

In spite of the numerous cases in which mention has been made of the doctrine of hot pursuit, most of the available information concerning it is to be obtained from four or five cases. It will not only be profitable to review these, since they disclose the law on the subject, but it will be, I believe, interesting both because of the historical incidents out of which the controversies developed and the variety of circumstances involved.

THE ITATA.

The steamship *Itata*, a merchant vessel owned by the Compania Sud Americana de Vapores, was captured in the harbour of Valpraiso, Chile, in January, 1891, by the Congressional Party who were attempting to overthrow the established Chilean government of which Balmaceda was the head. She was used as a transport to convey troops, provisions and munitions, and as a hospital ship, as well as a place in which to confine prisoners. Four small cannons were put on her decks, and she sometimes flew a jack and pennant.

A plan was worked out for obtaining arms and ammunition for the insurgent forces who were badly in need of them. Ricardo A. Trumbull purchased 5,000 rifles and 2,000,000 cartridges in New York, and he and another agent of the revolutionists had them shipped by rail to San Francisco. Meanwhile *The Itata* set out from Chile to get this equipment. She took on board 12 soldiers at one Chilean port, and put herself under the command of the captain of *The Esmerelda*, a war ship in the service of the Congressional party, at another. She proceeded to the United States, but before appearing in American waters the cannon on her decks were stowed away in the hold, the jack and pennant were hauled down, the soldiers on board discarded their uniforms and arms and appeared as civilians; and she represented herself as an ordinary merchant ship when met by the customs officers at San Diego, California, at which port she

was provisioned and coaled up. The plan was that she should meet an American coasting schooner, *The Robert and Minnie,* in which Trumbull had placed the arms and ammunition he had bought. Some of the United States officers had become suspicious of *The Robert and Minnie,* but she had eluded them and escaped into Mexican waters. Suspicion was naturally also cast upon *The Itata,* and the Attorney-General advised that if she were found to be engaged in violating the neutrality laws of the United States, she should be detained. On instructions from the District Attorney the local marshal went on board *The Itata,* and left her in charge of a keeper.

However, *The Itata* weighed anchor on the 6th of May, and against the protests of the keeper who was first put on shore, steamed out of the harbour to meet *The Robert and Minnie* with which she had meantime had communication. They came together on the 9th of May at a point alleged to be a mile and a-half south of San Clemente Island, where the arms and ammunition were transhipped into *The Itata,* which set out at once for Chile.[63]

Feeling that due respect had not been paid to the dignity of their country[64] and possibly that its neutrality laws had been violated as well, the United States authorities, through Mr. Tracy, Secretary of the Navy, ordered two American cruisers, *The Charleston* and *The Omaha,* to go in search for *The Itata,* and if practicable to bring her back.[65] *The Charleston* started off in pursuit, actually arriving at Iquique before the other ship,[66] which had been delayed in its passage because of difficulty with some of its nautical instruments. The Congressional authorities, believing the arms and ammunition had been transferred at San Diego, expressed disapproval of this action and voluntarily promised to hand her over into the possession of the United States on her return together with her cargo. But on learning that the arms and ammunition had really been put on board *The Itata* off San Clemente island, it was sought to retain them, which Rear-Admiral McCann of the United States Navy

[63] Statement of facts from *United States* v. *Trumbull* (1891), 48 F. 99.

[64] In his annual message of Dec. 9, 1891, President Harrison said: "It would have been inconsistent with the dignity and self-respect of this Government not to have insisted that the Itata should be returned to San Diego to abide the judgment of the Court."—See, Foreign Relations of the United States, 1891, page vii.

[65] See orders to Capt. Remey of U.S.S. Charleston, May 8, 1891, H. Ex. Doc. 91 52 Cong. 1 Sess. 250.

[66] Sherman—Relations of the United States and Chile, 1925, p. 155.

refused; and finally both were given up together,[67] and taken to the United States for adjudication.

Trumbull and Burt were indicted, and appeared before the District Court for the Southern District of California.[68] The main part of the charge against them was in connection with the fitting out of *The Itata* with intent that she should be used by the Congressional Party in committing hostilities against the then established and recognized government of Chile, with which the United States was at peace, contrary to the provisions of section 5283[69] of the Revised Statutes of the United States.

District Judge Ross, who tried the indictment expressed grave doubts as to whether the Section applied to the case at all or not. For it appeared in the chapter of the statutes headed "Neutrality," and was enacted in furtherance of the obligations of the United States as a neutral nation. As he conceived the idea of neutrality it signified that the neutral should treat each contending party alike. And the term "people" in the statute, he stated, relying on its interpretation by the Supreme Court of the United States in an earlier case,[70] could not be taken to include an association in no way recognized either by the United States or by the government against which its revolt was directed, a revolt not even sufficiently dignified to be termed a war.[71] It was also held that the evidence did not show that the defendants had fitted out, armed or furnished *The Itata*, or had attempted to do any of these things, within the purview of the statute, since the arms put on board were not to be used in a campaign with the ship or in defending it; but were to be

[67] Latter facts taken from Moore—International Law Digest, 1906, Vol. II., pp. 985-6.

[68] *United States* v. *Trumbull et al.* (1891), 48 F. 99.

[69] This section was quoted, at p. 99 of the Report, as follows: "Every person who, within the limits of the United States fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of, any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues and delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she shall be so employed, shall be deemed guilty of a high misdemeanour, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building or equipment thereof, shall be forfeited, one-half to the use of the informer, and the other half to the use of the United States."

[70] *United States* v. *Quincy* (1832), 6 Pet. 445.

[71] See page 105 of the Report

transported to Chile for use there.[72] The defendants were found not guilty.

Nor did the suit in Admiralty for the forfeiture of the ship and cargo for alleged violation of the neutrality laws instituted by the United States in the same District Court and before the same District Judge, achieve results any more satisfactory to the United States.[73] New evidence was admitted and added to that already introduced in the case of *United States* v. *Trumbull* in the same Court, the additional testimony only strengthened the opinion of the Court that when *The Itata* came within the waters of the United States she was not a ship of war; for it was explained that the four small cannon she had carried and the ammunition for them had been discharged before leaving Chile, and that the 12 men taken on board were employed, not as soldiers, but as stokers. The Court was undoubtedly correct in this finding, for even the American Minister in Chile spoke of *The Itata*, not as a war ship, but as a transport in his correspondence.[74] Otherwise the facts were the same as those in the prosecution of Trumbull and Burt. And on the same reasoning, the libels were dismissed.

The suit was taken by appeal to the Circuit Court of Appeals for the Ninth Circuit.[75] It was claimed that even though the purchase of the arms and ammunition was legal, their shipment to Chile to be used there against the Balmaceda Government, with which the United States was at peace, was unlawful, and proper grounds for a decree of forfeiture of the vessel.[76]

The Court met this contention with the argument that, if the Congressional Party were to be accorded the status of belligerents, they had under rules of international law the right to ship the arms and ammunition at their own risk, as well as to purchase them, subject only to the penalties which the laws of war authorize. Indeed, before the expedition of *The Itata*, the Secretary of State had advised the Chilean Minister at Washington[77] that his request that the

[72] See page 107 of the Report.
[73] *The Itata* (1892), 49 F. 646.
[74] Mr. Egan to Mr. Blaine, May 8, 1891, in Foreign Relations, 1891, p. 122.
[75] *The Itata* 1893, 56 F. 505.
[76] At page 509 of the Report.
[77] Mr. Blaine to Señor Lazcano, March 13, 1891, in Foreign Relations, 1891, at p. 314, which read in part: "The laws of the United States on the subject of neutrality, which may be found under title lxvii of the Revised Statutes, while forbidding many acts to be done in this country which may affect the relations of hostile forces in foreign countries, do not forbid the manufacture and sale of arms or munitions of war. I am therefore at a loss to find any authority for attempting to forbid the sale and shipment of arms and munitions of war in this country, since such sale and shipment are per-

United States direct her Customs-Houses to prevent the shipment to Chile of arms and munitions of war, the importation of which the Chilean Government had declared prohibited, could not be complied with. This in itself should have been a warning to those officers who sought to detain *The Itata* that she had committed no offence against American neutrality laws.

Mr. Justice Hawley proceeded with the appeal by considering what would be the effect of the argument of the Attorney-General, if granted, that since the United States had not done any act tending to accredit the rebellion in Chile, the Congressional Party had no belligerent rights. It was conceded that the judiciary ought to follow the executive department in such a matter. But nevertheless, if it was decided to treat all warlike acts of the Congressional Party as piratical acts if performed on the sea or as robbery if on land, and to treat the members of that Party as pirates and robbers, it would not assist the appellants in their case, for then the statute on which the suit rested would be no longer applicable, being intended to govern only cases of neutrality between two recognized belligerent countries.[78]

Mr. Justice Hanford delivered a concurring opinion,[79] based expressly upon the ground that the vessel was not intended for service against the republic of Chile. The judgment of the lower Court dismissing the libels was affirmed. A petition for a writ of certiorari was denied by the Supreme Court of the United States without stated reasons.[80]

Finally the company that owned the ship presented a claim for damages before the United States and Chilean Claims Commission[81] under the Convention of August 7, 1892.[82] The question which the Commission set itself to determine was:

> Did the Government of the United States, by the seizure of the 'Itata' for an alleged infraction of its neutrality laws, incur any legal liability.[83]

The treatment of the incident in the cases arising out of it before

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mitted by our law. In this relation it is proper to say that our statutes on this subject are understood to be in conformity with the law of nations, by which the traffic in arms and munitions of war is permitted, subject to the belligerent right of capture and condemnation."

[78] Page 510 of the Report.

[79] *Ib.*, p. 518.

[80] *United States* v. *Steamship Itata*, 1892, 149 U.S. 789.

[81] *South American Steamship Co.* v. *The United States*, No. 18, United States and Chilean Claims Commission, Convention of August 7, 1892. See, also, Shield's Report, 90.

[82] I Malloy's Treaties, 185.

[83] See Moore—International Arbitrations, 1898, Vol. III, p. 3069.

the American Courts was reviewed, and it was declared to be the belief of the arbitrators that "the United States committed an act for which they are liable in damages and for which they should be held to answer."[84] After quoting from decisions in American cases and Mr. Field's International Code, it was concluded by the tribunal:

> We are of the opinion that the South American Steamship Company has a claim for extraordinary repairs of machinery and boilers made necessary by the long voyages to and from San Diego.[85]

the demurrer of the United States was overruled.

This dispute has been cited by many authors and advocates as enunciating the law concerning the doctrine of hot pursuit. For example, it constitutes virtually the whole section devoted to Hot Pursuit in Moore's International Law Digest;[86] and Jessup[87] has cited it, quoting from the decisions at some length, as imposing on the right of hot pursuit the very proper limitation that the pursuit must cease when the pursued vessel enters the territorial waters of its own or of a third country.

But in spite of emphatic statements to the contrary, the case of *The Itata* seems to be a very weak pronouncement upon rights under the doctrine of hot pursuit. I believe that the disputes that arose might well have been, indeed they practically were, settled without reference to that doctrine. Moreover, even had the factors which made it feasible to decide the questions involved without reliance upon that doctrine been absent, I cannot convince myself that there were proper grounds for commencing a hot pursuit, even though, as was not the fact, the seizure of the pursued ship had been effected before the territorial waters of Chile had been reached. For, as the American courts have held, no offence had been committed. And even if the transferring of the cargo of arms from *The Robert* and *Minnie* to *The Itata* had amounted to a violation of the law of the United States, is there any more than presumptive evidence that that act took place within the jurisdictional limits of the United States? A writer[88] who has had access to American official archives and other valuable sources of information on the problem, has stated:

[84] *Ib.*, p. 3070.
[85] *Ib.*, p. 3071.
[86] I.e., section 316.
[87] Jessup—op. cit., p. 110.
[88] Sherman—The Diplomatic and Commercial Retations of the United States and Chile, 1925, at p. 155.

The 'Itata' met the 'Robert and Minnie' about forty miles off the coast where the cargo of arms was transferred.

And even if we could make the assumption, a very liberal one, I think, that the act complained of occurred within the jurisdiction of the United States, could it be established that the ensuing pursuit was commenced before *The Itata* escaped therefrom? This is another link in the chain necessary to bind together a complete right of hot pursuit which is lacking in the situation we are considering. So, I reiterate, *The Itata's* rôle in the history of the doctrine of hot pursuit has been over-emphasized.

(To be continued.)

J. STAFFORD H. BECK.

Ann Arbor, Mich., U.S.A.

WOULD SUPPRESS THE PRESS.—The following declaration signed by Editors or ex-Editors, representative of British journalism, was issued in London on March 18th:—

The Newspaper Press to-day plays a much more intimate part in the life of every citizen than Parliament, and its influence, day in day out throughout the year, is far greater than that of the political leaders.

At a time when the bulk of our electorate is still new to its political responsibilities, the power that the multiple newspaper gives to irresponsible amateur politicians to mislead their readers by the weapons of distortion and suppression constitutes a menace to our treasured political institutions the gravity of which it would be impossible to overstate.

We, having no partisan interest whatever in the issues raised by the St. George's by-election, desire to place on record our sense of the national danger of the abuse of the power of the Press involved in the recent encroachments of newspaper proprietors upon the political field.

(Signed) GERALD BARRY, J. A. SPENDER,
G. E. BUCKLE, J. C. SQUIRE,
A. G. GARDINER, H. WICKHAM STEED,
KINGSLEY MARTIN, EVELYN WRENCH,
RHONDDA.

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