THE DOCTRINE OF HOT PURSUIT.

PART IV.

CHAPTER IV.—(*Continued*).

The North.

The case of *The North* was not an international arbitration; but in deciding the issue the Canadian Courts looked to the rules of international law on the subject rather than merely to municipal statutes; so the case is of much greater interest than it would have been had only local Canadian law been taken into consideration. In fact, it has been said that the doctrine of hot pursuit has received its most thorough treatment in *The North* case.[1]

The American schooner *North* was on the 8th of July, 1905, hove-to and unlawfully engaged in fishing for halibut in Quatsino Sound, Vancouver Island, within the three-mile limit of Canadian territorial waters. She had all her four dories out fishing. She observed the Canadian Fisheries Protection Cruiser *Kestrel* approaching her about four or five miles off, hurriedly picked up two of her dories and headed for the open sea without even taking time to pick up her other dories. *The Kestrel* pursued the fleeing ship at top speed, only deviating from her course slightly to pick up one of the dories. She came up with *The North* after ten or twelve minutes' chase at a point which was determined by cross-bearings to be about one and three-quarter miles outside the three-mile limit. Freshly caught halibut were found lying on the deck, so that there was no room left for doubt that the ship had been fishing within the three-mile limit. Besides, there were several tons of halibut in the hold. The schooner and its three dories were towed to Winter Harbour, Quatsino Sound, and the fourth dory was seized when it came in later.

The trial came on before Martin, Local Judge in Admiralty, in July, 1905.[2] The facts were not controverted, the master frankly admitting that the schooner had been unlawfully engaged in fishing. Nor was there any dispute as to any of the important geographical points, for cross-bearings had been taken carefully by *The Kestrel*.

[1] Jessup—op. cit., p. 107.
[2] *The King* v. *The Ship North*, 1905, xi Br. Col. Rep. 473.

What was truly presented before the Court was a pure question of law, principally international law—the determination of the rights that may be exercised under the doctrine of hot pursuit.

Attorney-General Wilson, counsel for the owners of the ship, denied that a Canadian court could have jurisdiction over the offence, and claimed that the detention of the crew on board amounted to unjust imprisonment. His argument was based on the familiar theory, which he supported by various cases, that a British ship outside the territorial jurisdiction of a foreign State is to be regarded as British territory. This rule applied to the American ship would, he said, prevent the exercise of jurisdiction by the Court, since *The North* was seized outside the three-mile limit. He further pointed out that, according to his own conception of the doctrine of hot pursuit, there was no occasion for invoking it here, since no crime had been committed, and the Dominion Government had no property in the fish to protect. He asserted emphatically that the right to seize after a hot pursuit does not arise after the violation of a mere local regulation, such as the regulation in question, that a foreigner should not fish in Canadian waters without a license.[3]

Mr. Macdonell, advocating the condemnation of the ship, rested his case entirely on the doctrine of hot pursuit. The elements necessary for its application, he said, were an offence within the jurisdiction followed by a continuous pursuit. And he denied that the mere pausing of *The Kestrel* to pick up one of the dories broke up the continuity of the pursuit. Cases were cited substantiating the right of a State to make extraterritorial seizures under certain circumstances.[4] Then Mr. Wilson made a rather dangerous move: he responded with a suggestion that the view expressed on the point in *Hudson* v. *Guestier,* one of the cases relied on by opposing counsel, was *ob iter,* and cited in turn another case[5] equally objectionable in this respect, and with the additional defect that it had been expressly overruled by *Hudson* v. *Guestier.*

Mr. Justice Martin was impressed with the moment of the case before him, for he realized that it involved important questions concerning fisheries on which many of the people of his own province depended for a livelihood and which were an asset of considerable value to his country. So great care was taken in the decision of this case and in the preparation of his judgment.

[3]At page 474 of the Report.

[4]*Hudson* v. *Guestier* (1810), 6 Cranch, 283; *Church* v. *Hubbart,* (1804), 2 Cranch, 187; *The Alexander* (1894), 60 F., 914.

[5]*Rose* v. *Himely* (1808), 4 Cranch, 240.

The first consideration was that merchant ships in foreign ports subject themselves to the laws of the nation to which the port belongs, though they may of course also still be amenable to the law of the flag. This proposition was substantiated by references to several cases.[6] Next it was established that it has been held by American Courts that seizures may be made on the high seas,[7] and from these two conclusions it was reasoned that, *a fortiori* the right to seize would exist after the territorial waters had been actually entered and violated;[8] several writers were quoted to this effect.[9]

Usually four classes of jurisdiction are asserted by States over their territorial waters; the prohibition of hostilities, the enforcement of quarantine, the prevention of smuggling, and the policing of fisheries. And this last is not the least of the duties of a State, especially one bounded, as in Canada, by waters in which fishing is extremely profitable. And though the Government of Canada has no property in the fish, it has been expressly given, by the British North America Act[10] power to protect the interests of the nation at large in those fisheries, and to regulate their use, for instance by requiring licenses to be taken out by foreigners before they may fish there. The exclusive right to regulate the fisheries in the Dominion Government has been affirmed in *The Fisheries Case* in 1898.[11] Moreover, the United States had for a long time recognized and acquiesced in the right of the Dominion to regulate its fisheries, since they are, as are the fisheries adjacent to the coasts of the United States, of great consequence to the country. Both the United States and Canada had endeavoured to guard against depredation of their waters by foreigners, and had prohibited and criminalized poaching there.

It was thus shown that an offence for which she could have been arrested had been committed by *The North* within the three-mile limit, and that she was in fact seized a short distance outside that limit whither she had fled to escape possible prosecution, after a

[6] *E.g., The Queen* v. *Anderson* (1868), L.R., 1 C.C., 161, at p. 166; *The Exchange* (1812), 7 Cranch. 116, at p. 144.

[7] Citing cases referred to in notes (4) and (5), and *Cucullu* v. *Louisiana Insurance Co.* (1827), 16 Am. Dec., 199.

[8] At page 478 of the Report.

[9] *I.e.*, Woolsey—International Law. 6th ed., 1898, p. 71, par. 58; p. 365, par. 212; Taylor—International Public Law, 1901, p. 307, par. 262; p. 310, par. 267; Hall—International Law, 4th ed., 1895, pp. 213, 215, 263, 266; Phillimore—Commentaries on International Law, Am. Ed., 1854, Vol. 1, p. 179; Lee —Captures in War, 1803, 123.

[10] British North America Act, 1867, 30 & 31 Vict., c. 3, s. 91, subs. 12.

[11] *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700 at p. 713.

continuous pursuit by the Government boat, a pursuit not broken by merely turning slightly out of its direct course to pick up one of the ship's dories, any more than would the pursuit of a thief be broken merely by the constable's stopping to pick up and take as evidence the stolen article thrown away in the course of the flight. The seizure was held justified; and the schooner, her boats, tackle, rigging, apparel, furniture, stores and cargo were condemned and declared forfeited to His Majesty.

The case was promptly appealed to the Supreme Court of Canada,[12] where it was heard by five judges in March and April, 1906. Indicative of the importance attached to the issue at stake is the fact that not only did Mr. Wilson, Attorney-General for British Columbia, again appear for the owners of the ship, but that Mr. Newcombe, Deputy Minister of Justice presented the case of the respondent, His Majesty The King on the relation of the Attorney-General for the Dominion of Canada.

Again the preliminary argument was advanced by Mr. Wilson to the effect that the territorial waters off the west coast of Canada form part of the province of British Columbia, and are not subject to the legislative jurisdiction of the Dominion Parliament, and that the case at Bar was not within the jurisdiction of a Dominion Court,[13] a very weak argument. But the main contention put forward in the appeal was that even though the doctrine of hot pursuit may find some basis in international law, as asserted by William Edward Hall and other writers on the subject, yet it is contrary to the law of England, the dominating doctrine of which is the territoriality of the ship. It was argued that international law, or the law of nations, is applied as between nations, and even then must be incorporated in some proclamation or statute announcing the intention or desire to give effect to its rules. No such statute exists in Canada allowing pursuit or seizure beyond the three-mile limit. And it was declared that even if such a right may possibly exist apart from statutory authority under international law it must spring from sovereign power recognized in international affairs, which, it was said, had never been conferred on Canada—an assumption thoroughly inconsistent with modern theories of Dominion status. It was asserted that Canada had no jurisdiction beyond her territorial boundaries, which, for the purposes of the litigation before the Court, meant the

[12] *The Ship North* v. *The King*, [1906] 37 Can. S.C.R. 385.
[13] At page 386 of the Report.

three-mile limit. Certain cases very little in point were cited in support of this proposition.[14]

Mr. Newcombe, for the respondent, replied that it was not necessary to look for a statute permitting pursuit, after a municipal regulation had been violated, out onto the high seas;[15] for poaching on a State's fisheries has been recognized as a crime by many States, including England and the United States. As such a crime having been committed it might properly be followed by a continuous pursuit of the offender if such a measure were made necessary by his flight. As to the question whether the matter was not within the jurisdiction of the provincial Courts, it was stated that the Dominion alone should represent the country as far as transactions with parties outside the State are concerned, especially so when the affair is connected with territorial waters or where the defence of the State or the security of its interests are involved. And this is further fortified when, as in the case before the Court, the dispute is also related to the right of the Dominion Government to legislate with regard to sea-coast fisheries and to prescribe the terms, if at all, on which foreigners shall be permitted to fish there.

Mr. Justice Davies delivered an opinion in which he reached the conclusion that the appeal should be dismissed,[16] with which Mr. Justice Maclennan concurred.[17] He denied the necessity of a statute or treaty permitting seizure outside territorial waters, which had been relied on by counsel for the appellant. As had been done in the lower Court, he quoted from Hall's book to show that the right of hot pursuit is a part of the law of nations. At page 394 of the Report he said:

> The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.

Mr. Justice Davies looked at the statute in question[18] not to ascertain whether it expressly provided for the right of hot pursuit, but whether the terms of the statute negatived that right. He concluded that the fourth section was broad enough in its language to permit its being considered as impliedly adopting the doctrine. It is not customary for statutes passed in the British Empire to state

[14] *E.g.*, inter al: *Reg.* v. *Keyn* (1876), 2 Ex. D. 63; *McLeod* v. *Attorney-General for New South Wales*, [1891] A.C. 455.
[15] At page 388 of the Report.
[16] At page 392 of the Report.
[17] *Ib.*, page 403.
[18] R.S.C., c. 94.

affirmatively that rules of international law are to apply so as to permit seizures outside territorial waters. Such rules are presumed to apply *proprio rigore*, and were the Parliament to enact expressly that a certain rule should apply, being a rule of international law, it would bind none but the local courts, unless the other States concerned had acquiesced in it. The doctrine of hot pursuit is a part of international law, acquiesced in by other States, and not contradicted by the statute under which *The North* had been seized. Consequently the seizure was lawful.

An alternative line of reasoning leading to the same decision was offered,[19] based on the so-called kidnapping cases.[20] The tenor of this argument is to the effect that the original offence having taken place within the territorial jurisdiction, and the Court being competent to try the case, and having the *res* before it, it may proceed with its adjudication. Such a principle has been used to good advantage in numerous cases when persons charged with offences have been kidnapped in a foreign State and brought back for trial before a magistrate having jurisdiction without the usual process of extradition.[21] Here, to pursue the analogy, the ship committed an offence within Canadian territorial waters, fled to the high seas just outside those waters, was seized there and brought before a Canadian Court. Pushing this principle to its logical conclusion it may be said that it will not then lie in the mouths of the owners of the ship to plead as a defence an irregularity in the mode of her taking. Such a line of attack has assisted courts in the United States in resolving many otherwise more or less difficult cases.[22] Nor does such reasoning as Mr. Justice Davies used appear to arrive at an inequitable result: for, as he pointed out, if the ship was actually captured on the high seas after a hot pursuit it really can offer no valid objection to the prosecution going on; and if the pursuit was irregular, for instance if it was carried into the territorial waters of another State, it is conceivable that the littoral State or the State of the flag would intercede on behalf of the ship through diplomatic channels. In any case the members of the crew, if they could establish an unlawful seizure or detention, would always find available the remedies for illegal arrest or imprisonment.

[19]At page 395 of the Report.

[20]Such as *Ker* v. *Illinois* (1886), 119 U.S. 436.

[21]*In re Walton* (1905), 11 O.L.R. 94; and *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, were cited, at page 396 of the Report, on this point.

[22]*E.g., The Underwriter* (1925), 6 F. (2d), 937, at p. 939; (1926), 13 F. (2d), 433; *The Rosalie M.* (1926), 12 F. (2d), 970; Dicta in *Ford* v. *United States* (1926), 273 U.S. 593, at p. 606.

An opinion concurring in the result was delivered by Mr. Justice Idington.[23] He did not accept the appellant's proposition that before a doctrine of international law may be applied in a case it must be found expressed in some proclamation or statute. But he adopted that reasoning so far as to assume that the judgment must necessarily be rested upon the statute covering the matter. He also conceded that doctrines of international law should, to become operative and effective, be incorporated into municipal statutes. Nevertheless, the right under international law should first be recognized, for otherwise a State might enact as international law provisions diametrically opposed to the true principles of international law, a mistake which would only serve to offend other members of the family of nations, and would not tend to establish the provisions of the statute as a rule of international law.

When read in the light of the customary and international law and so interpreted the meaning of the statute became quite clear, said Judge Idington. The right of seizure was first provided as to vessels in Canadian waters. Its third section then described the steps that might be taken in causing the forfeiture of a vessel. Then section 4 provided for seizure of vessels liable to forfeiture by any of the officers mentioned in the second section of the Act. Now, the right to make a seizure must have originated in Canadian territorial waters, and the attempt to seize must have begun there. And there was nothing in the statute to indicate where the actual seizure had to be effected, nothing to show that the Dominion Parliament did not intend that the seizure might be made any place where the offending vessel might later be discovered. The unstated restriction upon the right to seize must be imported from the international law on the subject, otherwise the statute would have an unreasonable meaning. And by international law as generally recognized, it was stated, provisions relative to seizure are taken to imply seizure within the three-mile limit of international law, if the particular state legislating adheres to that limit. It may be inferred from the unqualified provisions for seizure that it was to be permitted within as broad limits as would be consistent with recognized rules of international law. The case of *Macleod* v. *Attorney-General for New South Wales*[24] authorized just such a construction of the sections relating to the offence of bigamy in the 54th section of the New South Wales Criminal Law Amendment Act of 1883.[25] Lord

[23]At page 397 of the Report.
[24][1891] A.C. 455, at p. 456.
[25]46 Vict., No. 17.

Halsbury, handing down the judgment of the Judicial Committee of the Privy Council in that case, interpreted the general words "Whosoever being married," appearing in the statute, to read "Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales," and to the single word "Wheresoever" was attributed the meaning, "Wheresoever in this Colony the offence is committed."

But there was nothing in the Canadian "Act respecting Fishing by Foreign Vessels" to indicate an intention of the Legislature that the adoption of international law on the subject should be only partial or fragmentary. Its general terms would justify the inclusion within its provisions of any pertinent rules of international law not inconsistent with its express terms. Consequently, if the right to seize was to be restricted under ordinary circumstances to territorial waters, in appropriate cases the doctrine of hot pursuit, another rule of international law, must be available. In other words, the appellants in the principal case could not be permitted to say that though there had been an offence within territorial waters together with the correlative right of seizure, the rules of international law were to apply in so far as to restrict the right of seizure to those waters, without their also admitting that another rule of international law justified the seizure outside territorial waters after an immediate continuous pursuit.

The right of hot pursuit was here recognized by Mr. Justice Idington as a rule of international law which prevented the offending ship from frustrating the right in the authorities of the littoral State to make the seizure simply by reaching a point outside territorial waters in an attempt to escape.[26] This right sprang from the very necessity of the case in the interests of self-defence and protection. It is a reasonable extension of the ordinary control over the waters adjoining the coast essential in order that the exercise of the sovereign power in protecting the State may be effective, a right recognized by writers of such eminent authority as Hall and acquiesced in by various States.

In meeting the argument of appellant's counsel that "Canada has no jurisdiction beyond her territorial boundaries, in this case the three-mile limit," an attempt to draw a distinction between the authority vested in the Imperial Parliament and the authority of the Canadian Parliament over the waters adjoining the coasts of the two nations, Mr. Justice Idington pointed out that section 91,

[26]At page 400 of the Report.

subsection 12 of the British North America Act, 1867, conferred plenary power in respect to sea-coast and inland fisheries of Canada coextensive with that possessed by the Imperial Parliament in relation to the same matters. Under the authority of this grant of power, the Act before the Court, Chapter 94, was passed by the Dominion Parliament, and it had been already upheld by the Judicial Committee of the Privy Council in *The Fisheries Case.*[27] thus vindicating the right of Canada to control her own fisheries in the same way as other nations might do, incidentally employing means available under the rules of international law, such as the right of hot pursuit, in the process of such control.

A brief dissenting opinion was presented by Mr. Justice Girouard who construed the Act respecting Fishing by Foreign Vessels as definitely making it necessary that a seizure under its provisions be made within the three-mile-limit; though he confessed that had it not been for the statute, he would not have been obliged to dissent[28] for had the statute not been drafted as it was, he said, the operation of the doctrine of hot pursuit would not have been negatived. It may be said that all the judges sitting on the case on *The North* upheld the doctrine of hot pursuit.

The Anichab.

This very curious case[29] arose out of a campaign in Africa during the Great War. It involved the consideration in a negative, yet very interesting, way of the doctrine of hot pursuit.

Fearing an aggressive campaign by the British, a German officer ordered that certain of the craft in Luderitzbucht and Swakopmund, two harbours in German South-West Africa, be transported inland to avoid capture by the enemy. A launch, a number of lighters, rope, fenders and other accessories, some belonging to the German Woermann Line and some the property of the German Government, pursuant to this order, were taken about 12½ miles inland in August and September, 1914, by rail. During October they were moved by rail to a point 94 miles inland, and in April of the following year they were transported to two points Otavi and Omaruru, 310 and 148 miles from the coast respectively, where they were left standing on rail.

[27] *I.e.*, [1893] A.C. 700.

[28] At page 389 of the Report.

[29] *In the Matter of The Anichab and Other Vessels and Craft*, [1919] P. 329.

In the meantime His Majesty's military forces, operating under the Government of the Union of South Africa, occupied Luderitzbucht and Swakopmund on September 19, 1914, and January 14, 1915. A number of vessels and craft and accessories were seized there, and when these were declared condemned as prize by Lord Sterndale, President of the Probate, Divorce and Admiralty Division, no further dispute was raised as to them.[30] About six months after the occupation of the harbours, the British captured Omaruru and Otavi, about the end of June, 1915. They found the lighters and other paraphernalia, not afloat in the river, but still on shore and in very poor repair, obviously at least not ready for service in the water. Lord Sterndale's comment on their condition reveals his sense of humour: After referring to the fact that one of them had become covered with vegetation, he continued, "The vegetation on the others does not seem to have been quite so luxuriant."[31] The question for the determination of the courts was whether they were at the time of the seizure properly the subject of maritime prize, and whether or not the Crown was entitled to their condemnation as such.

Lord Sterndale, one of the presidents of the Probate Division, before whom the condemnation proceedings were argued, stated that it had been impressed upon him that he should treat the case as providing a proper situation for the application of the doctrine of hot pursuit.[32] He did not deny, he stated, the proposition Lord Parker had, he said, outlined in the case of *The Roumanian*,[33] that,

> If property is liable to seizure at sea, and the enemy succeeds in getting ashore and escaping with his property, the belligerent who is trying to capture it has a right to pursue him and to take the property from him.[34]

Nor did he throw any doubt on such a proposition. Neither did he suggest that a pursuit might not last six months and yet be a "hot

[30]See (1922), 1 A.C. 235, at p. 236.
[31]At page 337 of the Report.
[32]*Id.*
[33][1916] 1 A.C. 124.
[34]I do not find any such statement or any other reference to the doctrine of hot pursuit in the judgment of the Judicial Committee of the Privy Council in the case of *The Roumanian* delivered by Lord Parker of Waddington in November, 1916, and reported in [1916] 1 A.C. 124. Both the facts and the rationale of the decision appear from part of one of the concluding paragraphs of the judgment, found at page 144 of the Report, which reads: "Their Lordships, therefore, have come to the conclusion that the petroleum on board "The Roumanian" having from the time of the declaration of war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped (part of) it into the tanks of the British Petroleum Oil Company, Limited, for safe custody, and that therefore its seizure as prize was lawful."

pursuit." In fact it may be inferred that Lord Sterndale contemplated that in certain circumstances he might declare a pursuit that had lasted for six months a hot pursuit. But on the facts before him he said he could not bring himself to the point of deciding that in the interval between the occupation of the ports and the seizure of the ships far inland the British forces had been "getting on as fast as they could after these craft to try and get them."[35] The evidence submitted was consistent with a holding that the expedition into the interior was not commenced immediately after the taking possession of the ports. Indeed, Lord Sterndale stated that an affidavit of the Secretary to the Admiral, Sir Oswyn Murray, which was before the Court, suggested to him that the forces that seized the northern section of the railway lines from Swakopmund to Otavi, approached their objective from the land and not from the sea, and that, therefore, the whole campaign was a land operation and not a continuation of a marine or coastal engagement.[36] So he held that the doctrine of hot pursuit could not be invoked, and that the craft were not properly the subject of maritime prize.

But even in making his award the President showed that he was not perfectly confident in the unassailability of his position. He admitted in so many words that he might have been wrong in the conclusion at which he had arrived.[37] He refused to give a judgment for indemnity for damages as such courts are wont to do if it is found that a captor has made a wrongful seizure without having any reasonable ground for what he has done. The craft captured at the ports were condemned; while those taken at the two inland points were ordered released, without payment of damages, since there was sufficient doubt about the matter to afford possible reasonable grounds for what had been done on behalf of the Crown.

His Majesty's Procurator-General appealed from the judgment of the President of the Admiralty Division in so far as it refused to condemn as prize the craft which had been seized at the two inland places. The Woermann Line, respondents, did not present a case. The appeal was heard *ex parte,* and the judgment of the Judicial Committee of the Privy Council was delivered by Lord Parmoor. The same question had to be decided, namely, whether the craft under consideration, admittedly subject to being seized and condemned as prize at the declaration of war, had ceased to be the sub-

[35]At page 337 of the Report.
[36]*Ib.,* p. 336.
[37]*Ib.,* p. 338.

ject of maritime prize, and were simply private property seized on land by His Majesty's military forces.[38]

The appellant raised two points: first he argued that the craft had not ceased to be liable to capture as maritime prize, the answer to which was merely a review of the decision of the President in the lower Court on the point and of the case which he had distinguished, *The Roumanian*; the appellant also argued that the craft were the subject of maritime prize, since, if they were not condemned, they would when they came again into the possession of their lawful owners be once more employed for naval purposes, a submission which was summarily dismissed as immaterial.[39] This appeal apparently neither added anything to nor subtracted anything from the exposition of the doctrine of hot pursuit by the Admiralty Division.

The Vinces.

If the courts of a single nation could effect the extension of a rule of international law, an extension of the doctrine of hot pursuit would undoubtedly have been accomplished through the decisions in the case of *The Vinces*. For there that doctrine was applied in a novel situation[40] which it had not previously been suggested it would cover.[41]

The schooner *Vinces* was at the time the events leading to this case occurred a vessel of British registry, under the command of Michael Gillam, her master, and alleged, with some room for doubt on the point, to be the property of the Smart Shipping Company, Limited, of Halifax, Canada. She sailed from that port on February 15th, 1927, with a cargo of intoxicating liquors which she had taken on board at St. Pierre, Miquelon, and cleared for Nassau, in the Bahamas. However, she did not go to the Bahamas, which she might have reached in a week, but, as had been prearranged, met another vessel on the high seas about five days out from Halifax at an uncertain point off the coast of the United States, into which the cargo of *The Vinces* was transferred. About the 9th of March *The Vinces* was observed by an American revenue cutter engaged in taking on a cargo of liquors from the British schooner *Dorothy M. Smart* at a point on the high seas, the cargo which the master admitted was that on board *The Vinces* at the time of her seizure

[38]At page 236 of the Report.
[39]At page 239 of the Report.
[40]As stated by Cochran, D.J., in 20 F. (2d), 164, at p. 172.
[41]The writer's resumé of the facts of the case is a summary of the findings of the District Court and of the statement of facts by the Circuit Court of Appeals.

later. Five days later, March 14th, she was seen by the United States Coast Guard cutter *Mascoutin* within 12 miles of the United States and headed directly for the coast in an attempt to land the liquors she had on board. At about four o'clock in the afternoon *The Mascoutin* by several blasts of her whistle signalled her to stop, she being then about 7½ miles from the coast, and consequently within the 12-mile limit as well as the one hour's sailing distance of the Treaty concluded between the United States and Great Britain in 1924, since she was capable of doing 8½ miles an hour. *The Vinces* did not stop, but turned and headed seaward. The American boat gave chase, and got close enough to hail the other vessel by megaphone; but the master replied that he would not stop until forced to. *The Vinces* kept on even after several blank shots had been fired, but finally stopped when a solid shot was sent into her, in a spot which neither injured any of the crew nor seriously damaged the vessel. The chase had lasted about an hour, the two boats being by that time about a mile outside the twelve-mile limit.

The officers of *The Mascoutin* went on board *The Vinces*. The master could produce no manifest of the cargo of intoxicating liquors found in his ship, but he handed over his clearance paper which he falsely stated to be a manifest of the cargo then on board, and he also said, though he knew it to be untrue, as the Court found, that he was not bound for the United States. It was also found by the officers that the liquor was not under seal as it was required to be under the 1924 Treaty. *The Vinces* was towed into Charleston harbour and put, along with her cargo, in the possession of a United States marshal.

The first legal proceeding following the incident I have just described was a suit in equity brought before the District Court of the Eastern District of South Carolina by the master of *The Vinces* against the United States collector of customs for the port of Charleston, the United States attorney for the eastern district of South Carolina, and the prohibition co-ordinator for the South-eastern district of the United States for violations of the National Prohibition Act and other statutes, to secure the release of the vessel, her crew and himself, and her cargo.[42] This District Judge Cochran refused to decree, since other adequate remedies were available to the plaintiff either in the law courts or in Admiralty. The bill was dismissed without prejudice to the plaintiff's right to other relief.

About two months later the suit in admiralty on the libel filed

[42] *Gillam* v. *Parker* (1927), 19 F. (2d), 358.

by the United States against the vessel and cargo was heard before the same judge.[43] Three causes of action were set out:[44] the first alleged that *The Vinces* was bound for the United States and was found within four leagues of the coast with a cargo of intoxicating liquors, but without any manifest; the second alleged that *The Vinces* was fraudulently endeavouring to import into the United States, within 12 miles of the coast and also within one hour's sailing distance alcoholic beverages, which the master and crew sought to introduce into the commerce of the United States by making false and fraudulent representations; the third cause of action alleged that the master and crew did fraudulently and knowingly import foreign merchandise in the form of intoxicating liquor without paying any duty or intending to pay duty. The libel was directed to the imposition of certain penalties claimed to be a lien on the vessel, and the forfeiture of the cargo of liquor. The answer of the master declared that he was defending on behalf of the owners, the Smart Shipping Company, Limited, of Halifax, Nova Scotia, that the ship had not been bound for the United States, that it had not come within the jurisdiction of the court or even within four leagues of the coast, that no false statements had been made, that on request papers sufficient for the journey he claimed the ship was making from Halifax to Nassau had been handed over, and that the seizure had been made outside the 12-mile limit.[45]

It is not necessary, and it would not be very gratifying, at this point to go through the testimony received by the Court. Seemingly all rules of evidence were thrown to the winds: written unsworn statements by absent Government witnesses were accepted; evidence of a very dubious character confirming the presence of *The Vinces* within the 12-mile limit about six hours before she was sighted by *The Mascoutin*, tendered by a negro fisherman was admitted; and an exhibit was not thrown out even though the Judge was aware that it had been altered during one of the recesses of the Court.[46] The only witness for the defendant was the master of the libeled ship, and his testimony was very largely discredited, partly, apparently, owing to his demeanour in the court room.

The first step taken by Mr. Justice Cochran was to refuse to ignore the claimant's motion to dismiss on the ground that the seizure was unlawful, simply on the authority of a series of cases cited

[43]*The Vinces* (1927), 20 F. (2d), 164.
[44]For which, see pages 165 and 166 of the Report.
[45]At page 166 of the Report.
[46]At page 169 of the Report.

by counsel for the libelants, such as *The Underwriter,*[47] that had held that if the *res* is in possession of the officer making the seizure and within the jurisdiction of the court when the libel is filed it is sufficient to support the jurisdiction. None of these cases declared that the principle might be applied in dealing with foreign ships. So the Court proceeded to decide the question of the lawfulness of the original seizure of *The Vinces.*

The Court also denied the applicability of *The North* case for the pursuit dealt with in that case was commenced within territorial waters, inside the three-mile limit, quite different from a pursuit begun within the 12-mile limit or within a limit set up for certain particular purposes in a bilateral treaty. However, it was admitted that the case did tend to support the contention of the Government.[48]

Another weak-kneed escape from the necessity of deciding the issue apparently suggested to the Court but not employed, was that since the high seas are free to all nations the United States may seize vessels there which had infringed its laws, an idea usually forwarded only in dealing with American ships,[49] but which dicta in at least one case[50] had stated might be extended to foreign ships, leaving the ensuing complications to be disentangled by diplomatic agents.

The Court pointed out that it is generally recognized that the territory of a State includes a belt of the sea three miles in breadth extending outward from the coast line, but that for the prevention of frauds on the revenue, and for the protection of its borders, and the due execution of its laws, a State may exercise an authority on the high seas beyond the three-mile limit. Of course, objection might be offered by other States. But such considerations are for the legislative and executive departments of the government. And, in United States, when Congress has so extended her jurisdiction, it is the duty of the Courts to give effect to the acts of Congress. This method which the Court adopted of disposing of the point would lead us to expect little weight to be accorded to it, if this case were to be cited before an international tribunal as authority.

In order to prevent frauds on the revenue Congress had as early as 1790 provided for visitation, search and seizure of ships on the high seas within twelve miles of the coast. The similar provisions

[47](1926) 13 F. (2d), 433.
[48]At page 171 of the Report.
[49]See, *Maul* v. *United States* (1927), 47 Sup. Ct. 735.
[50]*The Rosalie M.* (1925), 4 F. (2d), 815.

of The Tariff Act of 1922,[51] which are still in force, govern the decision of *The Vinces* case before the Court.[52] Under the provisions of section 581 of that Act the officers of the *Mascoutin* undoubtedly had authority to hail *The Vinces,* to stop and arrest her, if necessary, while she was within the 12-mile limit. And this authority was not frustrated by an attempt to escape, for if such were true the very purpose of the Act would to a large extent be defeated. Indeed the Act itself provided for the pursuit of offenders. Even if Congress intended this statutory right of pursuit to extend only to pursuits entirely within the 12-mile limit, still the pursuit in this case would be justifiable. For the Act having given the right to board, search, and seize, it carried with it the right to capture on the high seas a vessel attempting to defeat those rights by escaping, after a hot continuous pursuit such as had been carried out by the *Mascoutin,* as long as the pursued vessel did not entirely escape or reach the territorial waters of its own or of another State.[53]

The Court might very well have considered the argument settled at that point and concluded its judgment, had not counsel for the claimant contended that the law on the basis of which the Court had been proceeding up to that point had been, so far as British ships were concerned, abrogated by the terms of a Treaty entered into between Great Britain and the United States and proclaimed May 22nd, 1924.[54] That Treaty, mainly by the provisions of its

[51]The Tariff Act, 1922, 42 Stats. 979, section 581: "Boarding Vessels—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States, or within four leagues of the coast of the United States, without as well as within their respective districts to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

"Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest, or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."

[52]See page 172 of the Report.

[53]At page 173 of the Report.

[54]43 Stat. 1761.

2nd article,[55] afforded the right of search and seizure of British vessels in proper circumstances within an hour's sailing distance of the coast. Claimant's counsel argued further that the treaty was exclusive, and that, though possibly the vessel here came within the one hour's sailing distance at one time, the actual seizure was effected beyond that distance from the shore and was unlawful. Several cases were in fact cited which had stated that the Treaty, as it was intended it should, had dealt with the matter in a complete way.[56] But though these meant that the terms of the Treaty were to be construed in a broad inclusive way, it had not been contemplated that the statute providing for search and seizure within the 12-mile limit should be *ipso facto* repealed, an interpretation which would curtail the extraterritorial rights of the United States rather than augment them as had been its obvious purpose. Mr. Justice Cochran stated that he could not subscribe to the idea that the Treaty did discontinue the operation of the 12-mile statute; and up to this point in his reasoning I can follow him. It does seem to me logical that if a state, in order to make its control along its maritime frontiers effective, extends its jurisdiction for some purposes beyond its strictly territorial waters, other states acquiescing in this step, the accompanying right of hot pursuit which rounds out the rights of states which only claim rights over a zone three miles

[55]Article II: "(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions, in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States, its territories or possessions, in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions, for adjudication in accordance with such laws.

"(3) The right conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected or endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

[56]*The Pictonian* (1924), 3 F. (2d), 145; *The Frances Louise* (1924), 1 F. (2d), 1004; *The Sagatind* (1925), 4 F. (2d). 928; *The Sagatind* (1925), 8 F. (2d), 789.

in breadth, such as were considered in the case of *The North*, should also be available from points within twelve miles of the coast when such is the limit claimed. Of course, the Court did not consider whether or not Great Britain had acquiesced in the claim of the United States to enforce a 12-mile limit.

But I cannot endorse the next step taken by Mr. Justice Cochran —a step quite superfluous and unnecessary to the judgment, and which led him to attribute to the doctrine of hot pursuit an extension unjustified, I submit, both in theory and in practice. He advanced the opinion that, in spite of the fact that the United States had experienced considerable difficulty in promulgating the Treaty in the first place, and could only induce Great Britain to accept even its mild and non-committal terms as finally drafted by holding out a tempting *desideratum* in the form of the right to carry liquors as sea stores within the waters of the United States if kept under seal, and though the Treaty expressly and unambiguously laid it down that the rights under it were not to be exercised at a greater distance from the coast than one hour's sailing, the Treaty was to be construed as carrying along with the right to seize the right also of hot pursuit from within the one hour's sailing distance.[57] This statement of the view of Mr. Justice Cochran was, I feel, a daring innovation unsupported by any authority, doing deliberate violence to orthodox methods of construction of statutes and treaties,[58] extending the exception to the general rule instead of the general rule itself although the treaty did not expressly declare such to be its intention. For I believe there can be no doubt that either the principle that the law of the flag State governs or of the freedom of the seas is to be taken for the general rule, and the doctrine of hot pursuit as an exception to that rule.

The remainder of Mr. Justice Cochran's judgment was devoted to deciding that the master of *The Vinces*, when boarded by the officers of *The Mascoutin*, had handed over the clearance certificate, which he himself had represented as a manifest (though it was patently evident that it was not) and which did not, as the statute required, include the cargo then on board. So it was held that the vessel could not, by virtue of a strict literal construction of the statutes, escape merely with the payment of a penalty of five hundred dollars which it was provided should be imposed on ships

[57]At page 174 of the Report.

[58]In 1906, in *Mortensen* v. *Peters*, 8 Session Cases 93, the High Court of Justiciary of Scotland showed that before a court will construe a statute (or treaty) as contravening or running contrary to an accepted rule of international law it will look for a clear stated intention of the legislature to do so.

failing to produce any manifest whatever;[59] but that the cargo should be forfeited also because not covered by the manifest. It was decreed that the master was liable for a penalty of $500, and an additional penalty to the extent of the value of the cargo, $73,089, both recoverable by seizure and sale of the vessel.[60]

Two additional causes of action on behalf of the United States failed. The one, based on section 592 of the Tariff Act of 1922,[61] charging the making of false statements in introducing or attempting to introduce imported merchandise into the commerce of the United States, could not succeed, because it was not proved that the goods were actually brought within the territorial limits of the United States so as to constitute importation as it had been defined by the Supreme Court of the United States in the case of *Cunard Steamship Company* v. *Mellon*,[62] nor that the false statements were made in an effort to introduce the merchandise into the commerce of the United States, since, of course, the misrepresentations complained of were actually made in attempting to get away from the United States. The other cause of action, charging the master with fraudulently and knowingly importing and bringing into the United States its cargo contrary to the provisions of section 593 of the Tariff Act,[63] was, of course, for the same reason also useless.

The case was appealed by the master, and came before the Circuit Court of Appeals, Fourth Circuit, in June, 1928.[64] Very similar arguments to those offered to the lower Court were again used, and the Court had no difficulty in disposing of them. Parker, Circuit Judge, repeated the opinion of Mr. Justice Cochran in briefer form and upheld *seriatim* the validity of the seizure,[65] the right to assess penalties against the offending vessel,[66] and the validity of the forfeiture of the cargo,[67] and arrived at the same result.[68]

The doctrine of hot pursuit was not discussed at any length in this judgment on appeal; however, the very fact that, though it was absolutely indispensable to the decision, yet it was practically taken for granted shows the firmness of the position it was considered to

[59]Sec. 431—Comp. St., s. 5841e; Sec. 583—Comp. St., s. 5841h 2; Sec. 584—Comp. St., s. 5841h 3; Sec. 594—Comp. St., s. 5841h 14.
[60]At page 178 of the Report.
[61]Comp. St., s. 5841h 11.
[62]262 U.S. 100, at p. 122.
[63]Comp. St., s. 5841h 12; Comp. St., s. 5341h 13.
[64]*Gillam* v. *United States* (1928), 27 F. (2d), 296.
[65]At page 299 of the Report.
[66]At page 301 of the Report.
[67]At page 302 of the Report.
[68]At page 304 of the Report.

occupy. Mr. Justice Parker referred to the doctrine, at page 299 of the Report, as follows:

> No point is made that the vessel was actually overhauled and the seizure actually made beyond the hour's sailing distance and beyond the 12-mile limit, if she was within these limits when signaled; and we think it is clear, under the "hot pursuit" doctrine, that if the right of seizure existed at the time the vessel was signaled, the right was not lost because she had succeeded in getting farther from shore in her attempt to run away.[69]

And these few words relating to the doctrine may be taken as a hearty endorsation since it is necessary to the decision. A petition for writ of certiorari was denied by the Supreme Court.[70]

CHAPTER V.

The Doctrine of Hot Pursuit in the Future.

The doctrine of the freedom of the seas is still a vital issue. I recently heard that great student of international affairs, Colonel House, state that if the seas had been truly free there might have been no Great War in 1914, a striking commentary on the importance of the doctrine.

Fulton, in the chapter of his work dealing with "The Historical Evolution of the Territorial Sea," explains that in modern times the general movement of opinion and practice has tended to be from the theory of the sea as appropriated by the maritime states of the world to the idea of the sea as under the sovereignty of no states, but free and open to all for all purposes. However, over against this characteristic trend he sets off another, a counteracting development, through the influence of which there is being incorporated into the rules of international law a more certain and clearer recognition of the exclusive rights of states in the zones of water adjacent to their coasts.[71]

One feature to be observed in this balancing movement accompanying the universal acceptance of the freedom of the seas has been the birth and growth of the doctrine of hot pursuit which we have been studying. And since its principal function has

[69]This statement is based on the following authorities, which are cited: *Hudson* v. *Guestier* (1810), 6 Cranch 281; *Ship North* v. *The King*, [1906] 37 Can. Sup. Ct. 385; Jurisdiction at the Maritime Frontier, by Prof. Dickinson, Harvard Law Review, vol. 40, 1926, page 1, and citations in notes 80 and 81 therein.

[70]*Gillam* v. *United States* (1928), 278 U.S. 635.

[71]Fulton—op. cit., p. 538.

consisted in cutting down somewhat the freedom of the seas and rendering less sharply defined and abrupt the dividing line between the parts of the seas considered free and the areas attributed to the adjoining States, and since interest in the freedom of the seas remains keen, we should naturally expect continued interest in the doctrine of hot pursuit also. Such an expectation would, indeed, seem warranted by contemporary developments of the law. Recent attention paid to the doctrine and use made of it by the United States in connection with its campaign for prohibition enforcement, in which it has done valuable service, indicate that the time for the doctrine of hot pursuit to die out and be forgotten, having served its purpose of curbing the freedom of the seas until such a time as adequate national belts of territorial waters may actually be established, has not yet arrived. Rather, as marine transportation accelerates its pace, the breadth of the protecting belt of marginal seas either remains undisturbed or else lags very far behind, so that occasions for invoking the doctrine of hot pursuit become more frequent and more urgent, instead of more rare, as one author has suggested.[72]

Having found the doctrine useful in giving effect to her prohibition law, the United States has been led to attempt extensions of the orthodox rules as to hot pursuit.[73] She has claimed certain jurisdictional rights over areas of sea outside the usual three-mile limit. For instance, she has asserted in customs matters rights of search and seizure within four leagues, twelve miles of her coasts. If, then, other States give their consents to the exercise of such jurisdiction, there would seem to be no logical objection to the institution, in an appropriate set of circumstances, of a hot pursuit from within this twelve-mile limit as we have seen to be possible from within the three-mile limit. Jurisdiction having once attached and having been admitted by the State of the flag of the ship over which that jurisdiction has fallen, there seems no reason why it should be lost simply by virtue of that ship having succeeded, though hotly pursued, in crossing the twelve-mile limit line. Nevertheless, we must not lose sight of the fact that the three-mile limit, and not the twelve-mile limit, is still the generally recognized rule of international law, and that for jurisdiction within the latter limit or for valid and effective hot pursuit begun from within that limit it is essential that the State admitting the jurisdiction have done so expressly—that is, it is not bound to admit the propriety of such a

[72]Calvo—*Le Droit International* (1896), 5th ed., vol. 1, s. 466, p. 567.
[73]See, for example, *The Vinces* case (*supra*).

pursuit unless it has already acquiesced in the claim of the other State to a twelve-mile limit.

Another step taken by the United States in carrying into execution her Eighteenth Amendment and Prohibition Laws has been the conclusion with various states of treaties of a uniform type,[74] designed to make it easier to apprehend offenders against those laws. The first article[75] of these treaties simply recites that the contracting parties do not by negotiating the treaties cease to uphold their former claims as to the proper extent of territorial waters, in the treaties with Great Britain and some of the other countries the three-mile limit being specifically mentioned. The second Article provides in each case that the other Government will not object to the boarding of private vessels under its flag outside the territorial waters of the United States, its territories and possessions by the authorities for the purpose of directing inquiries to those on board and examining the ships' papers in order to detect attempts to violate the laws of the United States preventing the importation of alcoholic beverages, or to a search of any vessel showing reasonable grounds for suspicion. Then it is provided that if there is reasonable cause to believe that the vessel is violating or attempting to violate such laws she may be seized and taken into an American port for adjudication. The third part of this second Article declares that the rights conferred by the Article shall not be exercised at a greater distance from the shore than can be traversed in one hour by the suspected vessel: however, it is further provided that if the liquor is intended to be conveyed to shore in another vessel it shall be the speed of such other vessel that shall determine

[74]Signatory; Signed: Ratification Exchanged; U.S. Treaty Series; U.S. Statutes: British Empire. Jan. 23, 1924, May 22, 1924, 685, 43 Stat. L. Pt. 2, p. 1761; Norway, May 24, 1924, July 2, 1924, 689 43 Stat. L., Pt. 2, p. 1772; Denmark, May 29, 1924, July 25, 1924, 693, 43 Stat. L., Pt. 2, p. 1809; Germany, May 19, 1924, Aug. 11, 1924, 694, 43 Stat. L., Pt. 2, p. 1815; Sweden, May 22, 1924, Aug. 18, 1924, 698, 43 Stat. L., Pt. 2, p. 1830; Italy, June 3, 1924, Oct. 22, 1924, 702, 43 Stat. L., Pt. 2, p. 1844; Panama, June 6, 1924, Jan. 19, 1925, 707, 43 Stat. L., Pt. 2, p. 1875; Netherlands, Aug. 21, 1924, April 8, 1925, 712, 44 Stat. L., Pt. 3, p. 2013; Cuba, March 4, 1926, June 18, 1926, 738, 44 Stat. L., Pt. 3 p. 2395; Spain, Feb. 10, 1926, Nov. 17, 1926, 749, 44 Stat. L., Pt. 3, p. 2465; France, June 30, 1924, March 12, 1927, 755, 45 Stat. L., Pt. 2, p. 2403; Belgium, Dec. 9, 1925, Jan. 11, 1928, 759, 45 Stat. L., Pt. 2, p. 2456; Greece, April 25, 1928, Feb. 18, 1929, 772, 45 Stat. L., Pt. 2, p. 2736; Japan, probably in 1930.

[75]*E.g.*, in the Treaty with France: "The High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction": and in the Treaty with Great Britain: "The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters."

this one hour's sailing distance. The treaties also provide that United States will permit the carrying within American waters of liquors listed as sea stores or cargo destined for a foreign port, if such liquors are kept continuously under seal while the vessel is within American territorial waters. Disputes under the treaties are to be referred to arbitration by two arbitrators, one being chosen by each of the contracting parties.[76]

Under such a treaty with Great Britain it has been argued in an American court[77] that Great Britain has waived her right to object to the assumption by the United States of jurisdiction over British ships found within the one hour's sailing distance, and it has been held[78] by an American Court that a hot pursuit may be begun within that distance from the shore and continued out onto the high seas beyond it without entailing the loss of that jurisdiction. This seems to be carrying the doctrine of hot pursuit too far, for of itself it is an exception to the general rule, and should, if its extension is to be permitted, be extended expressly and not by implication from obscure, indefinite terms contained in a treaty.

Another field for the operation of the doctrine of hot pursuit is the law of the air. In earlier times the seas passed through the stage of "ownership" and came to be considered free. In modern times the struggle has turned from the seas surrounding the land to the air above it. Three hundred years after Selden's championship of the cause of exclusive sovereignty of the seas, English scholars are again advocating the same theory as applied to the air, opposed by another group insisting on the principle of aerial liberty.[79] M. Paul Fauchille has taken the torch from Grotius, arguing that we must support the idea of the freedom of the air with a reservation of the rights of the underlying States for their protection, and not the sovereignty of the underlying States moderated by the right of innocent passage of air-ships.[80]

But whichever view ultimately triumphs it would seem that there must be a place in aviation law for the doctrine of hot pur-

[76]Article IV further provides for reference, if no joint report is agreed upon by the arbitrators, to "the Claims Commission established under the provisions of the Agreement for the settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910."

[77]Partridge, D.J., in *United States* v. *Ford* (1925), 3 F. (2d), 643, at p. 647.

[78]See, *The Vinces* (*supra*); and *The Resolution* (*supra*).

[79]See article by Blewett Lee. on Sovereignty of the Air, in American Journal of International Law, vol. 7, 1913, p. 470.

[80]Fauchille—Article in 1 *Revue Juridique Internationale de la Locomotion Aérienne* (1910), p. 9, referred to in Lee's article mentioned in note 79 (*supra*), at page 481.

suit. If we maintain the freedom of the air space, granting to the subjacent State only certain limited rights for its own protection, that State must also be permitted to invoke the doctrine of hot pursuit to prevent the defeat of those rights simply by virtue of the flight of an aircraft over which they would have extended beyond the zone of superincumbent air pertaining to the State. The same reasons are applicable which may be called into play in supporting the doctrine of hot pursuit on the sea.

Reference to pursuit in the air in enforcing the provisions of a statute has been made in an article by André Henry-Coüannier.[81] The writer is analogizing air and sea traffic, and considering an English Act of 1913, The Aerial Navigation Act,[82] requiring airplanes to enter the United Kingdom only at certain points on the coast and to land for purposes of visit, identification and inspection. He refers briefly to a pursuit after a plane attempting to fly inland without complying with the terms of this rule. And it seems to me, from the fact that even if the one plane came up with the other it is impracticable for officers on board the pursuing plane to step on board the other as can be done in the case of a pursuit of one ship by another on the sea, that if the pursued plane persisted in its refusal to submit to the jurisdiction, it would be necessary for its pursuer to use force, shooting at the fleeing offender. Coüannier wrote as follows:

> Si l'aéronef venait se poser sur les eaux territoriales, il serait immediatement aperçu facilement identifié, visité par les agents de l'Etat sans plus de difficulté qu'un navire, et tout l'organisation faîte sur les côtes pour les visites sanitaires ou douanières trouverait là une application nouvelle, cadrant parfaitement avec son premier objet. Au contraire, l'aéronef est contraint de passer la falaise, et d'aller atterir sur la campagne, exposant les paysans au feu de son moteur, et les moissons au choc de ses roues. Difficilement aperçu dès qu'il est à l'abri d'un bosquet ou d'un mur, il donnera lieu, sitôt posé, à une véritable chasse à l'aeroplane de la part de l'agent chargé d'en passer l'inspection. Et cet agent sera contraint pour remplir son devoir vis à vis cet esquif tombé du ciel, de se livrer à des enquêtes étrangères à ses occupations habituelles.[83]

[81]Coüannier—*L'Aviation sur les Eaux Territoriales*, in 28th Report of the International Law Association, 1913, p. 534.

[82]2 & 3 Geo. V, c. 22, amending an Act of 1911.

[83]Which I translate freely as follows: "If the aviator brought his plane to rest on territorial waters, it would at once be noticed, easily identified, and visited by the authorities of the State with no more difficulty than in the case of a ship, and the whole coastal organization for sanitary and customs inspection would receive there a new application, corresponding exactly to its original purpose. On the contrary, the aviator may decide to cross the border, and go inland across the country, exposing the people to the roar of his engine and the standing crops to the crushing of his wheels in landing. Since it will be difficult to discover as soon as it has reached the shelter of a thicket

I believe the doctrine of hot pursuit will retain its usefulness in the law of the sea, and achieve a similar position in the law of the air.

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or a wall, it will give rise, as soon as it has landed, to a genuine chase by airplane on the part of the officer whose duty it is to conduct the inspection. And this officer will feel himself bound to fulfil his duty towards this ship fallen from the sky, indulging in questions outside the usual scope of his investigation."

NOTE.—This thesis included also a detailed account of the incidents in connection with the sinking of the schooner "I'm Alone," and comments by the writer; but this part, which appeared at the end of the Fourth Chapter, has been omitted because of the pending arbitration.