National Prohibition and International Law

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COMMENTS

NATIONAL PROHIBITION AND INTERNATIONAL LAW

Some recent decisions and rulings enforcing the Eighteenth Amendment and the National Prohibition Act have brought those laws into considerable importance in international aspects. The case, United States v. Bengochea,¹ the ruling of our Executive Department regarding the Canadian schooner Emerald, and the case, United States v. Schooner Grace and Ruby² present a set of mooted questions in international law.³

The first and second holdings again raise the question whether a littoral state has the legal privilege by way of self-defense to take protective police action outside its three-mile limit to prevent violation of its municipal laws.⁴ The decision in the Bengochea case sustaining the privilege, and the ruling of the State Department on the Emerald, which apparently denies such privilege, represent the diversity of opinion on the question which the executive and judicial departments of the gov-

¹ (1922, C. C. A. 5th.) 279 Fed. 537.
² (1922, D. Mass.) 283 Fed. 475.
³ In the first case a Cuban vessel laden with intoxicating liquors sailed toward the shores of the United States until within twelve miles thereof, but stopped outside the three-mile limit with intent to deliver the cargo to boats coming from shore, such cargo to be carried by them into port. While waiting for those boats she was seized by the United States. The court sustained the seizure. In the second case the Canadian schooner Emerald was seized about eight miles from American shores while unloading intoxicating liquors into small boats for transportation to the coast. The small boats appeared not to belong to the Emerald. Thereafter, on representations from Great Britain, the State Department released the Emerald. See N. Y. Times, Oct. 28, 1922. On similar protests, all foreign ships seized by the United States beyond the three-mile limit have been ordered released by the Treasury Department; excepting only ships in the situation involved in United States v. Grace and Ruby. See N. Y. Times, November 11, 1922. In the last case the United States seized the British schooner Grace and Ruby beyond the three-mile limit under the following circumstances: The vessel brought a cargo of liquor, part of which at least belonged to an American owner, within twelve miles of the coast of the United States, but outside the three-mile limit. A boat from port came to meet her and received a part of the cargo in the nighttime for transportation inland. The vessel lent three of her crew to help make the landing, “and a dory belonging to the schooner was towed along presumably for use in landing the liquor or to enable the men to return to the schooner after the liquor was landed.” The attempted landing was discovered by United States revenue officers, who seized the liquor and the next day dispatched a revenue cutter to pursue and capture the schooner. Two days later she was discovered and seized some four miles from shore and brought into port. She was libelled for smuggling liquor in violation of the revenue laws and the National Prohibition Act. Judge Morton sustained the seizure.

⁴ Some confusion has obtained regarding the character of such privilege when exercised by a state. If the privilege be allowed, does that constitute an extension of territorial jurisdiction by the privileged state? Is it enforcing its laws as such beyond the three-mile limit when it prevents the consummation of an offense within that limit by physical action outside that limit? See oral argument of Sir Charles Russell, 13 Fur Seal Arbitration Proceedings (1895) 298; cf. oral argument of James C. Carter, 12 ibid. 244-247.
ernment have held at least as far back as 1804 when Church v. Hub-
barth was decided.

Even in cases dealing with the privilege of self-defense in its broadest
sense, that is, the protection of persons and property from physical
injury, the political departments of our government seem to have been
over-jealous of the principle of “freedom of the seas.” For example,
in the case of the United States warship Kearsarge and the Alabama, France foresaw that an attack would be made by the Kearsarge upon the
Alabama the instant the latter cleared the three-mile limit of France.
The artillery carried on shipboard had a greater range than three miles
and France justly feared stray shots. She suggested to the United
States that the attack be staged farther out on the high seas. The
American State Department replied: “. . . the United States do not
admit a right of France to interfere with their ships of war at any dis-
tance exceeding three miles.” If it was meant by this that France was
under a duty not to interfere with our ships outside the three-mile limit
there was obviously no privilege of interference even in the name of
self-defense.

In most instances, however, where our executive department has
taken this position, the privilege of self-help was claimed and-exercised
on the high seas by search and seizure of the menacing vessel with a
view to forfeiture. The denial of the privilege to make use of this
particular remedy, however, has been in terms general enough to deny
the very existence of any privilege of self-defense whatsoever if exer-
cised beyond the three-mile limit. “It is a well established principle,
asserted by the United States from the beginning of their national
independence, . . . and stated by the Senate in a resolution passed
unanimously on the 16th of June 1853, that “American vessels on the
high seas in time of peace, . . . remain under the jurisdiction of the
country to which they belong and therefore any visitation, molestation,
or detention of such vessels by force, or by the exhibition of force, on
the part of a foreign power is in derogation of the sovereignty of the
United States.” It is to be observed, however, in the Kearsarge case

1 (1804, U. S.) 2 Cranch. 187.

2 Moore, Digest of International Law (1906) 723; cf. Madison, Sec’y of
State, to Messrs. Monroe and Pickney, May 17, 1806 (two years after Church v.
Hubbard was decided). 1 Moore, op. cit. 722.

3 The Virginis, 2 Moore, op. cit. 895, especially, Opinion, Williams, Att’y. Gen.
at pp. 898-899; 1 Moore, op. cit. 724; The Mary Lowell, 2 Moore, op. cit.
sec. 315; Memorandum of Solicitor’s Office, Department of State (1910) Wool-
sey, Municipal Seizures Beyond the Three Mile Limit, For. Rel. (1912) 1289; see
also 1 Hyde, International Law (1922) sec. 229, note 3; Wheaton, International
Law (Dana’s ed. 1866) note 108; cf. Privilege of Visitation, Search and Seizure
to Enforce our Revenue Laws outside Three Mile Limit but within Twelve Mile
Limit, Evarts, Sec’y of State to Mr. Fairchild, Minister to Spain, Aug. 11, 1880,
2 Moore, op. cit. pp. 906-907.

4 President Grant, annual message, Dec. 1, 1873, 2 Moore, op. cit. 897-898.
that France in fact escorted the Alabama out of port with a French man-of-war to a point some seven or nine miles from shore, and only after the French escort departed did the battle take place. Apparently the United States never attempted to question the exercise of the privilege of self-defense by this method. From analogies in municipal law and the necessities of the case, it seems that no question could be raised. 9

If in the light of President Grant's message, as quoted above, a littoral state may not even "molest" a foreign vessel by a mere "exhibition of force" beyond the three-mile limit in defense of life and property, then a fortiori action that is merely in the course of assisting others to a contemplated violation of the public policy of such state, for example that embodied in its "dry" laws, may not lawfully be interfered with outside that limit. The ruling of the Secretary of State in the Emerald case is clearly consistent with this conclusion. On this basis the United States appears to be under a legal duty to suffer a foreign vessel to approach the outside rim of the three-mile limit, not bound to a United States port on legitimate business, but intending rather to aid others to violate the municipal laws of this country, and we may not "ward off" the intended blow by any policing or abatement beyond the three-mile limit. To do so would, apparently, "affect the independence" of the foreign state concerned.

It may well be pondered why we are thus limited in our protective police action as a littoral state to the exact limit of three miles. 10 If originally territorial extension of a littoral state to a limit of three miles was accorded by international law "to protect their safety, peace, and honour from invasion, disturbance and insult," 11 and if in modern times invasion, disturbance, and insult have a longer range and have become more troublesome, it seems reasonable that the zone of protection should be further extended. It is not indispensable that the limit be extended by a greater number of miles specifically with accompanying proprietary claims thereto which nations now assert in the

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9 "The sovereign of the shore has a right, by international law, to require no action to be taken by ships of other friendly nations by which his subjects should be injured, or the peace of the shore disturbed." Wharton, International Law Digest (1886) 114; see also Hall, International Law (4th ed. 1895) sec. 86; Woolsey, International Law (1901) sec. 214; 2 Moore, op. cit. 981; Cobbett, Leading Cases on International Law, (3d ed. 1909) 168; 1 Hyde, op. cit. sec. 65.

10 "We can conceive, for instance, of a case in which armed vessels of nations with whom we are at peace, might select a spot within common range of our coast for the practice of their guns. ... Supposing such vessels ... to be four miles from the coast, could it be reasonably maintained that we have no police jurisdiction over such culpable negligence?" 1 Wharton, op. cit. supra note 9, 114-115.

11 For a valuable summary on the extent of marginal seas as a rule of international law, see Evans, Cases on International Law (1917) 152, note; also 1 Hyde, op. cit. secs. 141, 142, 143.

12 Hopkinson, J., in United States v. Henry Kessler (1829, C. C. Pa.) 1 Baldwin, 15, at p. 35.
three-mile limit, but rather that by international law a nation shall have no right where its nationals have engaged in defying the policy of another state as embodied in its reasonable municipal laws, although they are apprehended even on the high seas as such offenders. This would not seem to be "in derogation of the sovereignty" of such nation.  

Moreover, even under the rule as generally announced, that as a matter of international law the privilege of self-help does not exist beyond the three-mile limit, at least if exercised by search and seizure, it is to be observed that one who undertakes a nefarious expedition against the security or welfare of another state, will have no valid private claim for personal inconvenience and loss. "A nation will not interfere to throw the mantel of its protection over one of its nationals when that national has, for his own private ends, been running counter to a just and reasonable law of a friendly power." Can a foreign government justly assert in its own behalf a legal right under international law in such case which it will not assert in behalf of its own nationals individually when the same transaction forms the entire basis for both claims? It seems to be the view of the political departments of this government that it can, and that by international law a foreign government as such has the legal right that another state shall not act outside its three-mile limit in protection of its "security, peace, and honour," at least if such action takes the form of search and seizure. Apparently this is true even though the nationals of that foreign state whose acts present the question have no private rights therein.

The judicial department of our government takes a different view of the question. The Supreme Court considered the matter in Church v. Hubbard. In that case it appears that Portugal prohibited trade with her colonies. An American vessel, Aurora, cleared from New York bound for Portuguese colonies with goods on board for trade. The Aurora was seized by Portugal some four or five leagues from the shores of its South American colonies where she was anchor'd. Marshall, C. J., declared: "That the law of nations prohibits the exercise of an act of authority over a vessel in the situation of the Aurora; and that this seizure is, on that account, a mere marine trespass... cannot be admitted. ... Its (a nation's) power to secure itself from injury..."  

See oral argument of Sir Charles Russell, op. cit. supra note 4, at p. 1076; Cobbett, loc. cit. supra note 9.

On this general question the following or like rule is sometimes suggested: "The right of self-preservation is the first law of nations, as it is of individuals... All means which do not affect the independence of other nations are lawful to this end." I Phillimore, International Law (1854) sec. 210. Such statement is undoubtedly true in its generality, but affords little assistance in deciding the real question of what does "affect the independence of other nations."

The Brig Mary Lowell, 3 Moore, International Arbitration Digest (1898) 2772-2777; The Deerhound, supra note 7; Borchard, Diplomatic Protection of Citizens Abroad (1915) secs. 546, 561-563.

Oral argument of Sir Charles Russell, op. cit. supra note 4, at p. 1079.
may certainly be exercised beyond the limits of its territory . . . . the
right of a belligerent to search a neutral vessel on the high seas for
contraband of war, is universally admitted, because the belligerent has
a right to prevent the injury done to himself by the assistance intended
for the enemy: so too, a nation has a right to prohibit any commerce
with its colonies. Any attempt to violate the laws made to protect this
right is an injury to itself which it may prevent and it has a right to use
the means necessary for its prevention. These means do not appear to
be limited within any certain marked boundaries, which remain the same
at all times and in all situations. If they . . . unnecessarily . . . . vex
and harass foreign lawful commerce foreign nations will resist their
exercise. If they are . . . reasonable and necessary to secure their laws
from violation, they will be submitted to." 15 In other words, reason-
able police protection reasonably executed even by search and seizure
and for forfeiture by a littoral state is not per se wrong as a matter of
international law simply because the acts take place more than three
miles from the shore. Such views seem sound. 16

In the third case of this series, 17 the British vessel Grace and Ruby
may be said to have constructively entered the American three-mile
limit. 18 The seizure, however, was beyond the three-mile limit. Appar-
ently the executive department is prepared to support the action in this
case. The decision as such is well within the principle of Church v.
Hubbart, upon which case Judge Morton relied. The apparent
approval by the executive department of the result of the decision sug-
gests however, that it is to be supported on some other or further rule
of international law. The doctrine of "hot pursuit" can be invoked.
The privilege of "hot pursuit," though stated in various ways, 19 seems
fairly set forth in the following: "Take again the pursuit of vessels
out of the territorial waters, but which have committed an offence
against municipal law within territorial waters . . . . There is gen-
eral consent on the part of nations to the action of a state pursuing a
vessel under such circumstances . . . . it must be a hot pursuit—that is

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15 Supra note 5, at p. 234.
16 See accord, Cockburn, C. J., in Regina v. Keyn (1876, Cr. App.) 13 Cox C. C. 403, 525, 527; Evans, op. cit. supra note 7; contra, Wheaton, loc. cit. supra note 7; cf. Woolsey, op. cit. supra note 7, 1201; cf. Le Louis (1817, Adm.) 2 Dod. 210, at pp. 425, 255.
17 Supra note 3.
18 See accord, Cockburn, C. J., in Regina v. Keyn (1876, Cr. App.) 13 Cox C. C. 403, 525, 527; Evans, op. cit. supra note 7; contra, Wheaton, loc. cit. supra note 7; cf. Woolsey, op. cit. supra note 7, 1201; cf. Le Louis (1817, Adm.) 2 Dod. 210, at pp. 425, 255.
19 Supra note 3.
20 Supra note 9, 985.
21 2 Westlake, International Law (1904) 173; Woolsey, op. cit. supra note 9, sec. 194; Cobbett, op. cit. supra note 9, 169, note; Hall, op. cit. supra note 9, sec. 80; 1 Oppenheim, International Law (3d ed. 1920) sec. 266; Scott, Resolutions (1916) 115, 339; 2 Moore, op. cit. supra note 9, 985 et seq.; Story, J., in The Mariana Flora (1826, U. S.) 11 Wheat. 1, 42; see also The King v. Ship North (1905, Can.) 11 Exch. 141, reviewing American cases; cf. Wheaton, loc. cit. supra note 7.
to say a nation cannot lie by for days or weeks and then say: 'You, weeks ago committed an offense within the waters, we will follow you for miles, or hundreds of miles, and pursue you.' As to that it must be a hot pursuit, it must be immediate, and it must be within limits of moderation."20 It seems that the instant case satisfies this rule.

A second series of cases recently decided under the Eighteenth Amendment and National Prohibition Act also involve questions of international law.21 In The Cunard S. S. Co. and Anchor Line v. Mellon (1922, S. D.'N. Y.) 28—Fed.—, Learned Hand, J., decided that the carrying of intoxicating liquors as sea stores on board foreign merchant vessels was "transportation" and prohibited in American waters by those laws. By a second ruling in the same case, American ships were prohibited from carrying liquors for beverage purposes on the high seas since the Amendment applied to "all territory subject to the jurisdiction" of the United States.22

Two general questions present themselves: first, whether the United States has the legal privilege under the rules of international law to execute its prohibition laws in the cases under consideration; secondly, whether they were intended to be so executed. The first question in turn raises two issues, namely, has the United States the privilege to enact laws (1) for foreign merchant vessels while within our marginal waters and (2) for American vessels while on the high seas or in mar-

20 Oral argument of Sir Charles Russell, op. cit. supra note 4, at p. 1079.
"The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel . . . . might be doubtful." Hall, op. cit. supra note 9, sec. 80.
21 So much of the Amendment and Act as are here material read as follows; 18th Amendment, sec. 1: "After one year from the ratification of this Article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."
"No person shall on or after the date when the 18th Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented." The National Prohibition Act, Act of Oct. 28, 1919 (41 Stat. at L. 305).
22 Prior to Oct. 6, 1922, but subsequent to the effective dates of the Amendment and Act, foreign and American merchant vessels were allowed by the United States Treasury Department to carry liquors as a part of their sea stores for beverage purposes, which, when brought within American waters, were locked up and sealed by Treasury Department officials, so to remain until the vessels departed our waters. On Oct. 6, 1922, the United States Attorney General rendered an opinion relying on Grogan v. Walker & Sons, Ltd., and Anchor Line, Ltd. v. Aldridge (1922, U. S.) 43 Sup. Ct. 423, wherein he ruled that the Amendment and Act prohibit the service and transportation of intoxicating liquors on American ships at sea, and the transportation of intoxicating liquors on all vessels within American waters. On the same day President Harding directed the Secretary of the Treasury to execute the laws accordingly.
original waters of foreign states? The authorities seem conclusive that a littoral state may enact legislation binding upon foreign merchant vessels while they are within its marginal waters and not merely passing through. Likewise, by a long line of decisions the jurisdiction of a littoral state follows its vessels on the high seas and into foreign ports.

These points are not seriously contested in the cases referred to, but the second general question is made the primary issue. It is contended by the foreign vessel owners that our "dry" laws were never intended to prohibit them from carrying liquors in and out of American waters if they were locked up under seal and were not available for beverage purposes within American waters. American owners argue that these laws are not to be deemed applicable to their vessels while on the high seas or in foreign waters chiefly because they are not then within the provision "all territory subject to the jurisdiction thereof, (United States)" as set forth in the Amendment.

No consideration of these arguments will be undertaken here further than to make brief reference to the recent cases of Grogan v. Walker and Sons, Ltd., and Anchor Line Ltd. v. Aldridge. In the Anchor Line case the plaintiffs sought to make a transshipment of a cargo of liquors from one British ship to another in New York harbor. In the Walker case the plaintiff sought to make a shipment of liquors by rail from Canada across the United States to Mexico. In both cases the majority

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25 Regina v. Cunningham (1858, Cr. App.) 8 Cox C. C. 104; Regina v. Keym, supra note 16, 434; The Kestor (1901, D. Del.) 110 Fed. 432; The Ester (1911 E. D. S. C.) 190 Fed. 216; United States v. Dickman (1875) 92 U. S. 520; see also The Exchange (1812, U. S.) 7 Cranch. 116; Norse (1920) 20 Col. L. Rev. 207, 479; Evans, op. cit. supra note 10, 181; Gregory, Jurisdiction over Foreign Ships in Territorial Waters (1904) 2 Mich. L. Rev. 333; Hyde, op. cit. supra note 7, secs. 221, 226, and authorities cited. British Foreign Office, Oct. 9, 1922, referring to the ruling of the Attorney General, supra note 22; "It is domestic legislation in which Great Britain has no right to interfere. The United States Government has a perfect right to enact shipping laws that it thinks fit and to enforce them within the three mile limit."

26 The King v. Brizac and Scott (1833, K. B.) 4 East. 163; Regina v. Anderson (1868, Cr. App.) 11 Cox C. C. 198; Wharton, op. cit. supra note 9, 123; 49 L. R. A. 273, note. See also 8 Ops. Att'y Gen. (1856) 73; Wheaton, op. cit. supra note 7, 105; Evans, op. cit. supra note 10, 181.

Under the ruling of Judge Hand, American owners will be placed in an awkward situation in some instances. For example, it appears that by the laws of some foreign countries ships must carry a daily ration of liquors for passengers and crew. Our laws prohibit it. Such cases must be cared for by treaty if the decision of Judge Hand is sustained.

27 There seems to be some judicial opinion bearing against the general contentions of both foreign and American owners, expressed prior to Judge Hand's decisions as well as prior to the ruling of the Attorney General, supra note 22. See United States v. Thirty-six Cases of Intoxicating Liquor (1922, S. D. Tex.) 281 Fed. 243 (re foreign owners); United States v. Two Hundred Fifty-four Bottles of Intoxicating Liquor (1922, S. D. Tex.) 281 Fed. 247 (re American owners).

28 Supra note 22.
of the court held that the plaintiffs were prohibited by the laws in question. Holmes, J., remarked, *inter alia*: "The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere and that the reference to beverage purposes and use as a beverage show that it is not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented as it has been; that the repeal of statutes and treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

"The 18th Amendment meant a great revolution in the policy of this country . . . . it did not confine itself in any meticulous way to the use of intoxicating liquors in this country. . . . It is obvious that those whose wishes and opinion were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay."

If such be the vigor of the "letter" of the law, it seems that it would be possible for the Supreme Court to answer the arguments in question with a ruling that here is another opportunity to stop at least a part of "the whole business," and that again we must not "let it in" because "some of it [is] likely to stay." 28

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28 See the dissenting opinion of McKenna, J., in which Day and Clarke, J.J., concurred.

29 The Supreme Court's decision in *United States v. Bowman* (Nov. 13, 1922) U. S. Sup. Ct., Oct. Term, 1922, No. 69, applying sec. 35 of the United States Criminal Code also seems pertinent to the contention of the American owners. Sec. 35 reads in part: "... whoever shall enter into any agreement, combination or conspiracy to defraud the Government of the United States . . . . by obtaining . . . the payment or allowance of any false claim . . . . shall be fined. . . ." The defendants, American citizens, were prosecuted thereunder, the indictment laying the offense to have occurred on the high seas. An objection was taken to the jurisdiction. Chief Justice Taft, holding against the objection, said: "Some . . . offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." After commenting on sec. 35 he concludes: "We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign port and beyond the land jurisdiction of the United States and therefore intended to include them in the section."