

are so great and their evil effects upon the body politic are not serious enough to awaken a more general desire to suppress them. This is not the place to discuss the future of trusts or to weigh their respective merits and failings. It has been merely the object of the writer to show the illegality of such organizations and to point out some of the consequences of that fact. The law is clear. The remedy for the evils of trusts is not to change the law, but to enforce it.

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### THE CASE OF THE "SAYWARD."

(The Law Oration of RUSSELL DUANE, delivered at the commencement exercises of the University of Pennsylvania, June 11, 1891.)

One day last January the surprising announcement appeared in the morning papers that, on the preceding day, Queen Victoria had appeared as a suitor in the Supreme Court of the United States. To explain the cause of such an unusual proceeding, it is necessary to go back nearly four years. In the month of July, 1887, a British schooner named the "Sayward" was seized by a United States cruiser in Behring Sea, for the alleged offence of killing fur seals in violation of an Act of Congress.<sup>1</sup> The vessel was taken into port, and after the usual formalities had been observed, a decree of forfeiture was entered against it by the District Court of Alaska.<sup>2</sup> Last January the English Government united with the owner of the "Sayward" in an application to the Supreme Court of the United States for a writ of prohibition to restrain the execution of this decree.<sup>3</sup> The application for the writ was based upon the ground that the Alaska Court had no jurisdiction to try the case because the seizure of the schooner had been effected on the high seas more than three miles from land. This question will be argued before the Supreme Court at its next session.

<sup>1</sup> The "Sayward" was seized on July 9, 1887, in latitude 54° 43' north and longitude 167° 51' west, at a distance of fifty-nine miles from land, upon waters lying between Oonalaska and the Prybyloff Islands, in Behring Sea.

<sup>2</sup> On September 19, 1887, under section 1956, R. S., which contains the following provision: "No person shall kill any otter, mink, martin, sable, or fur seal or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof; . . . and all vessels found engaged in a violation of this section shall be forfeited."

<sup>3</sup> Reported in 138 U. S. 404, under the heading of *In re Cooper*.

In the meantime, the right of the United States to protect the seals in Behring Sea by such measures as the seizure of the "Sayward" and other vessels has been the subject of a prolonged diplomatic controversy between our government and that of Great Britain. This controversy has been conducted in behalf of the British Government by Lord Salisbury, and in behalf of the United States by a man whose skilful treatment of ~~of~~ and other diplomatic questions entitles him to the admiration and gratitude of all good citizens of both political parties, the Honorable James G. Blaine. It is now proposed to refer the various matters in dispute to a Board of International Arbitration, and six questions have been propounded by the two governments for this Board to decide. Of these, the fifth and most important question is the following: "Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit?"<sup>1</sup>

There are three way in which the question of our rights in Behring Sea may be discussed. One may be called the "Spread-Eagle" method, which, however appropriate for a political meeting, on an occasion like the present one would obviously be out of place. The subject may also be approached from the moral standpoint, but in this aspect it has been so fully discussed by Ex-Minister Phelps and others that nothing further remains to be said.<sup>2</sup> Lastly, it may be treated simply as a question of international law, to be determined by precedents and existing rules, and upon this phase of the question it is my purpose to say a few words.

It is admitted upon all sides that the United States has at least a qualified right of property in the Alaskan seals, and the right to protect them within the limits of its own territory and upon its marginal waters. For example, when the seals make their annual journey, as their habit is, from the coast of Alaska to the Prybyloff Islands, they are clearly within the protection of our laws up to the time of their departure and after their arrival. It is contended, however, by Great Britain that our

<sup>1</sup> See Mr. Blaine's letter of April 14, 1891, to Lord Salisbury.

<sup>2</sup> See an article in Harper's Monthly Magazine for April, 1891, by Hon. E. J. Phelps, in which the subject is also discussed as a question of international law, but on different lines from those followed in this argument.

government is prevented from extending this protection to them in the open waters of Behring Sea, by the rule of the three-mile limit. Let us see what this so-called rule really is.

We might naturally suppose from some of the statements of our adversaries upon this point that the high seas are and always have been entirely free, subject only to the right of every nation to control its marginal waters for a distance of three miles. In point of fact, history shows that what has really happened is the exact reverse, viz., that large portions of the high seas were formerly treated as lying within the territorial dominions of different States, and that these restrictions have been only partially removed. As recently as the seventeenth century, proprietary rights were both claimed and exercised by Venice over the Adriatic, by France over the Bay of Biscay, by England over the British Channel and the North Sea, and by Denmark over the broad stretches of ocean which lie between Iceland and the coast of Norway.<sup>1</sup> These rights were not only asserted by different nations, but they were also conceded in practice, and in many instances they were sanctioned by treaties. Thus, in the year 1485, Henry VII of England, in a treaty with the King of Denmark, acknowledged the right of the latter sovereign to require that all English fishermen should take out licenses before being admitted to the Danish Seas to the north of Scotland.<sup>2</sup> Two centuries later similar proprietary rights were enforced by England against the Dutch and other nations with reference to the fisheries of the North Sea. The treaty of Westminster, which was signed in 1674, contained an express recognition by the government of Holland that the jurisdiction of England extended over the sea from Cape Staten in Norway to Cape Finisterre on the coast of Spain.<sup>3</sup> It was also the regular practice of Great Britain and other maritime States to send out armed cruisers "to keep the peace of the seas," as it was called.<sup>4</sup> It was a common thing for one of these cruisers to stop a merchant vessel on the high seas, to institute inquiries as to its purposes and destination, and to exact tolls as compensation for the services which the cruiser was supposed to render

<sup>1</sup> Hall's International Law, p. 126.

<sup>2</sup> *Id.*, p. 126, note. Selden's *Mare Clausum*, Book II, Ch. 32.

<sup>3</sup> Ortolan, *Dip. de la Mer*, Book I, p. 372; Woolsey's International Law, § 86; Hall's International Law, p. 131.

<sup>4</sup> Hall's International Law, pp. 126, 132.

by protecting lawful commerce and warding off the attacks of pirates. In fact, so extreme was the practice of European nations in former times in the exercise of their sovereign rights upon the sea that, had the seizure of the "Sayward" occurred two centuries ago, the right of our government to perform such an act would have been universally upheld. If, then, national rights of the same general character existed and were exercised at that time, it is certainly proper for us to inquire whether some of these rights, at least, do not exist now; and if they do *not* exist, when and how they were lost. The recent tendency of international law has, it is true, been in the direction of restricting rather than of enlarging these rights, and hence it might be argued that when an entirely new case arises, like that of the "Sayward," the presumption is against rather than in favor of the exercise of national authority. This argument would undoubtedly apply to a certain class of cases. For instance, if an English ironclad, stationed off Folkestone, were to attempt to collect tolls from foreign merchant vessels passing through the British Channel, there can be no doubt that, although lawful at one time, such an act would now be regarded as a clear breach of international law, and that the nation whose ships were so treated would have the right to demand redress. The reason for this change in the law is simply the absence at the present day of that need for armed protection on the high seas which formerly was indispensable. But this argument cannot be advanced against the right of the United States to protect our seals in Behring Sea, since the necessity for such protection at the present time has been clearly demonstrated. Again, if we apply the test suggested by Hall,<sup>1</sup> a recent English writer on international law, that maritime occupation to be valid must be effectual, the obvious ability of our government to control Behring Sea for this particular purpose satisfies the requirements of this criterion. Again, it does not appear that the United States has ever consented to a restriction of this right in any treaty, or that it has passed to any other nation by prescription. Consequently, the only resource left to our opponents is to contend that, by the general consent and common usage of all nations, the extensive maritime rights of former centuries have become entirely merged in the rule of the three-

<sup>1</sup> Hall's International Law, p. 136.

mile limit, and that this rule is binding in every place and for all purposes.

Now, in point of fact, no such consensus of opinion or uniform practice among different nations can be shown to exist. If we consult statutes, treaties, state papers and the works of leading text-writers on international law, we shall find that the proper limit of a nation's jurisdiction over its marginal waters has been variously stated at three, five,<sup>1</sup> six,<sup>2</sup> nine,<sup>3</sup> twelve,<sup>4</sup> fifteen<sup>5</sup>, sixty<sup>6</sup>, ninety,<sup>7</sup> and one hundred miles.<sup>8</sup> By other authorities it has been limited respectively to two days' sail,<sup>9</sup> the line of the horizon,<sup>10</sup> the limit of possible soundings,<sup>11</sup> and the range of cannon.<sup>12</sup> Two writers, Vattel and Chancellor Kent, lay down the broad rule that in general the dominion of the State over the neighboring waters extends as far as is requisite for its safety, and for some lawful end,<sup>13</sup> and in this position they are reinforced by the famous English text-writer Chitty, who says that "all seas belong to those who without fraud or unallowable violence can occupy or secure them."<sup>14</sup>

However, all controversy as to the real character of the three-mile limit is set at rest by the recent English case of the "Franconia."<sup>15</sup> In the year 1876 a German ship bearing that name was passing down the British Channel, and had reached a point within three miles of the cliffs of Dover, when it came into collision with the "Strathclyde," an English ship, bound from London to Bombay. The "Strathclyde" was sunk, and many

<sup>1</sup> Proposed by the United States in 1864. See Hall's International Law, p. 138, n.

<sup>2</sup> Repertoire de Jurisprudence, article "Mer."

<sup>3</sup> Adopted in a number of treaties in the eighteenth century, and advocated by Smaltz, a German writer.

<sup>4</sup> For revenue purposes. See *infra*, p. 11.

<sup>5</sup> Massé, Le Droit Commercial, II, ii, Ch. I, § 205.

<sup>6</sup> By Baldus and Bodinus, German writers.

<sup>7</sup> Bodinus.

<sup>8</sup> By Albericus Gentilis, and Caesaregis, Discursus de Commercio, § 136, 1740.

<sup>9</sup> Loccenius, De Jure Maritimo, Ch. IV, § 6.

<sup>10</sup> Rayneval, Institute du Droit de le Nature et des Gens, Book II, Ch. 9, § 10.

<sup>11</sup> Valin, Com. on French Ordinances of 1681, Ch. V.

<sup>12</sup> Bynkershoek, De Domino Maris, 1702.

<sup>13</sup> Vattel, Droit des Gens, I, Ch. 23, § 289; Kent's Com., I, p. 29.

<sup>14</sup> Chitty on Common Law, I, 93. Most of the above references may be found collected in the report of the case of *Reg. v. Keyn*, L. R. 2 Exch. D., pp. 176-192.

<sup>15</sup> *Reg. v. Keyn*, L. R. 2 Exch. D., 63.

persons on board perished. It appeared that the master of the "Franconia" had been guilty of such a degree of negligence as amounted, by the law of England, to a crime, and he was subsequently tried and convicted in the Central Criminal Court at London. An argument was then made in his behalf before the Court of Crown Cases Reserved, that inasmuch as the alleged crime was committed on the high seas, in the absence of an express statute to that effect, neither the criminal nor the common law of England had any application to it whatsoever. It was argued in behalf of the Crown that the Court had jurisdiction in the case, because the crime had been committed within the three-mile limit. The former contention prevailed, and the prisoner was released. In his opinion Lord Chief Justice Cockburn discussed at great length the history and character of the three-mile rule. He showed that it was a doctrine of very recent origin; that it had never even been referred to by any English Judge prior to this century; that it never had been adopted in practice or in any treaty, except for certain limited purposes, and then not as a matter of right, but of convenience; that outside of those limits it had no binding force upon any court, and that it would be an improper exercise of judicial power to extend the rule to an entirely new class of cases without the express sanction of an Act of Parliament. In a controversy with Englishmen on this question it is unnecessary to go beyond this case in search of authorities.

Now, if the three-mile rule is thus restricted in its scope, it follows that, for all other purposes, more extended rights of maritime sovereignty may be invoked, as in former times, whenever necessity requires it, and we are by no means confined to *ancient* precedents for instances of the exercise of such rights. Not to mention the more direct analogies suggested by Mr. Blaine, it has been held by the Privy Council of Great Britain, in a recent case, that complete territorial dominion may legally be exerted over all parts of bays, inlets, and arms of the sea enclosed by headlands, and that it is immaterial that there are particular points in such waters which are much more than three miles from shore.<sup>1</sup> Acts have been passed in England within

<sup>1</sup> *Direct United States Cable Company v. Anglo-American Telegraph Company*, L. R. 2 Ap. Cas. 394. This doctrine was applied to Delaware Bay in 1793, in the case of the ship "Grange:" Am. State Papers, I, 73. See also *Stetson v. United States*, 32 Albany Law Journal 484.

the last century, and copied in the United States, which have prohibited the transshipment by any vessel of her cargo within twelve miles of the coast.<sup>1</sup> Laws are to be found on the statute books of the United States and of most foreign countries prescribing penalties for crimes committed on board of national vessels by citizens or foreigners, for marine torts, for marine robberies, for acts of violence against ships, and for attempts to take life or to destroy property anywhere on the high seas.<sup>2</sup> It has been judicially decided that a foreign vessel, committing an infraction of our laws while in port, may be pursued and seized upon the ocean, and of this principle the recent pursuit of the "Itata" is a good illustration.<sup>3</sup> Finally, it has been held by the Supreme Court of the United States on two occasions that it is not a violation of international law for a foreign country to seize American merchant vessels on the high seas, at a distance, in one case, of eighteen miles from land, for attempting to trade at particular ports in violation not of belligerent rights, but of municipal law.<sup>4</sup> The legality of such seizures was upheld by Chief Justice Marshall upon the broad ground that the right of every nation to secure itself against injury, or an anticipated infraction of its laws, is not confined to its own territory, or within any definite boundary upon the sea, but is to be measured by the degree of the necessity which requires its exercise.

Now, if we examine these various instances of maritime

<sup>1</sup> Sections 2867, 2868, R. S. ; the "Betsy," 1 Mason 354.

<sup>2</sup> U. S. Const., Art. I, § 8; § 730 R. S. ; *Reg. v. Lopez*, D. & B. C. C. 525; *Reg. v. Anderson*, L. R. 1 Cr. C. 161; *Rev. v. Allen*, 1 Moody C. C. 494; *U. S. v. Palmer*, 3 Wh. 630; *U. S. Klintonck*, 5 *Id.* 144, 152; *U. S. v. Smith*, *Id.* 153; *U. S. Pirates*, *Id.* 184; *U. S. v. Holmes*, *Id.* 412; the "Marianna Flora," 11 *Id.* 1; Wharton's Conflict of Laws, § 862; Brown on Jurisdiction, §§ 87, 90.

Some of these instances of maritime jurisdiction were formerly explained on the theory of the so-called "territoriality" of merchant vessels, viz., that they were to be regarded as floating portions of the State to which they belonged. This theory has been completely refuted by Woolsey, in his International Law, § 54; by Hall, in his International Law, pp. 223-228; and by Lindley, J., in *Reg. v. Keyn*, L. R. 2 Exch. D. 93.

<sup>3</sup> Wharton's Com. on Am. Law, § 188; Heffter's Public International Law of Europe, § 80; Woolsey's International Law, §§ 54, 194; opinion of Story, J., in the "Marianna Flora," 11 Wh. 49.

<sup>4</sup> *Church v. Hubbard*, 2 Cranch 187; *Hudson v. Guestier*, 4 *Id.* 293; 6 *Id.* 281.

jurisdiction, we shall find that the essential idea underlying all of them is that which Chief Justice Marshall has suggested, viz., the right of self-protection, and, as we have seen, for different purposes very different degrees of protection are required. The three-mile rule is itself an instance of this broader principle,<sup>1</sup> having been originally based upon the supposed range of cannon shot; and owing to the recent increase in the carrying power of cannon, it is the opinion of most text-writers that this limit should be changed from three to nine miles. Hence, in order to explain these cases, it is necessary to formulate a wider rule upon this subject than is to be found in most treatises on international law. Such a rule might be stated as follows: "Every nation, in time of peace as in time of war, has the right to adopt such measures and to employ such kinds and degrees of force upon the high seas as are essential to the protection of its sovereign rights, its citizens, and its property." A rule at least as broad as this is supported by the cases cited, and no more restricted rule would be adequate to explain them.<sup>2</sup> If, then, such a principle exists, it must be applied like any other legal principle to new cases as they arise. It has been shown beyond a doubt that it is essential to the preservation of the Alaskan seals that they should be protected in Behring Sea, and that if such protection had not been accorded to them a most important national industry might have been destroyed.<sup>3</sup> In view of these facts, and in the absence of any technical rule or treaty restricting the authority of our government in

<sup>1</sup> Sir Robert Phillimore, in his opinion in the case of *Reg. v. Keyn*, L. R. 2 Exch. D. 81, says that a qualified jurisdiction over the three-mile belt is recognized because "it is necessary for the defence and security of the adjacent State."

<sup>2</sup> Such a rule would also furnish a ground of distinction between the case of the "Sayward" and a case like that of the "Louis," 2 Dods. Ad. 245, which has been cited against the contention of our government in the Behring Sea controversy. In that case Lord Stowell held that it was an infraction of international law for a British cruiser to seize a foreign vessel on the high seas for carrying on the slave trade. Obviously such an act upon the part of the vessel seized in that case did not inflict any injury upon the sovereign rights of Great Britain, or upon its citizens or property.

<sup>3</sup> Numerous seizures of British ships were made during the years 1886, 1887, 1889 and 1890, for the purpose of preventing the destruction of seals in the waters of Behring Sea. In the year 1888 there were no seizures.