NORTH CAROLINA LAW REVIEW

Volume 7 | Number 4 Article 3

6-1-1929

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THE "I'M ALONE" CASE AND THE DOCTRINE OF "HOT PURSUIT"

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On March 22nd, a United States coast guard vessel sunk the Canadian rum schooner, *I'm Alone.* The destruction of the ship was accomplished upon the high seas and at a very considerable distance from American territorial waters.

The incident soon became a popular subject of press comment. The two governments concerned exchanged diplomatic notes discussing the facts and the legal problems involved. A review of these communications is here in point.[1]

At the request of the Canadian Government, the Secretary of State of the United States on March 28th, stated the facts in the case.[2] The *I'm Alone* appears to have been a well known offender, having been engaged in smuggling liquor into the United States for years. In 1928 the vessel changed its base of operations from the New England coast to British Honduras. On March 20th, 1929, it was sighted by the United States coast guard vessel *Walcott,* within ten and one-half miles of the coast of the United States. Upon the approach of the *Walcott* the *I'm Alone* fled. The *Walcott* ordered the schooner to halt for boarding, but this command was not complied with. The *Walcott* pursued the *I'm Alone* seaward, calling on her to halt. This command was not obeyed, and the *Walcott* fired warning shots, first across the bow of the schooner and then into the sails and riggings. At this juncture the *Walcott's* gun jammed and she summoned to her assistance the coast guard vessel *Dexter,* which joined in the pursuit. The *Dexter* warned the *I'm Alone* to stop, but the master of the schooner refused to heed. After firing warning shots the *Dexter* put several shots into the hull of the *I'm Alone,* whereupon she sank. The crew were rescued by the coast guard vessels, with the exception of one seaman who was drowned. It was stated that the vessel could not have been boarded because of the roughness of the sea, and furthermore the master of the *I'm Alone* indicated that he would forcibly resist such an effort. The

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[1] See recent discussion by W. C. Dennis, 23 Am. Jr. Int. Law 351 (1929).

[2] MS. Department of State, Press release, April 26, 1929.

officers and crew of the schooner were placed under arrest and taken to New Orleans for trial.[3]

The Canadian minister in replying to the American note pointed out the difference in the statement of facts made by the coast guard officers and the master of the *I'm Alone*.[4] He further declared that the proceedings of the coast guard were without legal foundation.

It was admitted that the *I'm Alone* had "unquestionably been engaged for a number of years, under various owners, in endeavoring to smuggle liquor into the United States." But in the instant case the master of the *I'm Alone* claimed to be, when challenged, not less than fourteen and one-half miles from the American coast. It was also pointed out that during the chase of the schooner by the *Walcott* the cutter *Dexter* came up from another direction.

Referring to the legal question involved, the Canadian Government pointed out that the Treaty of 1924[5] between the United States and Great Britain, and to which Canada agreed, was concluded "because the parties were desirous of avoiding any difficulties which might arise" in connection with the subject. It was stated in the treaty that while the parties reaffirmed their intention to uphold the three mile limit principle, the British Government would make no objection to visit and search beyond the three mile limit "when appearances warranted." The rights so conferred were not to be exercised at a greater distance from the United States coast than could be traversed in one hour by the vessel suspected of endeavoring to commit the offense, or by any other vessel in which the liquor was intended to be conveyed to shore.

"It was of the essence of the Convention that its provisions covered the whole field of extra-territorial seizures." It appeared to be established that the vessel was at all times beyond the limit of an hour's sailing distance from the shore.

The Canadian Government questioned the appropriate application of the doctrine of "hot pursuit." It was admitted that the validity of the doctrine is recognized in international law and by Canadian courts, if the pursuit is begun within the three mile limit. The statement of Secretary Hughes, January 23, 1924,[6] is here quoted to sustain this point. He stated that the United States Government did not

[3] Criminal proceedings against the master and crew of the *I'm Alone* have been dropped at the request of the United States government. U. S. Daily, April 10, 1929.

[4] MS. Department of State, Press release, April 26, 1929.

[5] U. S. Treaty Series, No. 685.

[6] Foreign Affairs, Special Supplement to Vol. II, No. 2, pp. iv and v.

claim territorial limits in excess of three miles. However, extra-territorial seizures might be made in the case of "hot pursuit" where the vessel has committed an offense against those laws, and is caught while trying to escape.

The fact that the sinking of the *I'm Alone* was not done by the cutter that commenced the pursuit but by one which "came up from a different direction two days later," is suggested as an additional ground for objection to the application of this doctrine.

Finally objection is made to the destruction of the *I'm Alone* by the coast guard vessel, as unwarranted by the circumstances and unauthorized by the treaty.

The Canadian note finally sums up the points at issue and the position of the government of Canada.

"1. The search and seizure of vessels beyond territorial waters should be exercised in accordance with the terms of the Convention.

"2. . . . that pursuit should not be continued beyond an hour's sailing distance from the shore unless initiated within territorial waters. (Three mile limit).

"3. . . . that the measures adopted for enforcing the rights conferred by the Convention should be confined to the reasonable minimum necessary for their enforcement, and that in the present instance the extreme course adopted constitutes just ground for such redress as is now possible."

The American Secretary of State replied to the Canadian minister on April 17th,[7] expressing complete agreement as to the propriety of the representations of the Canadian Government in such cases, in the interest of the maintenance of the principles of international law. He referred to the points of difference suggested in the Canadian protest. The United States based its claim to jurisdiction over the *I'm Alone* when first challenged upon evidence collected by a special representative of the Department of Justice of the United States, upon the statements of the commanders of the coast guard vessels involved, and finally upon the sworn affidavit of an impartial observer. All of which proved that the *I'm Alone* was not at a greater distance than ten and eight-tenths of a mile from the shore when first challenged. "If he (the Captain of the *I'm Alone*) believed that his vessel was beyond one hour's sailing distance from the shore when first hailed, he must have known that his vessel could not be legally seized by the coast guard vessel and that he had nothing

[7] MS. Department of State, Press release, April 26, 1929.

whatever to fear in complying with the command to stop and be examined."[8]

In respect to the speed of the *I'm Alone,* it is well established that she was fully capable of attaining a greater speed than ten and eight-tenths miles an hour, and hence would come squarely within the treaty limits.

As to the Canadian objections that the doctrine of hot pursuit could not apply since "(a) the chase began not from territorial waters (i.e. the three mile limit) but from the treaty distance of an hour's sailing; (b) the arrest of the vessel was performed not by the original pursuing vessel, but by another which had been called for assistance," it was replied that (a) pursuit beginning within the treaty limit is legal. This position has been taken by Parker, J., in the Circuit Court of Appeals, in the case of the *Vinces.*[9] If arrest is valid when the vessel is first hailed, pursuit is justified, and "the locus of the arrest and the distance of the pursuit are immaterial, provided: (1) that it is without the territorial waters of any other state; (2) that the pursuit has been hot and continuous." The duration of the pursuit is unimportant, if the foregoing principles are adhered to.

With regard to the joining in the pursuit by a second coast guard vessel, it was submitted in the note that there was a distinct unity and connection between the pursuing ships.

Finally as to the sinking of the *I'm Alone,* it was contended that because of the refusal of the captain to submit and the impossibility of boarding, drastic measures were justified. The laws of Canada permit such action.[10] The loss of the life of the seaman was a misfortune which the captain of the *I'm Alone* might have prevented by surrender.

On April 24th, the Canadian Government, through its minister, replied to the foregoing.[11] Commenting upon the position of the American Government, it was suggested that the question under discussion appeared capable of settlement only by an impartial tribunal.

[8] This statement is of particular interest because it indicates a reliance by the American Government upon the one hour's ruling as established by the treaty with Great Britain in 1924. The United States Tariff Act of 1922 establishing the twelve mile limit for purposes of revenue control is nowhere referred to in the note, and would receive no International Law recognition.

[9] The Vinces, 20 F. (2d) 164, 174-5 (E.D. S. C. 1927); affirmed as Gillam v. U. S., 27 F. (2d) 296, 299 (C. C. A. 4th 1928).

[10] Canada, Rev. Stat., ch. 43, §7 (2).

[11] MS. Department of State, Press release, April 26, 1929.

Referring to the applicability of the doctrine of hot pursuit, it was maintained that within the limits of its strictest interpretation, it has not been universally accepted, and in respect to its extension, as interpreted by the United States, it is without basis. The decisions of the courts of the United States do not have international validity, nor have they been accepted by the government of Canada. In the case of the *Vinces,* mentioned in the American note, the British Ambassador had stated that his government did not accept the principles upon which the decision of the District Court had been based. The treaty with Great Britain expressly confirms the agreement in the recognition of the three mile territorial limit; hence the right to pursue from a point beyond that limit is not implied.

Finally, it was repeated, that the right to seize could not be regarded as justifying the sinking of the *I'm Alone,* for, "when all of the circumstances are taken into account . . . the impression that is formed is of a distinctly punitive intent." The result could only be justified upon the assumption that the ship was within treaty limits when challenged and that pursuit would be justified. The proposal, on the part of the American Government to arbitrate the matter, as provided for in the treaty, would be accepted by the Canadian Government.

Upon the request of the Secretary of State, the Attorney General of the United States expressed an opinion upon the controverted points.[12] His conclusions were: that the *I'm Alone* was a notorious rum runner found in close proximity to the coast of the United States and therefore gave cause for the belief that she was attempting a breach of law, and was hence subject to being boarded and seized under the terms of the treaty. That the pursuit having begun within an hour's sailing distance of the shore, was permitted under the terms of the treaty, and that the doctrine of "hot pursuit" applies. Upon this point the Attorney-General referred to the decision in the case of the *United States v. Gillam.*[13] The fact that another vessel joined in the pursuit does not prevent the application of the doctrine "so long as a vessel of the United States was continually in sight of the *I'm Alone.*" Upon the final point the opinion was that in view of the felonious nature of the offense of which the *I'm Alone* was guilty, the coast guard vessels were warranted in sinking her if she could not be taken by other means.

[12] MS. Department of State, Press release, April 26, 1929.
[13] 27 F. (2d) 296 (C. C. A. 4th 1928).

The questions which have been raised in connection with the *I'm Alone* case justify a review of the current international practice and the claims of the states concerned. As to the general problem, there is certainly nothing novel in the claim of the littoral state to jurisdiction and control over the marginal sea.[14] However, it is generally agreed that such claims may not operate so as to interfere with the right of foreign vessels to pass freely upon the high seas in time of peace.

While it has been assumed since the medieval period, that only a narrow margin of the sea may be under the jurisdiction of a state, there has been no general agreement as to the limits of this area.[15] However, it is generally believed that the three mile limit stands as a rule of international customary law.[16] Exceptions to this rule may be observed for "a state may endeavor to prevent, in times of peace or war, the commission of certain acts by foreign ships, or the occupants thereof, at a distance of more than three marine miles from its coast, without claiming that the place where they occur is a part of its domain."[17] It is to be observed that authority within the three mile territorial belt is jurisdictional, whereas authority exercised beyond that limit is properly regarded as administrative control.[18]

The municipal laws of states contain variations[18a] with respect to claims of jurisdiction and control over the adjacent sea. In the year 1736 the English Parliament enacted a law whereby "hovering" within four leagues, or twelve miles, of the coast of England was forbidden.[19] However, as early as 1805 Lord Stowell in the case of the *Anna,* spoke of the marine boundary as "being about three miles from the shore."[20] The British Government definitely claimed the three mile territorial limit in the enactment in 1878 of the Territorial Waters Jurisdiction Act.[21] In 1893, Sir Charles Russell, Crown Advocate, in speaking before an international tribunal, ex-

[14] Bynkershoek as early as 1737 expressed concretely the idea that the sea admits of appropriation to the limits of common range or effective control. QUESTIONES JURIS PUBLICI, Lib. I, ch. 8.

[15] Dickinson, *Jurisdiction at the Maritime Frontier,* 40 Harv. L. Rev. 1 (1926).

[16] JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927); MASTERSON, JURISDICTION IN MARGINAL SEAS (1928).

[17] HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, Vol. I, p. 257.

[18] JESSUP, *supra* note 16, Introduction, p. xxxii.

[18a] 23 Am. Jr. Int. Law 249. Special Supplement.

[19] Geo. II, cxviii.

[20] The Anna, 5 C. Rob. 373, 385c.

[21] 41 and 42 Victoria, ch. 73, §7.

pressed the opinion that "hovering laws for the prevention of smuggling rested on the principle that no civilized state will encourage offenses against the laws of another state, the justice of which law it recognizes. It willingly allows a foreign state to take reasonable measures of prevention within a moderate distance even outside territorial waters."[22]

In the United States the weight of opinion among statesmen and as expressed in Congress and in court decisions upholds the extension of the authority of the state beyond the three mile limit. Thomas Jefferson, writing in 1793 to M. Genet, stated that the smallest distance claimed "is the utmost range of a cannon ball, usually stated at one league," or three miles.[23]

In 1799 the Congress of the United States authorized the exercise of certain acts of customs control within a twelve mile zone.[24] The Supreme Court of the United States did not denounce the act as being at variance with International Law.

The case of *Church v. Hubbart* decided in 1804 is the leading American case on the jurisdiction of the nation over the sea adjoining it. In this instance Chief Justice Marshall declared that "a nation's power to secure itself from injury might certainly be exercised in the marginal sea beyond the limits of territorial waters."[25] The exercise of extra-territorial authority is necessary to insure territorial security. Recent cases have been decided upon the authority of the statute of 1799, and in accordance with the view expressed by Marshall.

In 1922 the Congress of the United States enacted into law a Tariff Act establishing the authority of the United States for certain revenue purposes for a distance of twelve miles measured from the coast seaward.[26] The courts of the United States have generally upheld the validity of the Act of 1922, as they had the Act of 1799, although distinguishing between the territorial jurisdiction within the three mile limit and the right to make extra-territorial seizures within twelve miles of the shore.[27]

[22] Fur Seal Arbitration Proceedings, Vol. XIII, 1076-79.
[23] MOORE, DIGEST OF INTERNATIONAL LAW, Vol. I, p. 7.
[24] Act of Congress, Mar. 2, 1799; Rev. Stat., §99; U. S. Comp. Stat. (1918) §2760.
[25] Church v. Hubbart, 2 Cranch, 187, 234 (1804).
[26] U. S. Code, Title Customs Duties, §481.
[27] The Henry L. Marshall, 286 Fed. 260 (S. D. N. Y. 1922); The Marjorie E. Bachman, 4 F. (2d) 405 (D. C. Mass. 1925); U. S. v. Bengochea, 279 Fed. 537 (C. C. A. 5th. 1922); The Grace and Ruby, 283 Fed. 475 (D. C. Mass. 1922).

Claims to extra-territorial control such as those asserted by the United States are advanced by other nations. The civil codes of Argentina, Chile and Ecuador contain such provisions. Jessup, The Law of Territorial Waters, p. 9.

The treaty of 1924, agreed to by the United States and Great Britain, adopted a one-hour cruising distance from the coast as the limit of extra-territorial control to be exercised by the United States. An interesting question now arises. Does the treaty of 1924 serve to negative the statute of 1922? The courts of the United States have held in some cases that it does not; in others the affirmative view has been taken.[28] In a diplomatic note explaining the position of the American Government, in the *I'm Alone* case, the American Secretary of State implies that it does.[29] Certainly it cannot be supposed that the decisions of the municipal courts of the United States, unsupported by international practice, would meet with acceptance on the part of other nations. This implication, on the part of the United States Department of State, in relying solely on the provisions of the treaty, appears very significant, in view of the "test case" aspect of the present controversy.

The governments concerned differ as to the application of the "hot pursuit" doctrine to the situation of the *I'm Alone*. Both parties agree in recognizing the existence of the principle. The statement of Sir Charles Russell is sometimes interpreted as expressing the attitude of Great Britain. ". . . it must be hot pursuit, it must be immediate, and it must be within limits of moderation. . . . In other words we are still considering the character of the act which is not defined by international law, but which is something which a nation will stand by and see done, and not interpose, if they think that the particular person has been endeavoring to commit a fraud against the laws of a friendly power."[30] The great advocate further says that the doctrine rests upon acquiescence. It should be noted that today "hot pursuit" is regarded as "a perfect right under international customary law." The doctrine was applied by a Canadian court in the case of an American vessel committing a breach of the fishing laws. She was pursued from within three miles of the shore and seized one and three quarter miles beyond the three mile limit. The Supreme Court of Canada in reviewing the case said that it was "bound to take notice of the law of nations and . . . by that law when a vessel within foreign territory commits an infraction of its

[28] Gillam v. U. S., 27 F. (2d) 296 (C. C. A. 4th 1928); The Squanto, 13 F. (2d) 382 (C. C. A. 2d 1926); The Mistinguette, 14 F. (2d) 753 (S. D. N. Y. 1926); The Pesaquid, 11 F. (2d) 308 (D. C. R. I. 1926); Ford v. U. S., 273 U. S. 593, 609 (1926); U. S. v. Farris, 19 F. (2d) 925 (N. D. Calif, 1927).

[29] MS. Department of State, Press Release, April 26, 1929.

[30] Fur Seal Arbitration Proceedings, Vol. XIII, p. 300 (p. 1079 of original report).

laws either for the protection of its fisheries, or its revenues, or its coasts, she may be immediately pursued into the open seas beyond the territorial limits, and there taken.[31]

American courts have supported the right to pursue vessels beyond the three mile limit if they have been guilty of a violation of law within that area. It should be noted that in the case of the *Itata*,[32] a vessel guilty of violating our neutrality laws was pursued by an American warship from the territorial waters of the United States, into the territorial waters of Chile. The pursuit was held to be valid until continued in Chilean territory. In the recent case of the *Vinces* the court decided that pursuit initiated beyond the three mile limit but within the one hour limit is permitted under the terms of the treaty with Great Britain. The language of the court is positive. ". . . 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."[33] The situation of the *I'm Alone* was similar to that of the *Vinces*. According to the contention of the United States Government, she was within one hour's sailing distance of the shore, and therefore she could be legitimately taken when pursued into the open sea. The preamble of the treaty pledges the contracting parties to maintain the three mile territorial limit. Article III provides that the rights conferred (search and seizure) by the treaty shall not be exercised at a greater distance from the shore than can be traversed in one hour's time by the vessel suspected. According to the preamble, the three mile limit is to be maintained as the territorial limit, although under Article III extra-territorial seizures may be made within the one hour limit. There is no specific provision in the treaty that permits the seizure of the ships upon the high seas, when pursuit is begun beyond the three mile limit and within the one hour limit. Nor can such procedure be justified by the practice of other nations. Authoritative writers agree that pursuit must begin within "territorial waters," which in the present instance is definitely established as three miles from the shore.[34]

[31] The North, 37 Can. Sup. Ct. Rep. (1906).
[32] MOORE, DIGEST OF INTERNATIONAL LAW, II, 985-986.
[33] Gillam v. U. S., 27 F. (2d) 296 (C. C. A. 4th 1928).
[34] HALL, INTERNATIONAL LAW (4th ed.) p. 267; (8th ed.) p. 309; HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE U. S., Vol. I, pp. 418-21.
It can scarcely be thought that the joining in the pursuit by a second United States coast guard vessel materially alters the fact that the pursuit was immediate and continuous.

Can the sinking of the *I'm Alone* be justified? In the absence of a provision in the treaty covering such contingencies, the rule of international law governing visit and search, in time of peace, may be held to apply. Oppenheim states that if the command to halt is not heeded, "force may be resorted to."[35]

At the suggestion of the American Government, the *I'm Alone* case is to be referred for settlement to an international tribunal, as provided for in Article IV of the treaty. Any British vessel which claims an injury through the improper exercise of the rights conferred by the treaty upon the United States shall have its petition for redress referred to a commission of two persons "one of whom shall be nominated by each of the High contracting parties." If these two persons fail to agree, the matter is to be referred to the claims commission, established under the Pecuniary Claims Convention of August 18, 1910. It is presumed that this commission may be convened at any time for the hearing of such causes as those arising out of the *I'm Alone* incident.[36]

[35] OPPENHEIM, Vol. I, (2nd ed., 1912) §268, p. 337.
[36] MALLOY'S TREATIES, III, p. 2619.