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THE DECISION OF THE BEHRING SEA ARBITRATORS.

BY RUSSELL DUANE, ESQ.

THE decision of the Behring Sea Arbitrators, rendered at Paris on the fifteenth day of last August, marked the close of one of the most important international controversies of recent times. The original subject of complaint was the seizure by the United States of three Canadian sealing vessels in Behring Sea, in the summer of 1886, for the alleged violation of an act of Congress which forbade the taking of fur-seals in Alaskan waters. The British Foreign Office at once protested that these seizures were illegal because they had been made in the open sea at a greater distance from land than three miles, and therefore outside of the territorial jurisdiction of the United States. A prolonged diplomatic controversy between the two governments ensued. Mr. BAYARD, who was then Secretary of State, sought to solve the problem by proposing that the various nations interested in the seal fisheries should unite in an international convention providing for their suitable

regulation. Although the prospect of this result being accomplished appeared for a time to be very promising, the plan ultimately failed because of the refusal of Great Britain to proceed with it against the remonstrance of Canada. Under President HARRISON'S administration more British schooners were seized, and Mr. BLAINE, who had meanwhile succeeded Mr. BAYARD as Secretary of State, asserted the right of the United States to protect the seals in this manner on the two-fold ground of our having succeeded by the Treaty of 1867 to certain alleged rights of Russia in Behring Sea, and of the urgent necessity of such measures in order to prevent the seal herd from being destroyed. The stand thus taken by Mr. BLAINE met with such pronounced and continued opposition from the British Government that it became evident in the course of time that no satisfactory solution of the difficulty could be reached through ordinary diplomatic negotiations. It was therefore proposed that the questions in dispute between the two countries, with reference to the ownership and regulation of the Alaskan seal fisheries, should be referred to international arbitration. Effect was given to this proposal by the Treaty of February 29, 1892, which provided for the creation of a Board of Arbitration composed of seven members, of whom two were to be appointed by the President of the United States, two by the Queen of England, one by the President of France, one by the King of Italy, and one by the King of Sweden. By Article VI of this Treaty the Arbitrators had referred to them, in the first place, certain points bearing on the question whether the United States had acquired from Russia, upon the purchase of Alaska in 1867, any extraordinary proprietory rights in Behring Sea; in the second place, whether the United States had any right of protection or property in the fur-seals when found outside of the three-mile limit. Article VII of the Treaty provided that if these legal questions should be so decided as to deprive the United States of the right to make necessary regulations for the protection of the seal fisheries without the concurrence of Great Britain, the Arbitrators them-

selves should then determine what regulations outside of the jurisdictional limits of the two countries were necessary, and over what waters they should extend. The question whether any damages were due from the United States for past seizures was not submitted to the tribunal at all, but was reserved as a subject for future negotiation between the two governments.

The decision just rendered by the Arbitrators may be described as favorable to England in theory, and to the United States in practice. Every disputed point of law submitted to them by the Treaty was decided against our Government, but the regulations which they prescribed were of such a stringent character as to afford to our national interests in the seal fisheries almost as much protection as we ourselves would have been able to give them had the legal points been decided in our favor. The important features of these regulations are three in number, and comprise: First, the prohibition at all times of pelagic sealing within a circle drawn around the Pribyloff Islands at a distance of sixty nautical miles; second, the establishment of a close season for fur-seals during the months of May, June and July, within which time sealing is prohibited over the whole of Behring Sea and that part of the Pacific Ocean lying north of the thirty-fifth parallel of latitude and east of certain defined boundaries; third, the prohibition of the use of nets, fire-arms and explosives in taking seals. Various less important regulations were also made as to the character of the vessels which should be allowed to engage in the industry, and of their crews, requiring, for example, that such vessels should be licensed, that they must be sailing vessels and carry a distinguishing flag, and that they must make regular reports to their respective governments as to the times and places at which sealing has been carried on. The principal object which these regulations were intended to promote was the protection of the seals, especially the pregnant females, during their annual migration in the months of May and June from the waters of the Pacific to their home on the Pribyloff Islands in the centre

of Behring Sea, and also to protect during the summer months the female seals when frequenting the waters adjacent to these islands in search of food for their young. The sixty-mile zone and the close season of three months which the Arbitrators have established are well adapted to secure these results. When the seals migrate back again to the Pacific Ocean on the approach of cold weather in the autumn, they stand in no especial need of protection, because at that time the sea is usually so rough as to render marine sealing too dangerous an occupation to pursue, and also because the skins of the seals during that period are in a condition which renders them less valuable for commercial purposes. In this connection it is interesting to note that of the fourteen vessels seized by the United States in the years 1886, 1887 and 1889, nine were captured while engaged in sealing operations at times and places forbidden by the above regulations, while of the remaining five three were seized within two days of the close season just established, and the other two within five miles of the protective zone. All of these fourteen ships would likewise have been guilty of violating the present regulations by reason of their having employed fire-arms to kill seals. The total prohibition by the Arbitrators of the use of fire-arms in pelagic sealing, with the single exception that shot-guns may be used outside of Behring Sea, is a most important feature of the regulations, for the reason that in the past nearly all of the objectionable seal killing has been effected in that way. The number of seals which can be killed in the open sea by other weapons, such as spears and harpoons, is so small as to be of little practical account. It is now incumbent upon both the United States and Great Britain to enforce these regulations by appropriate national legislation; and if in addition to such legislation the Governments of the two countries see fit to adopt the recommendation of the tribunal that all seal killing shall be suspended for a period of from one to three years, it is probable that the recent depletion of the Alaskan seal fisheries will be checked, and that the herd will once more regain its former proportions.

It has been intimated in certain quarters that the Behring Sea Arbitration has not proved to be of any real benefit to the United States for the reason that equally good regulations might have been secured through ordinary diplomatic negotiations, if our State Department had confined itself exclusively to that end instead of asserting supposed principles of law which were destined to be overruled. The incorrectness of such criticism becomes apparent when we compare the regulations which have just been prescribed with various other sets of regulations which were suggested at different times prior to the arbitration, and consider the causes which prevented any of them from being adopted. For example, at a very early period in the diplomatic negotiations, Mr. BAYARD, who was then Secretary of State, suggested in a letter, dated February 7, 1888, and addressed to Mr. PHELPS, our Minister at London, that the United States, Great Britain, and other interested powers should unite in establishing a close season for fur-seals from April 15 to November 1, and extending over the area of sea lying north of latitude 50°, and between longitudes 160° west and 170° east. Lord SALISBURY expressed himself as well pleased with the general plan thus suggested, and the matter seemed to be progressing toward a favorable issue, when, as already stated, the negotiations were suddenly broken off by the refusal of Great Britain to proceed with them in opposition to the wishes of Canada. The fact that the interests of certain Canadians would be injured by any restrictions imposed upon pelagic sealing, has constituted a perpetual obstacle to any settlement of this question between the two countries by ordinary diplomatic methods. It has appeared very clearly from the beginning that had it not been for this circumstance, we should have had no difficulty in coming to terms with the British Government, for the reason that that country is equally interested with ourselves in the preservation of the fur-seals since the greater part of the skins secured in Behring Sea are prepared in London for commercial uses. In the summer of 1889 more British ships were seized for taking seals, and further corre-

spondence, took place between the two Governments. On April 30, 1890, Sir JULIAN PAUNCEFOTE, the British Minister at Washington, informed the State Department that, for the purpose of protecting the seal fisheries pending an investigation by a commission of scientists as to certain disputed facts relating to the industry, he was prepared to recommend to his Government, as a provisional measure, the prohibition of pelagic sealing in Behring Sea during the months of May, June, October, November and December, and at all times within a distance of *ten miles* of the Pribyloff Islands. Our Government declined to accede to this proposal upon the ground that a ten-mile zone around the islands was altogether inadequate to protect the female seals when frequenting the sea during the summer months in search of food. Later in the same year Mr. BLAINE, in a letter addressed to the British Minister at Washington on December 17, 1890, expressed his willingness to agree to regulations which should prohibit pelagic sealing within *sixty miles* of the islands from May 15 to October 15 of each year—regulations far less favorable to the United States than those which the Arbitrators have recently prescribed, inasmuch as the latter not only give us as large a protective zone around the islands as that asked for by Mr. BLAINE, but prohibit sealing therein continuously, and in addition establish a three-months' close season over the remainder of Behring Sea and the North Pacific, and prohibit the use of fire-arms in Behring Sea at all times. The great success of the arbitration in point of practical results also becomes apparent when we compare the terms prescribed by the Arbitrators with a set of regulations conceded to us by Great Britain during the argument at Paris. On June 20, Sir RICHARD WEBSTER, one of the British counsel, submitted a proposal to the Tribunal of Arbitration, that sealing should be prohibited within a radius of *twenty miles* of the islands, that the use of rifles and nets should be forbidden, and that a close season should be established extending from September 15 to July 1. It will be observed that these proposed regulations were

almost as unfavorable to us in some respects as the provisional terms stated by Sir JULIAN PAUNCEFOTE in April, 1890, who suggested a zone of *ten miles*, whereas the arbitrators adopted Mr. BLAINE'S suggestion, and gave us a zone of *sixty miles*. In connection with these regulations a most important victory was won by our counsel at Paris in their successful resistance to the efforts of the British counsel to induce the Board of Arbitration to make whatever regulations they might decide upon, conditional upon the acceptance and enforcement by the United States of supplementary regulations upon the Pribyloff Islands. The Arbitrators declined either to prescribe or to recommend any regulations with respect to the taking of seals on United States territory.

The successful outcome of the arbitration in this matter of regulations was made possible by the skill and foresight of Mr. BLAINE at a critical point in the diplomatic negotiations which preceded the Treaty of Arbitration. In his letter of December 17, 1890, already referred to, he replied to a previous offer of Great Britain to arbitrate certain other points by suggesting, as a more suitable subject for arbitration, substantially the same five questions of law which were afterwards embodied in the Treaty. Foreseeing the possibility that these questions might be decided adversely to the United States, he added a sixth paragraph, providing that, in that event, the Arbitrators should determine what regulations were essential for the preservation of the seal herd on the high seas, and with some slight change of form, this paragraph was subsequently embodied in Article VII of the Treaty of Arbitration. It is to this circumstance, supplemented by the skill of Mr. PHELPS and our other counsel at Paris, in convincing the Arbitrators that most stringent measures were needed to preserve the seals, that the successful outcome of the arbitration is due. In many respects we are in a better position than if the legal points had been decided in our favor. Had that been the case, our Government would have been subjected to the entire responsibility and expense of guarding

the seals against foreign depredators over areas of open sea covering many thousands of miles. The present situation appears to be that, whereas England formerly objected to all marine protection for the seals whatsoever, she is now compelled, by the decree of the Board of Arbitration, to co-operate with our Government in enforcing regulations which effectually deprive her subjects of all substantial benefit from the seal fisheries, while our own interests in that respect will be better protected than they have been at any time in the past.

The Tribunal of Arbitration which has just decided the Behring Sea question was one of such exalted dignity, and its individual members men of such great eminence, that any adverse criticism of the manner in which they dealt with the legal questions submitted to them would be altogether out of place. It is, perhaps, not too much to say that no court of greater dignity has ever sat to administer justice at any period in the history of the world. Hence when such a tribunal decides a legal question, or enunciates a proposition of international law, rules and principles so laid down must be regarded thenceforth as altogether removed from the sphere of controversy. But the character and scope of such rules and principles, and the manner in which they are likely to be applied in other cases, are useful subjects of discussion, and now that this particular case has been finally and conclusively determined, it is in order to inquire as to its probable bearing upon future international disputes, and the extent to which it is likely to be cited as a precedent. It is, perhaps, not too much to say that the legal principles which have been enunciated by the Board of Arbitration in the present instance are so fundamental, and deal with subjects of such wide importance, that their decision is destined to become a permanent and conspicuous land-mark in the development of international law. Between the conflicting practices of different nations, in matters of maritime jurisdiction, a sharp line has now been drawn separating the legal from the illegal, and many questions which previously

were open subjects of discussion must now be regarded as closed and settled. It is my purpose to state certain general propositions of international law which would appear to follow in logical order from the decision which the Arbitrators have pronounced.

I. In the first place, this is probably the last occasion in the history of the world upon which any nation will claim to be the exclusive owner of any portion of the open sea. It was contended by our Government in the present case that Russia, by the Ukase of 1821, and by the subsequent exercise of authority in Behring Sea, had acquired therein certain exceptional proprietary rights, which passed to the United States at the time of the purchase of Alaska. It was not, except at a very early period of the negotiations, claimed that Behring Sea was a *mare clausum*, or closed sea, but it was contended that we had derived from Russia exclusive rights of jurisdiction as to all matters relating to the seal fisheries. The Arbitrators, however, decided that Russia never exercised such an exclusive jurisdiction in Behring Sea, and that, consequently, no rights of this character passed to the United States by the Alaska Treaty. In view of this decision, it is unlikely that the claim will ever again be made that any considerable area of the high seas can become the property of any one nation or the subject of exclusive maritime jurisdiction for any purpose whatsoever. It is safe to assume that the ancient doctrine that the high seas are susceptible of ownership, as illustrated three centuries since, in the claims of Spain to the Indian Ocean, and of England to the "narrow seas" adjoining her coasts, has now passed away, and that this decision will stand as an insurmountable barrier to its ever being revived. It is the last mile-stone in the progress of international law from the mediæval idea of marine property to the modern theory that the high seas are free.

II. In the second place, the decision of the Arbitrators practically adopts the rules of the English common law as to the ownership of wild animals by individuals, and makes them part of international law as regards such ownership

by nations. Since no wild animal at all similar to the fur-seal ever figured before in an international dispute, it became necessary for our Government, in the absence of precedents of this character, to turn to the common law for some principle which would sustain our claim to ownership in the seal herds. Accordingly, it was argued in our behalf that seals in international law were analogous to such animals as bees, or carrier pigeons, at the common law, which, as BLACKSTONE said, continued to be the property of their custodian even when flying at a great distance from home, because of their having a fixed intention to return (*animus revertendi*). On the other hand, it was asserted in behalf of Great Britain by Sir CHARLES RUSSELL, that this *animus revertendi* only conferred the right of property in wild animals at the common law when it was induced by artificial means, such as taming them, or offering them food. Hence, he argued, it involved a confusion of ideas to claim that the seals were American property because they migrated at certain periods to a particular place, since they were led to do this, not by artificial, but by natural causes. As they resembled in this respect many other wild animals, there was no reason, he contended, why the same rule of law should not apply to them, and according to that rule of law such animals remain the property of their owner only so long as they continue on his domain. The Arbitrators appear to have been convinced by this reasoning, since they have decided that the United States has no right of property in the fur-seals when they are found outside of our territorial waters. The rules and distinctions of the common law on this subject have thus been transplanted into the domain of international law, and the decision of the Arbitrators supports the further inference that there is no such thing in international law as a national right of property in a herd or body of wild animals as a whole, apart from the ordinary right of property in each individual animal inherent in its custodian during the time that his possession of it lasts.

III. The decision of the Arbitrators establishes the further proposition of international law that beyond the

limits at which its property right in a wild animal ceases, a nation has no authority to enforce any measures for its protection, even though such measures are necessary to preserve the species. Conceding that in the present case the United States had no right of property in the fur-seals when found outside of territorial waters, the question still remained whether our Government did not have the right to surround them with such a degree of protection on the high seas as might be essential to save an important national industry from destruction, and to preserve the fur-seal species for the general benefit of the world. Many facts of natural history were invoked in support of such a right. It was proved that the fur-seals are all born on our territory, that the Pribyloff Islands are their regular abode, that they would remain there continuously were it not for the cold winter climate, and that they regularly return there with the approach of summer. It was said that these facts supplied a basis for ascribing to the United States, if not a general property right in the seals, at least such a qualified right of property as would sustain a limited national jurisdiction on the high seas for the purpose of protecting them against wasteful and destructive methods of attack at the hands of foreigners. In the brief of the United States the broad proposition was asserted, based upon numerous foreign precedents, which seemed amply to support it, that it is "a principle established by international usage that any nation which has a peculiar interest in the continued existence of any valuable marine product, located in the high seas adjacent to its coasts or territorial waters, may adopt such measures as are essential to the preservation of the species, without limitation as to the distance from land at which such necessary measures may be enforced." This was the question at issue: Is it consistent with the established rules of international law to hold that certain facts of natural history, having reference to the origin, habits, and mode of propagation of wild animals like fur-seals, or that the existence of certain valuable commercial interests, pertaining either to a single nation,

or to the world at large, can render a particular method of taking such animals wrong, which otherwise would be lawful, and confer upon the nation most interested the right to prevent such a mode of capture by the exercise of force on the high seas? It seemed to our Government that such a right might properly be held to exist in such a case. The Arbitrators, however, have held that it does not. The effect of this decision will be to restrict the right of a nation to protect its wild animals and marine products within the same limits as define its right of ownership, which, as we have seen, are coterminous with the outer margin of its territorial waters.

IV. This last proposition leads directly to another, which is more far-reaching and of wider application than any which has hitherto been stated. If the right of national protection to wild animals and other marine products does not extend for any purpose beyond a nation's territorial waters, then it follows that all the fishery legislation of the world, so far as it relates in any degree to fisheries which are more than three miles from land, is, as regards nations not parties to such legislation, illegal and void. At this point the decision of the Arbitrators begins to have an important practical bearing outside of the particular subject of dispute which was referred to them in in this case. In the first place, it follows inevitably that all the regulations now in force, for the protection of other seal herds, will have to be restricted hereafter to the three-mile limit. The United States produced evidence before the Board of Arbitrators, that at the Falkland Islands, a British dependency off the coast of Patagonia, a close time for seals is enforced over a strait which is twenty-eight miles wide. In the British colony of New Zealand stringent laws for the protection of all seal fisheries have been enacted, which authorize the seizure of offending vessels anywhere within the limits of the colony, which by a special act of the British Parliament, were made to include areas of open sea hundreds of miles in extent. In view of the present decision it will necessarily be illegal henceforth

to enforce these regulations at a greater distance than three miles from the different islands which comprise the colony. Directing our attention now to instances of laws enacted for the extra-territorial protection of other marine products, there are the regulations governing the pearl fisheries of Ceylon, which were used with such effect by Mr. Blaine in his diplomatic correspondence. The most recent of these regulations, issued in 1890, absolutely prohibits all persons from fishing for chanks, bêches-de-mer, corals and shells over an area of water extending seaward for a distance of from six to twenty miles. The government of Italy regulates numerous coral fisheries located at distances of from three to fifteen miles from the coast of Sardinia, and of fourteen, twenty-one and thirty-two miles respectively off the southwest coast of Sicily. The French colony of Algiers regulates its coral beds for a distance of seven miles from land. The United States of Columbia regulates its pearl fisheries in the Pacific for a distance of thirty miles from the coast of Panama. Mexico has made numerous grants of exclusive privileges in the pearl fisheries off the east coast of Lower California, extending seaward ten kilometres, or about six miles. Great Britain regulates the oyster fisheries on the southeast coast of Ireland for a distance from land of twenty miles; and the herring fisheries on the northeast coast of Scotland, over waters which at some points are more than thirty miles from land. Norway has established a close season for whales over an area of the Arctic Sea thirty-two miles in width, and Russia regulates the hair-seal industry over a section of the White Sea which has a width of fifty-three miles. These are some of the foreign statutes which were cited by the United States in support of its claim to a right of jurisdiction in Behring Sea. The terms of nearly all of these statutes are such as to make them applicable not only to the citizens of the enacting state, but also to foreigners. In view of the recent decision of the Behring Sea Arbitrators, there seems to be no escape from the conclusion that as regards the citizens of foreign nations sailing or hunting

in any of these waters beyond the three-mile limit, these laws are absolutely without authority. It is now permissible for the crew of an American vessel to hunt for fur-seals in the waters of New Zealand and the Falkland Islands, or for hair-seals in the White Sea, or for pearls and corals off the coasts of Ceylon, or Sardinia, or Sicily, or Algiers, or Panama, or Mexico, or to dredge for oysters off the coast of Ireland, or to trap herring on the coast of Scotland, or to catch whales at forbidden seasons off the coast of Norway. The fact that such promiscuous and unregulated hunting or fishing is likely to diminish or exterminate such fisheries can no longer be alleged as an excuse for national interference. In fact, this doctrine would have to be applied even to such an extreme case as that suggested by Mr. Phelps in a letter written by him to the State Department when he was United States Minister at London. He instanced the case of the killing of fish by the scattering of poison at some point off the coast of a friendly nation just outside of the three-mile limit, causing thereby the destruction of valuable fisheries within its territorial waters. Outrageous as such a breach of international courtesy would be, nevertheless it would seem to follow from the present decision that the nation whose interests were so attacked could not lawfully defend them.

These conclusions, which follow inevitably from the propositions which the Arbitrators have laid down, involve a more extended application of the three-mile rule than has ever hitherto been contemplated. Up to the present time it has had more of the character of a special rule applicable to particular classes of cases, which have either become the subject of a recognized international usage, or have been expressly designated in particular treaties and statutes. This fact becomes evident when we consider the manner in which the rule originated and has since been developed, and the theory upon which it is based. It was originally suggested by a celebrated law-writer, named Bynkershoeck, in the year 1702, in a work entitled "De Dominio Maris."

He advanced the proposition that the authority of a state over its marginal waters is limited to the range of cannon, expressing this thought in the Latin phrase, afterwards so widely quoted, "*potestas finitur ubi finitur armorum vis.*" The rule was based on the theory that a nation has a right to protect its territory from attack by extending its jurisdiction over as much of the open sea as it can control from the shore. Other continental jurists of the last century gave their support to the new rule, and fixed the limit suggested by it at three marine miles, which was the average range of marine ordnance at that time. English writers, such as Blackstone and Chitty, did not, however, accept the rule at all, but inclined the rather to favor the older doctrine that the prerogative of the British Crown extended over those wide areas of water adjacent to the coast which had been termed the "King's Chambers" and the "narrow seas." To the British Courts of Admiralty the three-mile rule was unknown until the year 1800, when in the celebrated case of the Twee Gebroeder Lord STOWELL held that the capture of four Dutch ships by a British cruiser, during the war with Holland, was illegal because made within three miles of the coast of a neutral State. The rule had previously been adopted in several treaties relating to the subject of neutrality, and since that time it has been adopted in numerous other treaties, and also in several English statutes. In deciding the celebrated case of the "Franconia," in the year 1876, Lord Chief Justice COCKBURN, after tracing the origin and history of the rule, divided the instances in which it had been applied by statutes, treaties and international usage into four classes. These four classes embraced cases relating to ocean fisheries, the collection of national revenue, the regulation of coast navigation, and neutrality. The fact that the Arbitrators were careful to use the phrase "seal fisheries" in their decision, instead of treating the seal as essentially a land animal, indicates that in their opinion the Behring Sea case would come under the first head of this four-fold classification. It should be remarked, however, that hitherto the rule has

not been universally applied even within the limits of these designated classes. Numerous instances of the exercise of national control over *fisheries* located beyond the three-mile line have already been cited. Certain of our *revenue* laws are enforced, in accordance with their own express provisions at a distance of twelve miles from our coasts. An Act passed by the British Parliament in 1816, which was designed to prevent the rescue of Napoleon from St. Helena, affected *navigation* for a distance of twenty-four miles. With the gradual increase in the range of cannon it has become the opinion of most writers on international law that in cases of *neutrality* a limit of nine miles should be imposed to correspond with the increased range of modern ordnance. Thus it would appear that prior to the recent arbitration it could scarcely be said that the three-mile rule was becoming any more widely extended or firmly fixed with the passage of time. On the contrary, it is a noticeable fact that recent text-writers, like Hall, speak much less positively about the binding effect of the three-mile rule than older writers like Wheaton and Dana. Now, under these circumstances, two courses were open to the Arbitrators to follow. One was to treat the three-mile rule as a general rule of law which must necessarily determine all new cases which are in any respect analogous to established precedents; the other course was to hold that it has no necessary bearing upon any new case outside of those which have become settled by international usage or by the authority of treaties. They might have held, for example, that while the rule would have to be enforced with regard to such ordinary fisheries as those to which it had frequently been applied in other instances, it wonld not be proper to apply it to cases where the preservation of fisheries of an exceptional character required the enforcement of rules and restrictions at a greater distance from land. It is certainly a grave question whether it is not a desirable thing that a nation should be permitted to regulate and control such marginal fisheries, and whether the development of the

principles of international law in this direction would not be beneficial to the interests of the world at large. Certainly great harm may ensue in cases of this character from the absence of all regulations except such as may be established through the tardy and uncertain medium of international conventions. The Arbitrators, however, have adopted the former of the two alternatives presented to them, and held that the three-mile rule is sufficiently general to include such a case as that of the seal fisheries; and, by so deciding the question have necessarily rendered it illegal henceforth for any nation to protect its coast fisheries over a greater area than that which the rule prescribes.

V. From this last proposition another and still wider proposition of law necessarily follows. If the three-mile rule applies to the seal fisheries in Behring Sea because it has been adopted in practice and embodied in treaties relating to other kinds of fisheries, then the rule must also be universally binding within the three other groups of cases within which, as already stated, it has been adopted and enforced at different times; and as these groups on examination will be found to embrace all of the more important purposes for which a limited marine jurisdiction is appropriate at the present day, the further proposition would seem to be established that in all cases where a nation has a marine jurisdiction which is limited, as contrasted with those cases, such as the enforcement of municipal law on on board of merchant vessels, where its jurisdiction extends over the entire sea, the measure of that limitation is always and invariably the three-mile line.

The Arbitrators must necessarily have reached the conclusion that the rule in question is binding on the seal fisheries by a course of reasoning from analogy. If then, it is universally applicable to all fisheries, without regard to time, or place, or peculiar circumstances, then it must be equally binding in all cases, for example, which relate to the collection of the revenue. Our statute which extends the national jurisdiction over foreign vessels for certain

revenue purposes when they have come within twelve miles of the coast, must necessarily be illegal as regards that portion of the distance in excess of three miles. The same principle must also hold in neutrality cases. It is a very old rule of international law that if two belligerents engage in naval warfare within cannon-shot, that is to say within three miles of a neutral country, they are guilty of violating its neutrality, and can be compelled to surrender any prize which they may capture under these conditions. This principle has been asserted by Wheaton, Vattel and the most eminent text writers, and it has been embodied in many treaties, among others the Jay Treaty of 1794 between this country and England. As already stated it was also enunciated by Lord STOWELL in the early case of the Twee Gebroeder. The theory on which this rule has always been applied to such cases is that a neutral state has an obvious right to immunity from the danger and inconvenience to itself which would necessarily result from a naval battle between two belligerents within "cannon-shot" of its coasts. Now at the time this principle was first laid down the phrase "cannon-shot" was always taken to mean *three miles*, and since the Arbitrators have implied in their decision that there is no elasticity about the three-mile rule which will admit of its being modified in any way, or varied to meet new conditions, it follows that this phrase would have to be interpreted in neutrality cases arising at the present day in the same manner as it was interpreted a century ago. Let us, then, suppose that two iron-clads, equipped with modern ordnance, were to engage in a battle at a distance, say of five miles, from the coast of some neutral state. It is probable that many of the shots fired during such an encounter would reach the shore and that they might prove most destructive to neutral property and possibly to human life. It is difficult to see, however, in view of the present decision, upon what ground the nation sustaining such a wrong could complain that its neutrality had been invaded, or could demand that a prize taken under such conditions should be

restored. In fact, it would appear to be doubtful whether a neutral state, which had reason to anticipate such an encounter, would have any right to forbid to a belligerent one the use of the open sea for such a purpose; and yet, in point of fact, the principle underlying the three-mile rule would apply to such a case as fully as to a naval combat within the distance it prescribes.

Is it then correct to assume that the effect of the Behring Sea decision is to make this rule universally applicable with regard to maritime rights and obligations? Will it ever again be possible for any civilized nation to assert its authority in time of peace, upon the open sea, more than three miles from land? These are questions of far greater importance to the world than the decision of the comparatively narrow issues involved in any single controversy. In attempting to answer these questions it is necessary to distinguish between two kinds of maritime jurisdiction, and two classes of maritime rights. On the one hand, there is a large class of cases of a nature similar to those which we have just been considering, which relate, for example, to such matters as the control of fisheries, or the protection of neutral waters. The maritime jurisdiction of a state for purposes of this kind must necessarily be limited by arbitrary boundaries. Formerly, these boundary lines were often very remote from land, but, as we have seen, they must be measured henceforth at a distance of three miles. But there is another kind of maritime jurisdiction which extends over the high seas without any geographical limits whatsoever, and which is of the same validity in every part of the world. Of such a character, for example, is the right of a state to enforce its laws on board of ships carrying the flag, both with respect to its own citizens and to foreigners. Another instance is the right of a state to punish marine torts inflicted upon its ships in time of peace, such as that committed in the celebrated case of the "Marianna Flora;" or on other kinds of national property such, for example, as the Atlantic cable. A good illustration of the same kind of jurisdic-

tion, in time of war, is the right of a belligerent to seize a neutral ship for carrying contraband goods, or for breaking a blockade. Again, it is well settled that whenever a warship possesses, upon any ground, the right of "visitation and search," that right can be exercised in one part of the open sea as lawfully as in any other part. Now, with regard to maritime jurisdiction of this latter class, the Behring Sea decision has no possible bearing or application. The decision leaves it entirely untouched. But with regard to maritime jurisdiction of the former class, which from the nature of the case must be confined within some arbitrary limit, it is difficult to see how it can ever again be peaceably asserted beyond the three-mile line. In other words, the terms of the Behring Sea decision appear necessarily to involve the abolition of all other marine jurisdictional limits whatsoever.

Certain other propositions of law which appear to follow from the decision can be very briefly stated.

VI. One of these propositions is that, for the future, no difference will be recognized in international law between near and remote parts of the world in the decision of questions affecting maritime rights. In the case of Church *v.* Hubbard, in 2 Cranch, 187, Chief Justice MARSHALL held that the seizure of a foreign vessel at a distance of fifteen miles from the coast of Brazil, for the intended violation of certain municipal laws of Portugal relating to colonial trade, might properly be regarded as a valid seizure in remote seas, such as those bounding the coast of South America, when it would be clearly illegal in more frequented waters like the British Channel. This proposition of international law must now be regarded as overruled, since the Behring Sea Arbitrators have virtually held that the rule of the three-mile limit is as binding in seas which are remote and little navigated as in those seas which are adjacent to large commercial countries.

VII. The decision of the Arbitrators is also likely to have a notable effect upon the future interpretation of a certain class of municipal statutes. It is a familiar princi-

ple of law that all the criminal legislation of a country is binding upon foreigners, while they are within its territorial limits, which for this purpose have been construed to include its merchant vessels when at sea. Since this decision narrows the territorial jurisdiction of a country on the high seas, for nearly all purposes, to three miles, it follows that henceforth general statutes, which by their terms extend beyond that limit, must, whenever such a course is possible, be construed as intended by the law-making power to apply beyond that distance only to its own citizens or subjects. For example, the Scotch Herring Fishery Act, 1889, already mentioned, imposes a penalty upon "any person" committing certain acts in extra-territorial waters. Words like these, which before the present decision might well have been interpreted to apply to foreigners, must now be interpreted to apply only to the citizens of the enacting state.

VIII. The Behring Sea decision also furnishes one more precedent in support of a proposition of international law which was laid down nearly a century ago by Lord STOWELL in the celebrated case of "Le Louis," and which has since been affirmed by several text-writers, viz.: that the right of "visitation and search" cannot lawfully be exercised upon the high seas by any nation in time of peace.

Lastly, the Behring Sea Arbitration is likely to prove of immeasurable benefit to the world in that it has furnished one more instance of the peaceful settlement of a most serious international dispute by the submission of the questions at issue to an impartial judicial authority.