JURISDICTION OVER THE LITTORAL BED OF THE SEA

On April 28, 1941, the United States Supreme Court decided that the State of Florida, under the statute presently to be mentioned, could lawfully prohibit a citizen of Florida, under penalty, from using diving apparatus in the taking of sponges at a point six miles off the coast of Florida.[1] Citizenship was not the ground on which the petitioner was convicted in the State courts of Florida. There he was convicted of violating a statute of Florida which prohibited *any* one from using diving apparatus in the taking of sponges in the Gulf of Mexico within three marine leagues (nine nautical miles) off the west coast of Florida; this zone, according to Section 8087, Compiled Laws of Florida 1927, was characterized as "within the territorial waters of the State of Florida." The decision of the Supreme Court of Florida[2] turned entirely on the question whether the State of Florida could bring within its jurisdiction a zone nine miles wide and punish offenses there committed. The Constitution of Florida of 1868, on which Florida was readmitted to the Union in 1868, and the Constitution of 1885, had fixed a zone of nine nautical miles as the western boundary of the State. Other States bordering on the Gulf of Mexico do likewise, including Alabama, Mississippi, Louisiana and Texas, Louisiana extending it to nine leagues. On the theory that the Florida extension of boundaries to nine miles had been approved by Congress in admitting Florida into the Union and by acquiescence had received the support of every State or person concerned, the Supreme Court of Florida sustained the conviction.

The petitioner maintained both below and in his appeal to the United States Supreme Court that the attempt of Florida to extend its boundaries to nine miles from the shore was a violation of the Constitution of the United States, of federal treaties and executive orders and of international law, which had on numerous occasions fixed three miles as the limit of territorial waters or marine boundaries; that the State assumption of jurisdiction could not exceed the federal limitations; and that if the offense was committed outside the territorial limits of the United States (more than three miles from shore) it could hardly be deemed inside the territorial limits of Florida. The petitioner denied that each State could, as the Florida court asserted, fix its own marine boundary subject to the approval of Congress, and that Congress had not, by admitting Florida into the Union, acquiesced in the Florida declaration of a nine-mile boundary. He denied also the Attorney General's contention that a citizen of Florida was estopped to contest the geographical boundaries fixed by the Constitution of Florida. There was thus placed in issue the direct question whether Florida had jurisdiction to punish the unlawful taking of sponges outside the three-mile zone but within the "territorial" limits of nine miles asserted and claimed by the State of Florida.

[1] Skiriotes *v.* State of Florida, 61 S. Ct. 924 (1941); this JOURNAL, *infra*, p. 569.

[2] Skiriotes *v.* State of Florida, 197 So. 736 (Fla. 1940).

The United States Supreme Court on appeal decided the case on a ground not advanced in the argument, and left unanswered the important question whether Florida could prohibit the unlawful taking of sponges within the coastal zone of nine miles. It decided that Florida's personal sovereignty over the petitioner—rather than any territorial sovereignty over the sea bed—justified the conviction. It concluded that since Skiriotes was a citizen of Florida—although the record was barren of any affirmative proof on that point—the Florida Legislature had jurisdiction to punish Skiriotes for wearing a diving suit to quarry sponges, wherever he might be. The court cited in support some of the familiar cases of national jurisdiction based on personal sovereignty to control the actions of an American citizen abroad.

But while this may have sufficed to catch the luckless Skiriotes, it was not a satisfactory disposition of the issue involved. Florida did not purport to prevent Florida citizens from wearing diving suits, any more than the United States or New York punishes American women abroad for wearing those funny hats. It purported to penalize the taking of sponges at a certain place in a certain way and the court might well have responded to the issue really raised. Possibly this might have invited a discussion of the question of conflicting State and Federal jurisdiction; it would also have determined whether only Florida citizens could be thus controlled in the mere use of diving apparatus, or whether the citizens of other States and nations, who by inference could not be thus controlled, were privileged to take sponges beyond the three-mile limit. The court realized the narrow scope of its ruling but apparently felt justified in not saying more.

To the present editor it seems that the court might, without undue risk, have grappled with the real problem. Not that the court did anything especially unusual. In the case of the *Abby Dodge* [3] the Supreme Court decided that a federal statute prohibiting the *importation* of sponges taken in the Gulf of Mexico outside territorial limits by diving methods and below a certain size could be justified under the power of Congress to regulate commerce, without examining the question of jurisdiction over the place of taking. In the *Lotus* case, the Permanent Court of International Justice justified Turkish jurisdiction, not under the Penal Code provision conferring jurisdiction over offenses committed abroad against Turkish nationals, but on the practically unargued point that an injury to a Turkish ship was an injury to the "territory" and gave Turkey jurisdiction over the offender.[4]

The matter of extending local jurisdiction into the high seas involves a reconcilation of the interests of the riparian state and of other states and their respective nationals. Much of that reconciliation has already been made and the compromises effected mark the rule of law, probably more stable than similar compromises in more fluid branches of social policy, *e.g.*, the line between the police power and the Fourteenth Amendment. If, in the Skiri-

[3] 223 U. S. 166 (1911).

[4] Series A, No. 10.

otes case, we wish to examine the question of Florida jurisdiction over the sponge fishery outside the three-mile limit—the only constitutional and international issue presenting any difficulty—it would seem that distinctions must be made between an international and a constitutional boundary, between sedentary and other fishing, between regulation for the protection of the natural resource and an attempted monopoly for the benefit of residents or citizens.

These issues were not passed upon by the United States Supreme Court. But since practically all the States bordering the Gulf of Mexico fix their State boundary at least three leagues out, it could be argued that the federal Congress has acquiesced in it for domestic police purposes. No federal function could probably be impaired by that extension, and of course no rights of other countries could be handicapped thereby. The international boundary or limit of national sovereignty would still be three miles.[5] A unilaterally asserted marine boundary, except possibly in the case of bays, is not usually challenged on announcement, but awaits enforcement in a specific case. Thus, the Norwegian and Spanish claims of extended marine jurisdiction were challenged only when applied to foreign vessels, and the famous Moray Firth encroachment was retracted;[6] although no State needs to permit the importation of marine products taken in violation of its laws.

What distinguishes the Florida sponge case from several other attempts to extend the marine frontier is the fact that the Florida regulation was solely protective, not monopolistic. It forbade all persons, nationals and aliens, residents and non-residents, to take sponges by diving methods, which would in time destroy the resource. The federal Government had supplemented this local law by a similar prohibition in the Gulf of Mexico outside State limits, a measure which apparently has not been challenged internationally. Whether the federal Government recognizes the boundary of State jurisdiction at three or nine miles is a constitutional question. It is possible to argue that even if State sovereignty can be recognized only up to three miles, the function of police jurisdiction to save the sponges can be divided between State and nation as they see fit.

But internationally a different question arises. May a State or nation extend its jurisdiction into the high seas at will? Numerous attempts of this kind have been made. Where the claim sought merely to protect the riparian nation from injury more tolerance has perhaps been evident than when the claim involved an attempted monopoly of economic exploitation, such as fisheries, migratory or sedentary. Yet even for jurisdictional purposes there has been a reluctance to admit such extensions. When the United States sought to extend its liquor control to twelve miles under the Tariff Act of 1922, foreign countries protested and the famous liquor control treaties had to be concluded on a *quid pro quo* basis. If under the Anti-

[5] *Cf.* editorial by P. C. Jessup, this JOURNAL, Vol. 33 (1939), p. 129.

[6] P. C. Jessup, Law of Territorial Waters, New York, 1927, p. 434.

Smuggling Act of 1935 an attempt should be made to interfere with foreign vessels bound for foreign ports, there seems little doubt that foreign countries would justly regard it as a violation of international law.[7] Only vessels bound to the United States could, in the widest interpretation of the theory of the Hovering Acts, be regarded as properly within the scope of American legislation and jurisdiction, and then only under considerable restrictions in application. No assumed solicitude for "protection of the national interests" can justify a general interference with and examination of foreign ships on the high seas.

It is true that at the Hague Conference of 1930 thirteen States protested the three-mile rule as too narrow, and some urged a contiguous zone in which jurisdiction but not sovereignty might be claimed. But these proposals failed because the major Powers preferred to adhere to the traditional three-mile rule. Uruguay has recently proposed under a resolution of the Havana Conference that the maritime sovereignty of the American Republics be extended to twenty-five miles, a proposal not likely to meet general favor. Plausible claims can usually be advanced for extending the three-mile zone and to that extent cutting down the freedom of the high seas. The effort centers mainly around expanded fishing monopoly claims, the most recent of which is the Alaska salmon fishing claim embodied in the Copeland and Dimond Bills of 1937 and 1938.[8] Several such claims have been settled by treaty or arbitration,[9] probably the only way in which a measure of acquiescence in such expansive claims can be secured or a workable compromise effected.

But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit.[10] So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States, and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. The claim may be said to rest on several theories—the extension of the land to the shallow banks, the long historical use and presumption of acquiescence, the physical occupation, and the special fact that Palk's Bay, if not the Gulf of Manaar, which divides India from Ceylon, may be deemed

[7] T. Baty in this JOURNAL, Vol. 35 (1941), p. 227. [8] *Cf.* Jessup, *supra*, n. 5.

[9] Daggett, "The Regulation of Maritime Fisheries by Treaty," this JOURNAL, Vol. 28 (1934), p. 693.

[10] Sir Cecil Hurst in 1923–1924 British Yearbook of International Law, p. 34.

a constituent portion of the British dominions. Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit.

If the doctrine of *terra nullius*, supported by Oppenheim and Fenn, is invoked, then physical occupation of the bed of the sea is necessary to acquire title and presumably to keep others off. What would constitute "effective occupation," *e.g.*, the building of platforms or the drilling of wells, may be debatable. Very recently Great Britain and Venezuela agreed to divide between them the exploitation of the petroleum resources of the Gulf of Paria which lies between Trinidad and Venezuela, about 35 miles long and 70 miles wide, practically entirely surrounded by land with the exception of two gaps, one at either end, six and ten miles wide respectively.[11] The configuration of the Gulf of Paria might well justify this claim. A similar but less sustainable claim has been advanced by Louisiana asserting title to "full and complete ownership" of the waters of the Gulf of Mexico and of the arms, beds and shores of the Gulf "including all lands covered by the waters of the Gulf within the boundaries of Louisiana, as fixed in the statute," to a distance of 24 miles beyond the three-mile limit. Although the federal Government appears once to have fixed the boundaries of Louisiana at nine miles from shore, it remains to be seen whether any economic development by Louisiana, *e.g.*, petroleum exploitation, at a distance of 27 miles, will be allowed to go unchallenged.[12]

The Florida claim to control the manner of taking sponges at a distance up to nine miles from the shore could therefore be justified on the theories of historical assertion of jurisdiction and acquiescence therein, protective jurisdiction for the preservation of a natural resource, and possibly occupation. The Florida statute escapes the more debatable but not necessarily unsustainable claims of licensing a national monopoly in the nine-mile zone or effective occupation of the bed of the sea. In any event, the Florida statute seems invulnerable to attack even if State sovereignty over the bed of the sea beyond three miles be denied.

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ESCAPED PRISONERS OF WAR IN NEUTRAL JURISDICTION

One of the questions arising during the neutrality of the United States in the course of the current European War is that of the status of prisoners of war who make their escape and enter the United States. Probably the most publicized person within this description has been Baron Franz von Werra, leader of a German air squadron, reputed to have brought down fourteen British planes before he was captured and taken to Canada. At a point about one hundred miles north of Quebec, he escaped from his

[11] Message to Congress by President of Venezuela, April 19, 1941, and simultaneous statement published same day in Caracas and London.

[12] Comment in 39 Columbia L. Rev. 317 (1939).